



**WORKING PAPER**

**LEGAL COMMITTEE – 39th SESSION**

(Montréal, 25 to 28 June 2024)

**Agenda Item 2 : Consideration of the General Work Programme of the Legal Committee**

**FINAL REPORT OF THE WORKING GROUP FOR THE REVIEW OF THE ICAO RULES  
FOR THE SETTLEMENT OF DIFFERENCES (WG-RRSD)**

(Presented by the Chairperson<sup>1</sup> of the WG-RRSD)

**1. BACKGROUND**

1.1 At its 37th Session (Montréal, 4 to 7 September 2018), the Legal Committee considered LC/37-WP/3-2, *Review of the Rules for the Settlement of Differences*, presented by the Secretariat, and decided to include the Item “Review of the ICAO Rules for the Settlement of Differences” as a new Item 2 to its Work Programme. In doing so, the Committee further decided to establish a Working Group to carry out the review, whose members would be nominated by the Chairperson of the Committee 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 and held eight meetings in the intervening period until September 2023, when it completed its work.

1.2 This working paper contains in its Annex, the Final Report of the WG-RRSD, which is hereby presented to the 39th Session of the Legal Committee for consideration. The Final Report presents a summary of the substantive deliberations held by the WG-RRSD over the course of its eight meetings along with proposed draft revisions to the Rules which are set out in its **Appendix A**. **Appendix B** presents a non-exhaustive list of subjects that could potentially be addressed in practice directions issued by the Council if the proposed amendment pertaining to practice directions is ultimately adopted.

**2. ACTION BY THE COMMITTEE**

The Legal Committee is invited to consider the information provided in the Final Report of the WG-RRSD and in the Appendices thereto to facilitate the conduct of its work.

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<sup>1</sup> Mr. Terry Olson, France.

## ANNEX

### **FINAL REPORT OF THE WORKING GROUP FOR THE REVIEW OF THE ICAO RULES FOR THE SETTLEMENT OF DIFFERENCES (WG-RRSD) PRESENTED TO THE 39TH SESSION OF THE LEGAL COMMITTEE**

#### **1. BACKGROUND**

1.1 At its 37th Session (Montréal, 4 to 7 September 2018), the Legal Committee decided, following consideration of LC/37-WP/3-2, *Review of the Rules for the Settlement of Differences*, presented by the Secretariat, to include the item “Review of the ICAO Rules for the Settlement of Differences” as a new Item 2 in its Work Programme. The Committee further decided to establish a Working Group to carry out the review, whose members would be nominated by the Chairperson of the Committee in consultation with the President of the Council.

#### **2. ESTABLISHMENT, MEETINGS AND METHODOLOGY OF THE WG-RRSD**

2.1 The Working Group for the Review of the ICAO Rules for the Settlement of Differences (WG-RRSD) was established in May 2019, following a State letter (IND/19/3) dated 22 March 2019 seeking the nomination of experts by the States invited to constitute the Working Group. State letter IND/19/3 informed the concerned States that the WG-RRSD will assist the Legal Committee in revising the *ICAO Rules for the Settlement of Differences* (Doc 7782/2) (the Rules), taking into account comparable documentation that is in use for similar purposes elsewhere in the United Nations system as well as international governmental organizations, and in particular the Rules of Court of the International Court of Justice. The State letter further mentioned that the Working Group should also take into account the development of new and innovative mechanisms to facilitate the settlement of differences in a timely, expeditious and transparent fashion. As a deliverable, it was expected that the Working Group would prepare a revised draft set of Rules for consideration by the Legal Committee.

2.2 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) as well as one international organization (the African Civil Aviation Commission) participated in one or more of the meetings of the Working Group.

2.3 During the First Meeting of the Group, Mr. Terry Olson (France) was elected by acclamation as the Chairperson of the Working Group. At the same meeting, Ambassador Abdul Kadir Jailani (Indonesia) was elected as the Vice-Chairperson. During its Fourth Meeting, the Group was informed that Ambassador Jailani had been assigned to other responsibilities by his government and would no longer participate in the work of the Group. At its Fifth Meeting, the Group elected Mr. John Thachet (Canada) as its Vice-Chairperson.

2.4 Furthermore, during its First Meeting, the Working Group agreed unanimously to recommend to the Chairperson of the Legal Committee to appoint Mr. David Low (Singapore) as Rapporteur to serve until the 38th Session of the Legal Committee and to carry out a study to assist the Working Group in carrying out its work in the intervening period. At its 38th Session (Virtual, 22 to 25 March 2023), the Legal Committee agreed that Mr. David Low should continue to serve as Rapporteur of the Working Group.

2.5 The WG-RRSD met eight times: First Meeting, Montréal, 7 to 9 May 2019; Second Meeting, Montréal, 12 to 14 November 2019; Third Meeting, Virtual, 1 to 3 December 2020; Fourth Meeting, Virtual, 6 to 8 April 2021; Fifth Meeting, Virtual, 5 to 7 October 2021; Sixth Meeting, Virtual, 11 to 13 January 2022; Seventh Meeting, Montréal, 10 to 12 January 2023 and Eighth Meeting, Montréal, 19 to 22 September 2023. In the course of its Meetings, the Working Group considered, among other matters, various possible draft revisions to the ICAO Rules.

2.6 In order to facilitate its work, the Working Group had for consideration the results of benchmarking studies and research conducted by the Secretariat to identify relevant practices of other international judicial and dispute settlement bodies. Given that Article 84 of the *Convention on International Civil Aviation* (Chicago, 1944 – the “Chicago Convention”) provides for the International Court of Justice (ICJ) to consider appeals against decisions of the Council, the Working Group took into account relevant decisions of the ICJ, and in particular the ICJ Judgments in the *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, *Judgment, I.C.J. Reports 2020*, p. 81 (“the ICJ Judgment of 14 July 2020 on Article 84 of the Chicago Convention”) and the *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, I.C.J. Reports 2020*, p. 172, (“the ICJ Judgment of 14 July 2020 on Article II of the Transit Agreement”) (collectively, “the ICJ Judgments of 14 July 2020”), which were rendered between its Second and Third meetings.

### **3. CONSIDERATION OF THE ITEM BY THE 38TH SESSION OF THE LEGAL COMMITTEE AND THE 41ST SESSION OF THE ASSEMBLY**

3.1 At its 38th Session (Virtual, 22 to 25 March 2022), the Legal Committee considered LC/38-WP/2-1, *Progress Report on the Work of the Working Group for the Review of the ICAO Rules for the Settlement of Differences (WG-RRSD)*, presented by the Chairperson of the Group. It was highlighted that, from the Chairperson’s viewpoint, the Group had reached a high level of agreement in principle on some areas for possible revision to the Rules, as well as on other areas where no revisions to the Rules were considered necessary. It was outlined that some other areas considered for the modernization of the Rules, although being the subject of in-depth discussions, continued to evolve and required further consideration by the Group. The Legal Committee assigned the item “Review of the ICAO Rules for the Settlement of Differences” priority number 1 on its Work Programme. The revised General Work Programme of the Legal Committee was subsequently approved by the Council at the Fourth Meeting of its 226th Session (30 May 2022).

3.2 During its 41st Session (Montréal, 27 September to 7 October 2022), the Legal Commission of the Assembly considered A41-WP/53, presented by the Council, which informed the Assembly on the legal work of the organization, including on the ongoing work of the Working Group. The Commission also considered A41-WP/124, Revision No. 1, presented by the Republic of Korea which proposed, inter alia, that the Assembly support the work of the Working Group and that ICAO prepare a workshop/seminar for all Member States to exchange views on the outcomes of the Working Group upon the completion of its work. The Commission noted the progress made by the Working Group, that the work is continuing as outlined by the Council, and the suggestion by the Republic of Korea to hold a seminar/workshop on the outcomes of the work carried out by the Working Group.

#### 4. **DRAFT REVISIONS TO THE ICAO RULES FOR THE SETTLEMENT OF DIFFERENCES**

4.1 Following its deliberations, the Working Group has proposed the draft revisions to the Rules presented in **Appendix A** to this Report.

#### 5. **SUBSTANTIVE ISSUES CONSIDERED BY THE WG-RRSD WITH RESPECT TO THE RULES**

5.1 This section presents a summary of the substantive deliberations held by the Working Group over the course of its eight meetings. While the Working Group considered that some provisions of the Rules do not require any modifications, it also determined that, for a variety of reasons outlined below, a number of provisions required revision. In this regard, **Appendix A** to this Report contains draft revisions to the ICAO Rules prepared by the WG-RRSD for those areas that the Group considered revisions to the Rules are warranted. While some of the substantive issues discussed by the Working Group were of a thematic nature and therefore cut across various provisions of the Rules, others were specifically focused on individual provisions within the Rules. Therefore, although the summary of the deliberations below is generally presented in a sequential order following the ordering of the provisions of the Rules, the deliberations in respect of a number of provisions are presented together whenever thematic/crosscutting issues are under consideration.

##### 5.2 **Scope of the Rules - Article 1**

5.2.1 The Working Group's deliberations under this issue related to whether the current scope of the Rules as stated in Article 1 should be expanded so that, in addition to disagreements between Contracting States to the Chicago Convention relating to the interpretation and application of the Chicago Convention and its Annexes, the Transit Agreement and the Transport Agreement, the Rules would also apply to disagreements between such Contracting States relating to other international air law instruments that have already or may in the future entrust the Council with dispute settlement functions.

5.2.2 Different views were expressed during the Working Group's deliberations on this item. Some Delegations expressed support for expanding the scope of the Rules to include a catch-all provision that would encompass other disagreements between Contracting States to the Chicago Convention relating to international civil aviation, which had been referred to the Council pursuant to a treaty between States. In order to avoid the need for the Rules to be amended each time a new instrument conferred dispute settlement functions upon the Council, some Delegations suggested that a separate list of relevant instruments could be maintained outside of the Rules.

5.2.3 However, some Delegations queried the jurisdictional basis for enlarging the scope of the Rules, while others questioned whether Article 1 should be amended to also cover air law treaties empowering the Council to render "recommendations" and not just "decisions" in any such disputes. Furthermore, some Delegations were of the view that widening the scope of application of the Rules would overburden the Council, while others had no concerns as long as the Council was consulted beforehand and expressly accepted any such dispute settlement functions.

5.2.4 After extensive discussions, the Working Group decided to propose the revisions to Article 1 reflected in **Appendix A** to this Report. However, this proposal would be placed in square brackets to indicate that a number of Delegations continued to have concerns about it, and that it would ultimately be for the Legal Committee to decide on whether to accept this proposed revision. Delegations that favoured the inclusion of this revision cited the need for legal certainty over what procedural rules would apply in

the event of disagreements relating to the interpretation or application of other treaties concerning international civil aviation between Contracting States. Delegations that raised concerns over its inclusion queried whether the proposed revisions might raise issues relating to the jurisdiction of the Council to hear such disagreements under those other treaties; as well as whether the consent of the Council to perform such functions was to be obtained at the point when the treaty was concluded, or at the point when a disagreement was referred to the Council. Nevertheless, all Delegations agreed that the proposed revision was not a jurisdiction-creating provision, and that whether the Council had jurisdiction to perform such functions would still have to be determined on a case-by-case basis in accordance with the underlying treaty in question.

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

5.3.1 The Working Group's deliberations in connection with this issue related to whether, in addition to having an address at the seat of the Organization (as currently required under the Rules), additional practical solutions could be found for maintaining communications between the Organization and the Agents for the respective parties. There was consensus within the Working Group on the need to maintain the requirement for the Agents to have an address at the seat of the Organization. In order to provide for a high level of certainty while allowing flexibility for the Rules to keep pace with evolving means of communication, the Working Group has proposed that the Rules be revised, as reflected in **Appendix A** to this Report, to expressly require the Agents for each of the respective parties to also provide an email address. The Working Group also discussed practical solutions for States that may not have a physical address at the seat of the Organization, including the possibility to use the address of a State's diplomatic representative at the seat of the Organization for this purpose.

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

5.4.1 The Working Group's consideration of this issue concerned the replacement of the references to "Chairman" and other gendered pronouns with a gender-neutral alternative. The Working Group has proposed that the Rules be revised, as reflected in **Appendix A** to this Report, to reflect the principle of gender neutrality throughout the text of the Rules in all the linguistic versions, if need be.

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

5.5.1 Under this cross-cutting item, the Working Group considered whether, in addition to or in substitution of the paper-based submissions already provided for in the existing Rules, the Rules should be revised to permit the parties to a dispute to submit their written pleadings, supporting documents and correspondence to the Organization in electronic format. As reflected in the draft revisions to the above-mentioned provisions presented in **Appendix A**, the Working Group concluded that the Rules should require the parties to submit their documents to the Organization in both paper and electronic formats. In the Working Group's view, this would strike a balance between the need to facilitate the efficient submission and dissemination of such documents through the use of electronic formats, and the need to ensure certainty and authenticity of the documents through the retention of the requirement for paper-based documents.

## 5.6 **Precondition of Negotiation – Article 2 (1) (g)<sup>2</sup>**

5.6.1 Under this item, the Working Group considered whether the current requirement in Article 2 (1) (g) of the Rules that the Memorial attached to the Application shall contain a statement that “negotiations to settle the disagreement had taken place between the parties but were not successful” is consistent with the wording of Article 84 of the Chicago Convention. Article 84 refers to any disagreement that “cannot be settled by negotiation”. Although some Delegations suggested that Article 2 (1) (g) of the Rules should be deleted in its entirety, the Working Group ultimately agreed to propose amending Article 2 (1) (g) of the Rules to ensure consistency with Article 84 of the Chicago Convention. In this regard, the draft revision presented in **Appendix A** 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. The draft revision 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, taking into account the ICJ’s decisions and reasoning in its Judgements of 14 July 2020, where the ICJ observed that:

“The Court considers that Article 84 of the Chicago Convention imposes a precondition of negotiation that must be met in order to establish the ICAO Council’s jurisdiction. Prior to filing an application under Article 84, a contracting State must make a genuine attempt to negotiate with the other concerned State or States. If the negotiations or attempted negotiations reach a point of futility or deadlock, the disagreement “cannot be settled by negotiation” and the precondition to the jurisdiction of the ICAO Council is satisfied.”<sup>3</sup>

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

5.7.1 Under this item, the Working Group discussed whether Article 5 (1) of the Rules should be amended to explicitly include admissibility as a ground for preliminary objection. The current provision states that “If the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection.” A large majority of Delegations supported the idea of revising the wording of Article 5 (1) to expressly include admissibility as a ground for preliminary objection, citing the ICJ Judgments of 14 July 2020, in which the Court had observed that even though the Rules do not expressly mention admissibility as a ground of preliminary objection, this does not preclude the Council from considering an objection to the admissibility of a claim as a preliminary issue.<sup>4</sup> This is reflected in the proposed revisions to Article 5 (1) of the Rules presented in **Appendix A** to this Report. In proposing the revisions, reference was also made to Article 79 (1) of the ICJ’s Rules of Court.

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

5.8.1 The current Rules are silent on the possibility for an applicant to file a written pleading in response to the respondent’s statement of preliminary objection. Moreover, the Rules do not specify how many rounds of pleadings may be exchanged between the parties after the respondent had filed a

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<sup>2</sup> This refers to Article 2 (g) in the current Rules. If the Working Group’s proposal to add a new Article 2 (2) (on the submission of the Application and Memorial in both paper and electronic formats) is accepted, Article 2 (a) - (g) will be re-numbered to Article 2 (1) (a) - (g).

<sup>3</sup> Paragraph 89 of the ICJ Judgment of 14 July 2020 on Article 84 of the Chicago Convention. See also paragraph 90 of the ICJ Judgment of 14 July 2020 on Article II of the Transit Agreement.

<sup>4</sup> Paragraphs 56-57 of the ICJ Judgment of 14 July 2020 on Article 84 of the Chicago Convention; and paragraphs 56-57 of the ICJ Judgment of 14 July 2020 on Article II of the Transit Agreement.

preliminary objection. This has led, in the past, to uncertainty over how many rounds of pleading the parties may submit in relation to a preliminary objection.

5.8.2 Accordingly, the Working Group has proposed revising the Rules to clarify first, that the applicant may file a written statement in response to the respondent's preliminary objection, and second, that no further written pleadings would be permitted in connection with the preliminary objection unless the Council decides otherwise. The proposed revisions to Article 5 (3) of the Rules reflected in **Appendix A** to this Report aligns the Rules with international practice while clarifying the procedure applicable to preliminary objections. The Working Group agreed that the resulting amendments would place the Council in a better position to deal expeditiously with preliminary objections as a preliminary issue in accordance with Article 5 (4) of the Rules.

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

5.9.1 Under Article 5 (4) of the Rules, if a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question as a preliminary issue before any further steps are taken under the Rules. However, Article 14 (1) of the Rules provides that the Council may, at any time during the proceedings and prior to the meeting at which the decision is rendered as provided in Article 15 (4), invite the parties to the dispute to engage in direct negotiations, if the Council deems that the possibilities of settling the dispute or narrowing the issues through negotiation have not been exhausted.

5.9.2 The Working Group agreed that the filing of a preliminary objection should not prevent the Council from inviting the parties to engage in or to continue direct negotiations to resolve the dispute pursuant to Article 14 (1) of the Rules, and that this could not have been the intention behind Article 5 (4). The Working Group therefore agreed to propose that Article 5 (4) be revised to clarify that the Council's obligation to decide the question presented in a preliminary objection 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. In proposing the revisions to Article 5 (4) of the Rules reflected in **Appendix A** to this Report, reference was also made to Article 79*bis* (3) of the ICJ's Rules of Court.

#### 5.10 **Enquiry or Expert Opinion – Article 8 (1)**

5.10.1 The current text of Article 8 (1) of the Rules permits the Council at any time, but after hearing the parties, to entrust "any individual, body, bureau, commission or other organization that it may select with the task of carrying out an enquiry or giving an expert opinion". While Article 8 (2) of the Rules provides for how the report incorporating the results of any such investigation together with the record of the enquiry and any expert opinion shall be submitted to the Council and communicated to the parties, the Rules do not specify how the report may be used. In this connection, while noting that any such assistance will be advisory in nature and not binding upon the Council, the Working Group considered whether the Council could specifically rely on such assistance in arriving at its decisions.

5.10.2 In the course of its deliberations, various drafting proposals which sought to explicitly clarify that the Council may seek such assistance for the purpose of arriving at its decisions was considered by the Working Group. A proposal to establish a list of experts from which the Council could draw assistance when needed was also considered. However, as these proposals did not attract strong support from Delegations during its deliberations, the Working Group concluded that the current text of Article 8 should remain unchanged.

## 5.11 Evidence – Article 9

5.11.1 The Working Group discussed whether Article 9 should be amended to clarify the types of evidence that may be adduced by the parties in proceedings before the Council. Following consideration, given that no difficulties had arisen in practice during past cases, the Working Group concluded that there were no reasons to amend the provision. Some Delegations suggested that, while no revisions to Article 9 were necessary in this regard, the Council may wish to consider providing additional practical guidance on this issue through practice directions (see further, paragraph 5.21 below and **Appendix B** to this Report).

## 5.12 Reasons for the Council’s Decision – Article 15 (2) (v)

5.12.1 Under Article 15 (2) (v) of the Rules, decisions rendered by the Council under Article 84 of the Chicago Convention, including decisions on preliminary objections, provisional measures and the merits, must contain the Council’s conclusions together with its reasons for reaching them. However, in practice, the Council generally does not provide reasons for its decisions, particularly when the decisions are made by secret ballot. In the ICJ Judgments of 14 July 2020, the ICJ emphasized that the Court will be best positioned to act on any future appeal if the decision of the Council contains the reasons of law and fact that led to the Council’s conclusions.<sup>5</sup>

5.12.2 During the Working Group’s deliberations, several Delegations expressed divergent views on the matter and no clear agreement emerged on the question of how the Rules could be amended to assist the Council to articulate the reasons for its decisions. The Working Group ultimately concluded that the present wording of Article 15 (2) (v) of the Rules was satisfactory and clear. However, it also agreed that the question of how the Council could be better assisted to articulate and record the reasons for its decision was one that deserves further consideration.

## 5.13 Notification of Appeals – Article 18 (2)

5.13.1 Article 18 (2) of the Rules currently states: “Decisions rendered on cases submitted under Article 1 (1) (a) and (b) are subject to appeal pursuant to Article 84 of the Convention. Any such appeal shall be notified to the Council through the Secretary General within sixty days of receipt of notification of the decision of the Council.” The Working Group’s deliberations under this issue focused on identifying exactly what is required to be notified to the Council within the 60-day time-limit set out in Article 18 (2) for the notification of “any such appeal”, given arguments raised by some parties in recent cases before the ICAO Council, and whether revisions should be made to the provision for the avoidance of doubt.

5.13.2 Some Delegations expressed the view that Article 18 (2) referred only to the requirement of notification of an intention to appeal while others were of the view that the provision referred to a requirement of notification of an actual appeal which had already been filed at the time of the notification.

5.13.3 After deliberations, a majority of the Working Group supported the latter view, namely that the 60-day time-limit concerns the notification of an actual appeal which had already been filed at the time of the notification: in other words, Article 18 (2) reflects the requirement that any appeal must be submitted, and the Council must be notified of the appeal, within the 60-days of receipt of notification of the decision of the Council. The Working Group further considered that the proposed revision would provide greater legal certainty to the parties and the Council in knowing whether an appeal had been lodged, in particular having regard to Article 86 of the Chicago Convention, which provides that decisions of the Council shall, if appealed from, be suspended until the appeal is decided.

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<sup>5</sup> Paragraph 125 of the ICJ Judgment of 14 July 2020 on Article 84 of the Chicago Convention; and paragraph 126 of the ICJ Judgment of 14 July 2020 on Article II of the Transit Agreement.

5.13.4 The proposed revision to Article 18 (2) presented in **Appendix A** therefore aims to clarify that it is the actual submission of an appeal which must be notified to the Council within 60 days.

5.14 **Intervention and the precondition of negotiation – Article 19**

5.14.1 The Working Group considered whether the precondition of negotiation equally applied to a State wishing to intervene in a pending dispute pursuant to Article 19 of the Rules, and if so, whether the provision should be amended accordingly. Following due consideration, the Working Group concluded that the precondition of negotiation does not apply to an intervening State and accordingly, there were no reasons to amend Article 19 of the Rules.

5.15 **Dispatch – Article 19 (3)**

5.15.1 In order to update the Rules to reflect modern linguistic usage, the proposed revision to Article 19 (3) reflected in **Appendix A** to this Report aims to replace the old spelling of the word “despatch” with its modern spelling “dispatch” in the English version of the Rules. Similar adjustments will be made to reflect modern usage across the different linguistic versions of the Rules where necessary.

5.16 **Agents – Article 27**

5.16.1 The Working Group considered whether Article 27 of the Rules should be revised to reflect that a State which becomes party to proceedings before the Council may designate more than one Agent to represent and act for it in the proceedings. Following due consideration, the Working Group concluded that there was no need to amend the provision, since it was open to States to designate deputy or assistant Agents, and that the current wording did not prevent this.

5.17 **Time-limits – Article 28**

5.17.1 The Working Group considered whether to amend Article 28 of the Rules by introducing defined time-limits for the various parts of the proceedings under the Rules. After due consideration, the Working Group agreed that no strict time-limits should be set in the Rules, and that the current provisions in Article 28 of the Rules were deemed satisfactory, as this would retain the Council’s flexibility to fix time-limits taking into account the unique circumstances of each case. Nevertheless, a good number of Delegations felt that while flexibility within the Rules was desirable, some guidance on applicable time-limits would allow parties to a dispute to benefit from having a clear view of how their cases would proceed, and that such guidance could potentially take the form of practice directions (see further, paragraph 5.21 below and **Appendix B** to this Report).

5.18 **Languages – Article 29**

5.18.1 Under this issue, the Working Group discussed two matters: (1) the language(s) in which the parties may make their written or oral submissions to the Council; and (2) the translation of written submissions made by the parties.

5.18.2 Regarding the first issue, the Working Group noting that although ICAO presently has six working languages, the current Rules only refer to four ICAO working languages. The Working Group has therefore proposed revising Article 29 (1) of the Rules, as presented in **Appendix A** to this Report, such that generic, non-numeric language that addresses all of the working languages of the Organization at the

time, would be used. This would ensure that there will be no need to further amend the Rules should any additional ICAO working languages be introduced in the future.

5.18.3 Regarding the second issue, the Working Group considered the relevant practices of other international judicial and dispute settlement bodies with respect to languages.<sup>6</sup> The Working Group noted that a balance would need to be struck between ensuring that documents relating to proceedings under the Rules were available in all of the ICAO working languages, while also taking into consideration resource and budgetary constraints of the Secretariat to perform translations. The Working Group therefore agreed to propose revising the Rules to reflect the current practice of the Council, as confirmed by Council's decision taken at the First Meeting of its 226th Session (1 June 2022), whereby the Organization will only be required to translate the pleadings submitted by the parties in one ICAO working language to the remaining ICAO working languages, but not the supporting documents appended to the said pleadings, unless otherwise decided by the Secretary General. The Working Group also agreed to propose revising Article 29 (1) of the Rules to further clarify that any supporting documents which were not submitted in one of the ICAO working languages would have to be translated into one of those languages by the party submitting it. Nevertheless, the Working Group also noted that the Secretary General would have the flexibility and discretion to determine which supporting documents, if any, ought to be translated by the Secretariat, on a case-by-case basis.

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

5.19.1 Under this item, the Working Group discussed the apparent inconsistency between Article 30 (3) of the Rules, which provides that the “record of the proceedings shall, unless otherwise ordered by the Council, be open to the public”, and Rule 37 and Appendix F of the *Rules of Procedure for the Council* (Doc 7559/11), under which Council meetings pertaining to disputes between Contracting States should be held in closed session and related documents, should be marked as “Restricted”.

5.19.2 While a group of Delegations supported maintaining the current practice whereby the record of the proceedings are kept confidential unless otherwise ordered by the Council, several others spoke in favour of a suggestion to make the record of the proceedings open to the public in the interest of transparency, albeit subject to certain exceptions. It was acknowledged, for instance, that maintaining the confidentiality of documents pertaining to a case while the case is pending before the Council preserves and facilitates the possibility for a negotiated settlement to be achieved, which is also in line with Article 14 (1) of the Rules.

5.19.3 The Working Group considered the relevant practices of other international judicial and dispute settlement bodies with respect to confidentiality.<sup>7</sup> Bearing in mind such practices, as well as the nature of proceedings under Article 84 of the Chicago Convention, the Working Group has proposed the revisions to Article 30 (3) of the Rules reflected in **Appendix A** to this Report, which aim to reconcile the need for transparency of the proceedings, with the need to preserve confidentiality while the proceedings are ongoing. In embracing the idea of transparency at different phases of the proceedings, the drafting proposal endows the Council with discretion to open different parts of the record to the public at different stages of the proceeding, bearing in the mind the importance of preserving the possibility for negotiated settlements, which is an important feature of the procedure under Article 84 of the Chicago Convention.

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<sup>6</sup> WG-RRSD/2-WP/1, *Benchmarking Study of Other International Bodies*; and WG-RRSD/8-WP/2, *Additional Information on the Practice of International Dispute Settlement Bodies With Respect to Languages*.

<sup>7</sup> WG-RRSD/2-WP/1, *Benchmarking Study of Other International Bodies*; and WG-RRSD/4-WP/2, *Areas Identified by the Working Group as Requiring Further Consideration*, see Appendix B-1, *Confidentiality: Secretariat Note on the Practice to date with respect to the Application of Article 30 of the ICAO Rules*, and Appendix B-2, *Timing of Making Pleadings Available to the Public: ICJ and ITLOS*.

The Working Group considered whether Article 30 (3) should be further amended to expressly address the situation concerning an appeal from the decision of the Council. It concluded that no such reference was necessary given that under Article 30 (3), the Council can decide not to open the record of the proceedings to the public in such a situation, if appropriate. The Working Group further observed that Article 30 (3) also grants the Council the discretion to determine on a case-by-case basis who “the public” is for this purpose (e.g., non-governmental entities from Member States, lawyers, scholars, and/or the media), and the nature of information that will be opened to the public.

## 5.20 Provisional Measures – (New) Article 34

5.20.1 There are currently no provisions in the Rules that expressly refer to the Council’s ability to indicate provisional measures. In this regard, the Working Group considered a proposal to introduce a new provision that would clarify the Council’s power to indicate provisional measures acting on its own initiative (i.e., *proprio motu*), or pursuant to an application by one of the parties before the resolution of the case on its merits. During the Working Group’s deliberations, many Delegations supported the view that provisional measures would facilitate the Council’s role under Article 84 of the Chicago Convention, and that including a provision on provisional measures in the Rules would be consistent with the practice of other international courts and tribunals; while other Delegations were of the view that it would not be appropriate for the Council to be empowered to indicate provisional measures given the nature of its dispute settlement functions.

5.20.2 After due consideration, the Working Group agreed to propose the inclusion of a new provision on provisional measures presented as “Article 34”<sup>8</sup> in **Appendix A** to this Report, the text of which was based in part on relevant provisions of the rules of procedure for the ICJ, the International Tribunal for the Law of the Sea (ITLOS), and arbitrations under the International Centre for the Settlement of Investment Disputes, with suitable adjustments to reflect the unique role of the ICAO Council in the settlement of disputes under Chapter XVIII of the Chicago Convention. The proposed revisions seek to address a number of issues, concerns, and suggestions raised by Delegations during the Working Group’s deliberations on this issue, namely:

- a) That the purpose of such provisional measures is 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;
- b) That the provisions on provisional measures should provide a clear and precise framework and a commitment by the Council to act within the said framework when determining provisional measures;
- c) That the provision should allow for the Council to meet as soon as practicable via an extraordinary or special session to consider a request for provisional measures, in conformity with Rule 19 of the *Rules of Procedure for the Council* (Doc 7559/11);
- d) That the parties in a case should be given the opportunity to be heard in the Council’s consideration of provisional measures; and
- e) That any such provisional measures should be flexible, and subject to review and adjustment where necessary, in tandem with the evolution of the underlying dispute.

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<sup>8</sup> The Working Group considered that it would be appropriate for this new provision to be placed within Part III, Chapter VI (General Provisions) of the Rules.

5.20.3 Some Delegations suggested that it may not be appropriate for the Council to indicate provisional measures without a request by a party in the case, and further suggested (a) that Article 34 (1) should be adjusted accordingly to add a reference to “upon the request of any of the parties”; or (b) that Article 34 (4) should be adjusted accordingly to remove the reference to the Council indicating provisional measures “on its own initiative”. However, after due consideration, the Working Group felt it was important to retain a reference to the possibility for the Council to act on its own initiative, so as to fulfil its role under the Convention to safeguard the safety or security of international civil aviation.

5.20.4 The Working Group also observed that it was not necessary for this provision to provide that a request for provisional measures would be forwarded to the other parties in the case, since Article 3 (2) of the Rules already provides that copies of all subsequent pleadings or other documents submitted by a party to the Council shall be forwarded by the Secretary General to the other party or parties in the case.

## 5.21 Practice Directions – (New) Article 35

5.21.1 The Working Group observed that, unlike the case for several other international adjudicatory bodies or tribunals, the current Rules do not make express provision for practice directions or guidelines on procedural matters. However, such practice directions could provide additional clarity on how the Rules are to be applied on a practical level and in that regard provide useful guidance to the parties as well as the Council itself on procedural matters. At the same time, the Working Group agreed that such practice directions would not have the same force and legal effect as the Rules, and could not constitute “backdoor” amendments to the Rules; that such practice directions 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; and that the 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. The Working Group was agreed that the overall objective of practice directions should be to simplify and provide clarity, rather than add additional layers, to the procedure under the Rules. The Working Group also reiterated that the practice directions should not prevent the parties from entering into further negotiations to settle the disagreement. Based on this understanding, an overwhelming majority of Delegations supported the inclusion of an express provision in the Rules on the Council’s power to issue practice directions or guidelines.

5.21.2 Accordingly, the Working Group has proposed the inclusion of a new provision on practice directions presented as “Article 35”<sup>9</sup> in **Appendix A** to this Report, which would clarify the Council’s power to issue practice directions. As reflected in the wording of this new provision, in the event of any inconsistency between the practice directions and the Rules, the latter will prevail.

5.21.3 In addition, the Working Group noted that while it was beyond the mandate of the Working Group to draft the actual practice directions to be issued by the Council, it could identify and suggest various matters that may be suitable for the Council to consider issuing practice directions on. The Working Group noted that based on the practice of other international tribunals such as the ICJ and ITLOS, practice directions typically address administrative, logistical, and practical matters relating to the proceedings before a tribunal, such as guidance on how to submit electronic documents; time-limits for the filing of pleadings; how to present audio-visual evidence, the conduct of the oral hearing; guidance on how to make the pleadings and other relevant documents concise and economical considering the time and costs entailed in printing and translation. In this regard, the Working Group prepared a list of subjects that could

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<sup>9</sup> The Working Group considered that it would be appropriate for this new provision to be placed within Part III, Chapter VI (General Provisions) of the Rules.

potentially be addressed by practice directions, should the Council so decide, which is presented in **Appendix B** to this Report.

## 5.22 **Virtual Proceedings – (New) Article 36**

5.22.1 The Working Group’s attention was drawn to the fact that the current Rules do not include an express provision for the Council to conduct its proceedings through virtual means when circumstances so demand. The Working Group considered the relevant practices of other international judicial and dispute settlement bodies with respect to virtual proceedings.<sup>10</sup> Noting that the rules of procedure of several other international adjudicating bodies, such as the ICJ and ITLOS, do contain such provisions, and bearing in mind the lessons learnt from the COVID-19 pandemic which underscored the need for flexibility, including harnessing technological advancements which have increasingly made it feasible to hold effective virtual meetings in certain circumstances, an overwhelming majority of Delegations supported the inclusion in the Rules of a new provision on the conduct of virtual proceedings under the Rules.

5.22.2 The new provision presented as “Article 36”<sup>11</sup> in **Appendix A** to this Report on this item is intended to clarify that the Council may use virtual means in the performance of its Article 84 dispute settlement functions when exceptional circumstances so require. Taking into account the concerns and suggestions raised by Delegations in the course of the Working Group’s deliberations, the proposed provision clarifies that the option to hold any part of the proceedings virtually should only be used exceptionally, for public health, security or other compelling reasons, and that in deciding whether to hold virtual proceedings, the Council should also have due regard to the availability to the parties of technological means for any such virtual proceedings. In addition, before a decision is made on the organisation of such virtual proceedings, the parties shall be consulted. The Working Group also observed that in order to treat all parties on an equal footing, it may be best to avoid a situation where the parties in a case participate via different modalities, for example, where one party participates in-person, whilst another party participates through virtual means. In the Working Group’s opinion, the new proposal would align the Rules with the modern practice of other international adjudicatory bodies and tribunals.

5.22.3 The Working Group further noted that detailed guidelines for the conduct of virtual proceedings could potentially be addressed through practice directions (see further, paragraph 5.21 above, and **Appendix B** to this Report).

## 6. **OTHER SUBSTANTIVE ISSUES CONSIDERED BY THE WORKING GROUP**

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

6.1.1 The Working Group observed that the question of the meaning of the term “majority” in the context of decisions rendered by the Council pursuant to Article 84 has been raised in previous cases heard by the Council, and considered whether any revisions could be made to the Rules for greater clarity in this regard. Article 15 (2) (vii) refers to “a statement of the voting in Council showing whether the conclusions were unanimous or by a majority vote”, and Article 15 (3) refers to “[a]ny Member of the Council who voted against the majority opinion”. Article 52 of the Chicago Convention provides that “Decisions of the Council shall require approval by a majority of its members. [...]” The Working Group

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<sup>10</sup> WG-RRSD/5-WP/2, *Areas Identified as Requiring Further Consideration*, see Appendix B-4, *Benchmarking: virtual hearings*.

<sup>11</sup> The Working Group considered that it would be appropriate for this new provision to be placed within Part III, Chapter VI (General Provisions) of the Rules.

observed that Article 52 is of general application and does not apply exclusively to decisions of the Council rendered pursuant to Article 84 of the Convention.

6.1.2 There was a divergence of opinions during the Working Group’s extensive deliberations on this issue. Some Delegations were of the view that the term should be interpreted as referring to an “absolute majority” of the members of the Council while others supported an interpretation that favoured a “qualified majority”.

6.1.3 An absolute majority interpretation would require more than half of the total membership of the Council for a decision to be approved (presently 19 out of 36 Council Members) notwithstanding the fact that not all 36 Members may be eligible to vote in the Council’s consideration of an Article 84 dispute<sup>12</sup>. It was highlighted during the Working Group’s deliberations that the current practice of the Council was to apply the absolute majority interpretation for cases under Article 84 of the Chicago Convention, and also that the *Rules of Procedure for the Council* (Doc 7559/11) define “majority of the Members of the Council” as meaning “more than half of the total membership of the Council”.

6.1.4 On the other hand, a qualified majority interpretation would set the majority threshold based on the total number of Council Members eligible to vote in the Council’s consideration of a particular dispute (which, as noted above, may be less than the total number of Council Members). The Working Group also took note of the fact that several Delegations preferred the qualified majority interpretation, on the basis that the absolute majority interpretation could lead to a situation where the Council was deadlocked, because either party to a dispute was unable to obtain a majority due to a large number of Council Members being ineligible to vote in a particular case or abstaining<sup>13</sup>. The Working Group noted that some Members of the Council had expressed similar concerns during an informal briefing of the Council held on 21 November 2022<sup>14</sup>. Some Delegations also expressed the view that it could not have been the intention of the drafters of the Convention to permit a situation where the Council, due to being deadlocked in this regard, was unable to perform its functions under Article 84 of the Convention. One Delegation also made reference to Article 32 of the 1969 Vienna Convention on the Law of Treaties, in suggesting that the qualified majority interpretation would avoid leading to “a result which is manifestly absurd or unreasonable”.

6.1.5 The Working Group observed that the question of which interpretation was to be preferred in applying the definition of “majority” in the context of proceedings under Article 84 would have a strong impact on the decision-making process of the Council. After extensive discussions, the Working Group concluded that this was not a matter which it could definitively pronounce on, as any conclusions in this regard could have broader ramifications given Article 52 of the Chicago Convention, as well as wider implications for the efficiency and the legitimacy of the Council. In the course of the Working Group’s deliberations, one suggestion was made that the issue could be raised to the ICAO Assembly for a definitive and authoritative interpretation and decision on the matter (e.g. in the form of an Assembly Resolution). In

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<sup>12</sup> The Working Group observed that there were a number of possible scenarios where this could arise, such as:

- (a) Under Articles 53 and 84 of the Convention, no member of the Council shall vote in the consideration by the Council of any dispute to which it is a party;
- (b) Under Article 62 of the Convention, the Assembly may suspend the voting power in the Assembly and Council of any contracting State that fails to discharge within a reasonable period its financial obligations to ICAO;
- (c) Under Article 66(b) of the Convention, Members of the Council who have not accepted the *International Air Services Transit Agreement* (Chicago, 1944) or the *International Air Transport Agreement* (Chicago, 1944) shall not have the right to vote on any questions referred to the Council under the provisions of the relevant Agreement; and
- (d) Under Article 88 of the Convention, 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 of the Convention.

<sup>13</sup> See Article 15 (2) (vii) of the Rules, which refers to “...the number of Members of the Council who voted in favour of the conclusions and the number of those who voted against or abstained”.

<sup>14</sup> See WG-RRSD/7-IP/2, *Key Messages from the Informal Briefing of the Council held on 21 November 2022*.

this regard, the Working Group did not express a strong preference for either interpretation, and decided to refer the matter to the Legal Committee for its consideration.

7. **CONCLUSION**

7.1 The Legal Committee is invited to consider the information provided in this Report and the Appendices to facilitate the conduct of its work.

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**APPENDIX A**

**Proposed Draft Revisions to the ICAO Rules<sup>15</sup>**

**RULES  
FOR THE  
SETTLEMENT OF DIFFERENCES**

**Approved by the Council on 9 April 1957,  
~~and~~ amended on 10 November 1975\* and on XX [month] 202X\*\***

CHAPTER I

SCOPE OF RULES

*Article 1*

(1) The Rules of Parts I and III shall govern the settlement of the following disagreements between Contracting States which may be referred to the Council:

(a) Any disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International Civil Aviation (hereinafter called “the Convention”) and its Annexes (Articles 84 to 88 of the Convention); and

(b) Any disagreement between two or more Contracting States relating to the interpretation or application of the International Air Services Transit Agreement and of the International Air Transport Agreement (hereinafter respectively called “Transit Agreement” and “Transport Agreement”) (Article II, Section 2 of the Transit Agreement; Article IV, Section 3 of the Transport Agreement).

(2) The Rules of Parts II and III shall govern the consideration of any complaint regarding an action taken by a State party to the Transit Agreement and under that Agreement, which another State party to the same Agreement deems to cause injustice or hardship to it (Article II, Section 1), or regarding a similar action under the Transport Agreement (Article IV, Section 2).

[(3) The Rules of Parts I and III 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 Convention, the Transit Agreement, or the Transport Agreement which, pursuant to that treaty, has been referred to the Council. This is subject to the Council giving its express consent for it to undertake such functions as provided for under that treaty.]

Drafting Notes

*The proposed revisions expand the scope of the Rules to disagreements other than those brought under the Chicago Convention and its Annexes, the Transit Agreement and the Transport Agreement.*

<sup>15</sup> The proposed draft revisions are presented in blue font and grey highlight.

\* Amendment of Article 29 approved by the Council on 10 November 1975.

\*\* Amendments to Articles XX, ... approved by the Council on XX [Month] 202X.

*In this regard, it covers international air law treaties that have already or may in the future entrust the Council with dispute settlement functions.*

*The revisions also seek to make clear that (a) only contracting States to the Convention can rely on this provision; and (b) the disagreement must relate to the interpretation or application of another treaty concerning international civil aviation (i.e. other than the three 1944 Chicago treaties) which, **pursuant to that treaty**, refers such disagreements to the Council.*

*To facilitate discussions at WG-RRSD/8 on this provision, the possible options for the Working Group to consider with regard to this drafting proposal include:*

- (1) Adopting the wording of the current drafting proposal;*
- (2) Adopting the wording of the current drafting proposal, with additional wording (not yet included) clarifying that the Council must expressly agree to undertake such a role; or*
- (3) Omitting the current drafting proposal and leaving Article 1(1) unamended.*

## Part I

### CHAPTER II

#### DISAGREEMENTS

##### Article 2

##### Application and Memorial

**(1)** Any Contracting State submitting a disagreement to the Council for settlement (hereinafter referred to as “the applicant”) shall file an application to which shall be attached a memorial containing:

(a) The name of the applicant and the name of any Contracting State with which the disagreement exists (the latter hereinafter referred to as “the respondent”);

(b) The name of an agent authorized to act for the applicant in the proceedings, together with his the address of the agent, at the seat of the Organization, including an email address, to which all communications relating to the case, including notice of the date of any meeting, should be sent;

##### Drafting Notes

*The Working Group expressed the view that the current requirements relating to the address of the Agent at the seat of the Organization should be maintained. However, the Working Group also favoured providing for additional practical solutions for maintaining communications relating to a case (e.g. electronic means of communications).*

*The proposed revisions therefore expressly require that States also provide the email addresses of their agents, in addition to a physical address at the seat of the Organization. This would then facilitate electronic communications, as provided for in the draft revisions to Articles 2(2), 3(3) and 4(3) below.*

*Similar revisions have been proposed for Article 4(1)(a) below to require that the agent of the respondent also provide an email address.*

(c) A statement of relevant facts;

- (d) Supporting data related to the facts;
- (e) A statement of law;
- (f) The relief desired by action of Council on the specific points submitted;
- (g) A statement that negotiations to settle the disagreement had taken place between the parties but were not successful cannot be settled by negotiation.

Drafting Notes

*Members of the Working Group were generally of the view that the wording of (what will now be) Article 2 (1) (g) was too narrow and should be revised to ensure consistency with the requirements of Article 84 of the Chicago Convention. Accordingly, the proposed revisions are aimed at aligning the provision with the wording of Article 84 of the Chicago Convention.*

(2) The Application and Memorial, as well as all other supporting documents, shall be transmitted to the Secretary General in both paper and electronic formats.

Drafting Notes

*This drafting proposal requires the transmission of documents in both paper and electronic formats. This would be an enhancement of the current Rules because the requirement that electronic copies also be provided would allow for more efficient dissemination of the documents by the Secretariat which is, in any event, consistent with the current practice of the Council.*

### CHAPTER III

#### ACTION UPON RECEIPT OF APPLICATIONS

##### *Article 3*

##### *Action by Secretary General*

- (1) Upon receipt of an application, the Secretary General shall:
  - (a) Verify that it complies in form with the requirements of Article 2, and, if necessary, require the applicant to supply any deficiencies appearing therein;
  - (b) Immediately thereafter notify all parties to the instrument the interpretation or application of which is in question, as well as all Members of the Council, that the application has been received;
  - (c) Forward copies of the application and of the supporting documentation to the respondent, with an invitation to file a counter-memorial within a time-limit fixed by the Council.
- (2) Copies of all subsequent pleadings or other documents submitted by a party to the Council shall similarly be forwarded by the Secretary General to the other party or parties in the case.

(3) All correspondence addressed to the agents of the parties, the Members of the Council, as well as all parties to the instrument the interpretation or application of which is in question, shall be

transmitted in both paper and electronic formats. Transmission by electronic means to the agents of the parties shall only be made to the email address designated by an agent for that purpose.

Drafting Notes

*See the drafting notes corresponding to Article 2 (2).*

*Article 4*

*Counter-memorial*

(1) The counter-memorial shall contain:

(a) The name of an agent authorized to act for the respondent in the proceedings, together with his the address of the agent, at the seat of the Organization, including an email address, to which all communications relating to the case, including notice of the date of any meeting, should be sent;

Drafting Notes

*See the drafting notes corresponding to Article 2 (1) (b).*

- (b) Answer to points raised in the applicant's memorial under Article 2 (c) to (g) ;
- (c) Any additional facts and supporting data;
- (d) Statement of law.

(2) In the counter-memorial there may be presented a counter-claim directly connected with the subject matter of the application provided it comes within the jurisdiction of the Council. The Council shall, after hearing the parties, direct whether or not the question thus presented shall be joined to the original proceedings.

(3) The counter-memorial, as well as all other supporting documents, shall be transmitted to the Secretary General in both paper and electronic formats.

Drafting Notes

*See the drafting notes corresponding to Article 2 (2).*

*Article 5*

*Preliminary objection and action thereon*

(1) If the respondent questions the jurisdiction of the Council to handle the matter presented by the applicant, he or the admissibility of the application, the respondent shall file a preliminary objection setting out the basis of the objection.

Drafting Notes

*Members of the Working Group were generally of the view that the grounds for preliminary objection set out in this article were too narrow, and that this provision should be revised to expressly include admissibility as a possible ground for preliminary objection as well.*

*In this regard, it is relevant to note that the ICJ in its Judgments in the Appeals Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation of 14 July 2020 held (at paragraph 56) that:*

*“... Article 5 of the ICAO Rules for the Settlement of Differences does not preclude the Council from considering an objection to the admissibility of a claim as a preliminary issue.”*

*The proposed revisions therefore simply make it clear that, as the ICJ has held, a preliminary objection can also be based on the admissibility of the application.*

*In suggesting this draft revision to Article 5(1), reference was also made to Article 79(1) of the ICJ's Rules of Court, which states that:*

*“1. Following the submission of the application and after the President has met and consulted with the parties, the Court may decide, if the circumstances so warrant, that questions concerning its jurisdiction or the admissibility of the application shall be determined separately.”*

(2) Such preliminary objection shall be filed in a special pleading at the latest before the expiry of the time-limit set for delivery of the counter-memorial.

(3) Upon a preliminary objection being filed, the proceedings on the merits shall be suspended and, with respect to the time-limit fixed under Article 3 (1)(c), time shall cease to run from the moment the preliminary objection is filed until the objection is decided by the Council. [The applicant may file a written statement of the applicant's observations and submissions on the preliminary objection within the time-limit fixed by the Council. Thereafter, unless otherwise decided by the Council, any further proceedings relating to the preliminary objections shall be oral.](#)

Drafting Notes

*Members of the Working Group were generally of the view that it should be made explicit in the ICAO Rules that the applicant may file a written pleading in response to the respondent's statement of preliminary objection, and that there should be a limit on the number of pleadings exchanged between the parties at the preliminary objection stage. The Working Group has therefore proposed revisions to Article 3(3) accordingly, to reflect all of these points. In suggesting the first sentence of this draft revision, reference was made to Article 79bis(3) of the ICJ's Rules of Court, which states that :*

*“3. Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time-limit for the presentation by the other party of a written statement of its observations and submissions, which shall include any evidence on which the party relies. Copies of the supporting documents shall be attached.”*

*In suggesting the second sentence of this draft revision, reference was made to Article 79ter(2) of the ICJ's Rules of Court, which states that :*

*“Unless otherwise decided by the Court, the further proceedings shall be oral.”*

(4) If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question as a preliminary issue before any further steps are taken under these Rules [to determine the merits of the application](#).

Drafting Notes

*Members of the Working Group were generally of the view that the ICAO Rules should clarify that the filing of a preliminary objection does not prevent negotiations from continuing, either directly or through the good offices of the Council. Moreover, during the deliberations of the Working Group, the Rapporteur explained that the reference to “further steps” in that provision should be construed as relating to the merits of the case.*

*The proposed revisions are therefore aimed at clarifying that although the Council is obliged to decide on a preliminary objection before determining the merits of the matter, that does not preclude the parties from engaging in direct negotiations to resolve their dispute pursuant to Article 14 of the Rules.*

*In suggesting this draft revision, reference was also made to Article 79bis(3) of the ICJ’s Rules of Court, which states that :*

*“3. Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court....”*

### Article 6

#### *Action of Council on procedure*

(1) Upon the filing of the counter-memorial by the respondent, the Council shall decide whether at this stage the parties should be invited to enter into direct negotiations as provided in Article 14.

(2) If it is decided not to invite direct negotiations at this stage, without prejudice to a later invitation as provided in Article 14, the Council shall decide which procedure under these Rules is applicable. Unless the Council decides to undertake the preliminary examination of the matter itself, it shall appoint a Committee (hereinafter referred to as “the Committee”) of five individuals who shall be Representatives on the Council of Member States not concerned in the disagreement, and shall designate one of them as ~~Chairman~~Chairperson.

#### Drafting Notes

*It was noted during discussions of the Working Group that gendered pronouns should be replaced with gender-neutral pronouns in all linguistic versions of the Rules.*

*The Working Group has therefore proposed revisions accordingly to this and other relevant provisions in the Rules (i.e. Articles 2 (b), 4 (1) (a), 5 (1), 27 (2)).*

(3) The decisions under (2), in cases where negotiations are invited, may be postponed until the parties have either refused to enter into negotiations or reported that the negotiations have failed to solve the dispute.

## CHAPTER IV

### PROCEEDINGS

#### Article 7

#### *Written proceedings*

(1) The additional pleadings which may be filed by the parties shall consist of:

— Reply to be filed by the applicant,

- Rejoinder to be filed by the respondent.
- (2) The pleadings shall be filed with the Secretary General within time-limits fixed.
- (3) There shall be annexed to every pleading, copies or originals of all the relevant documents which the party filing the pleading may wish to have considered.
- (4) After the filing of the last pleading, save in the case of the submission of written evidence pursuant to Article 9 or of observations in writing pursuant to Article 19 (5), no further documents may be submitted by any party except with the consent of the other party or by permission of the Council granted after hearing the parties

(5) The Reply and the Rejoinder, as well as all other supporting documents, shall be transmitted to the Secretary General in both paper and electronic formats.

Drafting Notes

*See the drafting notes corresponding to Article 2 (2).*

*Article 8*

*Investigations by Council*

- (1) The Council may at any time, but after hearing the parties, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion. In such cases it shall define the subject of enquiry or expert opinion and prescribe the procedure to be followed.
- (2) A report incorporating the results of the investigation, together with the record of the enquiry and any expert opinion, shall be submitted to the Council in such form, if any, as the Council may have prescribed, and shall be communicated to the parties.

Note

*The Working Group considered whether revisions should be made to this provision, and ultimately concluded that the current text of Article 8 should remain unchanged. See further paragraph 5.10 of the Final Report of the Working Group.*

*Article 9*

*Evidence*

If the parties should desire to produce evidence in addition to any evidence produced with the pleadings, such evidence, including testimony of witnesses and experts, shall be submitted in writing, within a time-limit fixed by the Council, but on special application the Council may agree to receive oral testimony. The Council may also request the parties to call witnesses or experts to give testimony before it at an oral hearing.

Note

*The Working Group considered whether revisions should be made to this provision, and ultimately concluded that the current text of Article 9 should remain unchanged. See further paragraph 5.11 of the Final Report of the Working Group.*

*Article 10*

*Declaration by witnesses and experts*

- (1) The testimony of a witness shall be verified by the following declaration:  
“I solemnly declare upon my honour and conscience that my testimony contains the truth, the whole truth and nothing but the truth.”
- (2) The statement of an expert shall be verified by the following declaration:  
“I solemnly declare upon my honour and conscience that my statement is in accordance with my sincere belief.”

*Article 11*

*Questions*

At the oral hearing, any Member of the Council not a party to the dispute may put questions, through the President, to the agents of the parties or to any counsel or advocate appearing for them. Such questions, if any, may be answered immediately or at a later date to be fixed by the Council.

*Article 12*

*Arguments*

- (1) Upon completion of the evidence, and after a reasonable period for preparation by the parties, they may present arguments to the Council within time-limits fixed by it.
- (2) The final arguments shall be in writing, but oral arguments may be admitted at the discretion of the Council.

*Article 13*

*Procedure before the Committee*

(1) If under Article 6 of the present Rules a Committee has been appointed, it shall, on behalf of the Council, receive and examine all documents submitted in accordance with these Rules and, in its discretion, hear evidence or oral arguments, and generally deal with the case with a view to action being taken by the Council under Article 15. The procedures governing the examination of the case by the Committee shall be those prescribed for the Council when it examines the matter itself. While the Committee has charge of the proceedings, the functions of the President of the Council under these Rules shall be exercised by the Chairman/Chairperson of the Committee.

Drafting Notes

*See the drafting notes corresponding to Article 6 (2).*

(2) Thereafter the Committee shall, without undue delay, present to the Council a report which shall be a part of the record of the proceedings. The report shall include a summary of the evidence and other matters on record and the findings of facts and the recommendations of the Committee.

(3) The Council shall cause a copy of the report of the Committee to be delivered to each party in the case and each of the parties may, within a time-limit fixed by the Council, submit to the Council its written observations on the said report or, if permitted by the Council, its oral observations.

(4) When considering the report of the Committee, the Council may make such further enquiries as it may think fit or obtain additional evidence.

*Article 14*

*Negotiations during proceedings*

(1) The Council may, at any time during the proceedings and prior to the meeting which the decision is rendered as provided in Article 15 (4), invite the parties to the dispute to engage in direct negotiations, if the Council deems that the possibilities of settling the dispute or narrowing the issues through negotiations have not been exhausted.

(2) If the parties accept the invitation to negotiate, the Council may set a time-limit for the completion of such negotiations, during which other proceedings on the merits shall be suspended.

(3) Subject to the consent of the parties concerned, the Council may render any assistance likely to further the negotiations, including the designation of an individual or a group of individuals to act as conciliator during the negotiations.

(4) Any solution agreed through negotiations shall be recorded by Council. If no solution is found the parties shall so report to Council and the suspended proceedings shall be resumed.

*Article 15*

*Decision*

(1) After hearing arguments, or after consideration of the report of the Committee, as the case may be, the Council shall render its decision.

(2) The decision of the Council shall be in writing and shall contain:

- (i) the date on which it is delivered;
- (ii) a list of the Members of the Council participating;
- (iii) the names of the parties and of their agents;
- (iv) a summary of the proceedings;

- (v) the conclusions of the Council together with its reasons for reaching them;
- (vi) its decision, if any, in regard to costs;
- (vii) a statement of the voting in Council showing whether the conclusions were unanimous or by a majority vote, and if by a majority, giving the number of Members of the Council who voted in favour of the conclusions and the number of those who voted against or abstained.

(3) Any Member of the Council who voted against the majority opinion may have its views recorded in the form of a dissenting opinion which shall be attached to the decision of Council.

(4) The decision of the Council shall be rendered at a meeting of the Council called for that purpose which shall be held as soon as practicable after the close of the proceedings.

(5) No Member of the Council shall vote in the consideration by the Council of any dispute to which it is a party.

Note

*The Working Group considered whether revisions should be made to this provision, and ultimately concluded that the current text of Article 15 should remain unchanged. See further paragraph 5.12 of the Final Report of the Working Group.*

*Article 16*

*Default of appearance or in defending*

(1) If one of the parties does not appear before the Council or the Committee, if any, set up under Article 6, or fails to defend its case, the other party may call upon the Council to decide in favour of its claim.

(2) The Council must, before doing so, satisfy itself not only that it has jurisdiction in the matter but also that the claim is well founded in fact and law.

*Article 17*

*Discontinuance*

(1) If in the course of the proceedings the applicant informs the Council in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Secretary General, the respondent has not yet taken any step in the proceedings, the Council, or its President if the Council is not in session, will officially record the discontinuance of the proceedings, and the Secretary General shall inform the respondent accordingly.

(2) If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Council, or its President if the Council is not sitting, shall fix a time-limit within which the respondent must state whether it objects to the discontinuance of the proceedings. If no

objection is so made, acquiescence will be presumed and the Council, or its President if the Council is not sitting, will officially record the discontinuance of the proceedings. If objection is made, the proceedings shall continue.

### *Article 18*

#### *Notification and appeal*

(1) The decision of the Council shall be notified forthwith to all parties concerned and shall be published. A copy of the decision shall also be communicated to all States previously notified under Article 3 (1) (b).

(2) Decisions rendered on cases submitted under Article 1 (1) (a) and (b) are subject to appeal pursuant to Article 84 of the Convention. The submission of Any any such appeal shall be notified to the Council through the Secretary General within sixty days of receipt of notification of the decision of the Council.

#### Drafting Notes

*It was noted during discussions of the Working Group on this provision that the Council would need to know whether or not an appeal has in fact been lodged, particularly with reference to a decision on a preliminary objection. In its deliberations over this provision, the Working Group bore in mind that the original sentence is taken verbatim from the last sentence of Article 84 of the Chicago Convention. The Working Group has therefore proposed only a slight adjustment to this provision, to strike a balance between consistency with Article 84 as far as possible, with the need to clarify for the avoidance of doubt that the party appealing the Council's decision must submit the appeal and thereafter notify the Council within sixty days of receipt of notification of the Council's decision, and that an indication of a mere intention to appeal would not be sufficient.*

### *Article 19*

#### *Intervention*

(1) Any State which is a party to the particular instrument, the interpretation or application of which has been made the subject of a dispute under these Rules, and which is directly affected by the dispute, has the right to intervene in the proceedings, but if it uses this right it shall undertake that the decision of the Council will be equally binding upon it.

(2) Any State which desires to intervene in a disagreement shall forthwith file a declaration to that effect with the Secretary General.

(3) Such declaration shall be communicated to the parties to the instrument concerned. If within a month of the despateh dispatch of this communication, any objection has been notified to the Secretary General with respect to the admissibility of an intervention under paragraph (1) of this Article, the decision shall rest with the Council.

#### Drafting Notes

*The Working Group has proposed this revision in order to reflect modern English usage.*

(4) If no objection has been notified within the above-mentioned period or if the Council decides in favour of the admissibility of an intervention, as the case may be, the Secretary General shall take the necessary steps to make the documents of the case available to the intervening party who may file a memorial within a time-limit to be fixed by the Council, in no event later than the date fixed for the filing of the last pleading referred to in Article 7 (4).

(5) Any such memorial shall be communicated to the other parties to the disagreement who shall send to the Secretary General their observations in writing within a time-limit to be fixed by the Council. The memorial and observations may be discussed by the parties in the course of the subsequent proceedings in which the intervening party shall take part.

Note

*The Working Group considered whether revisions should be made to this provision in relation to the issue of the precondition of negotiation, and ultimately concluded that no such changes to the current text of Article 19 were necessary. See further paragraph 5.14 of the Final Report of the Working Group.*

*Article 20*

*Dismissal of proceedings*

(1) (a) If at any time before a decision is reached the parties conclude an agreement for the settlement of the dispute, or agree to discontinue the proceedings, they shall so inform the Council in writing. The Council shall then officially record the conclusion of the settlement or the discontinuance of the proceedings.

(b) In the event that the original parties to a dispute conclude such an agreement, the Council shall terminate the proceedings notwithstanding the fact that additional parties have intervened. This provision does not affect the right of an intervening party to file an application on its own behalf respecting the subject matter of the original dispute.

(2) In case the termination of the proceedings is pursuant to a settlement between the parties, the terms of the settlement shall be transmitted to the President of the Council and he shall communicate such terms to all States previously notified under Article 3 (1) (b).

**Part II**

CHAPTER V  
COMPLAINTS

*Article 21*

*Form of request*

Any Contracting State submitting a complaint to the Council regarding a situation defined in Article 1 (2) of these Rules shall file a request to which shall be attached a memorial containing the same particulars as in the case of an application submitted under Article 2.

*Article 22*

*Action upon receipt of requests*

Articles 3 (1) (a) and (c), 4 and 5 of Chapter III of Part I (*Action upon receipt of Applications*) shall apply correspondingly to a request submitted under the preceding Article.

*Article 23*

*Appointment of Committee*

(1) Upon the filing of the counter-memorial the Council shall meet and formally decide whether the matter falls under the category of complaints under the provisions listed in Article 1 (2).

(2) The Council shall, if the answer under (1) is in the affirmative, appoint a Committee composed as the Committee described in Article 6 (2) of these Rules.

*Article 24*

*Proceedings before Committee*

(1) The Committee shall thereupon inquire into the matter on behalf of the Council and shall call the States concerned into consultation.

(2) The Committee shall arrange the procedures for the consultation as far as possible in agreement with the parties, and on an informal basis in accordance with the circumstances of each case. It may request additional information and summon representatives of the parties to meet with the Committee at the seat of the Organization or in any other place.

*Article 25*

*Report of Committee*

(1) The Committee shall report to Council on the outcome of the consultation held as expeditiously as possible.

(2) If the consultation has failed to resolve the difficulty the report may include proposed findings and recommendations to the States concerned.

*Article 26*

*Council Action*

(1) After receiving the report of the Committee the Council shall consider it.

(2) If a settlement has been reached through consultation the terms of the settlement shall be recorded and communicated to all States notified of the proceedings.

(3) If consultation has failed to resolve the difficulty the Council may make appropriate findings and recommendations to the States concerned. Article 15 shall apply, *mutatis mutandis*, in this case.

**Part III**

**CHAPTER VI**

**GENERAL PROVISIONS**

*Article 27*

*Agents*

(1) A State which becomes a party to the proceedings on disagreements or complaints under these Rules shall name an agent authorized to represent it and to act for it in the proceedings, provided that a Representative on the Council of any Member State shall not be nominated as an agent.

Note

*The Working Group considered whether revisions should be made to this provision, and ultimately concluded that the current text of Article 27 should remain unchanged. See further paragraph 5.16 of the Final Report of the Working Group.*

(2) The agent may have the assistance of counsel or advocates. The name of any assisting counsel or advocate shall be communicated to the Council in advance of any meeting where [he such assisting counsel or advocate](#) will be present.

Drafting Notes

*See the drafting notes corresponding to Article 6 (2).*

(3) The agents shall be invited to attend any meeting convened to discuss the case.

*Article 28*

*Procedural measures*

(1) The Council shall determine the time-limits to be applied, and other procedural questions related to the proceedings. Any time-limit fixed pursuant to these Rules shall be so fixed as to avoid any possible delays and to ensure fair treatment of the party or parties concerned.

(2) The Council may at any time extend any time-limit that has been fixed under these Rules, either at the request of any of the parties or at its own discretion. It may also in special circumstances and after hearing objections from any party, decide that any step taken after the expiration of a time-limit shall be considered as valid.

(3) In respect of fixing or extending a time-limit under these Rules, the President of the Council shall act on behalf of the Council when it is not in session.

Note

*The Working Group considered whether revisions should be made to this provision, and ultimately concluded that the current text of Article 28 should remain unchanged. See further paragraph 5.17 of the Final Report of the Working Group.*

Article 29

*Languages*

(1) A party may make its submissions, written or oral, in any of the ~~four~~ working languages of the Organization and, ~~at the request of any of the other parties,~~ these shall be translated and/or interpreted into each of the other languages under arrangements to be made by the Secretary General. Unless otherwise decided by the Secretary General, supporting documents appended to written pleadings filed by the parties shall not be translated by the Organization. Any such supporting documents that are not submitted in one of the working languages of the Organization shall be translated into one of those languages by the party submitting it.

Drafting Notes

***Number of working languages:*** *The Working Group noted that there are at present six working language of ICAO. However, rather than simply amending the number from ‘four’ to ‘six’ in this provision, the Working Group was of the view that it would be better not to specify the precise number of working languages in the Rules, so as to avoid the need to further amend the Rules should there be any further changes in the number of ICAO working languages in the future.*

***Translation of pleadings and supporting documents:*** *The proposed revisions codify the current practice of the Council as confirmed by the Council’s decision taken at the Fifth Meeting of its 226th Session (1 June 2022), whereby the Organization is only required to translate the pleadings submitted by the parties in one ICAO working language to the other ICAO working languages, but not the supporting documents appended to the said pleadings. The revisions further clarify that if the supporting documents are not submitted in at least one of the working languages of the Organization, it shall be the responsibility of the party submitting those supporting documents to translate them into one of the working languages.*

(2) The Council may at the request of any party authorize another language to be used by that party, in which case the necessary arrangements for translation and/or interpretation shall be made by the party concerned.

(23) The text of the decision of the Council in case of a disagreement, or its findings and recommendations in case of a complaint, shall be rendered in the ~~four~~ working languages, and each of such texts shall be of equal authenticity unless all the parties agree that any of the texts shall be considered as the authentic one.

Drafting Notes

*See the drafting notes corresponding to Article 29 (1).*

*Article 30*

*Records and publicity*

- (1) The Secretary General shall keep a full record of the proceedings.
- (2) A verbatim transcript shall be made of any oral testimony and any oral arguments and incorporated into the record of the proceedings.
- (3) The record of the proceedings shall, unless otherwise ordered by the Council, be open to the public after the Council has rendered its decision on the merits of the case. The Council may open to the public any part of the record previously ordered to be withheld from the public.

Drafting Notes

*In order to balance the need for transparency with the need to preserve the confidentiality of the proceedings whilst they are still ongoing, which among other reasons, may help to preserve the possibility of a negotiated settlement, the Working Group has proposed revisions clarifying that the record of the proceedings will, as a default rule, only be open to the public after the Council's decision on the merits has been rendered. As the existing wording of the provision already makes clear ("unless otherwise ordered by the Council"), the Council retains the discretion to depart from this default rule if it so wishes.*

*Article 31*

*Costs*

- (1) Unless otherwise decided by the Council, each party shall bear its own costs.
- (2) All other costs may be assessed to the parties in proportions fixed by the Council.

*Article 32*

*Suspension of the Rules*

Subject to agreement of the parties, any of these Rules may be varied or their application suspended when, in the opinion of the Council, such action would lead to a more expeditious or effective disposition of the case.

*Article 33*

*Amendments to the Rules*

The present Rules may, at any time, be amended by the Council. No amendment shall apply to a pending case except with the agreement of the parties.

Article 34Provisional Measures

(1) Pending and without prejudice to the Council's final decision on the dispute as provided in Article 15 (4), the Council shall have the power to indicate, if it considers that circumstances so require, and after hearing the parties in the case, any provisional measures which are to be taken to preserve the rights and interests of any party in the case, or in the interests of the safety or security of international civil aviation.

(2) A written request for the indication of provisional measures may be made by a party in the case at any time during the proceedings and prior to the meeting which the decision of the Council is rendered as provided in Article 15 (4).

(3) A request for provisional measures by a party in the case shall specify the reasons for the request, the possible consequences if it is not granted, and the measures requested.

(4) The Council may also indicate, after hearing the parties in the case, provisional measures on its own initiative, or indicate provisional measures other than those specified in a request by a party to the case.

(5) The Council shall consider the request for provisional measures forthwith for the purpose of rendering a decision on the request, as a matter of urgency. If the Council is not in session when the request for provisional measures is made, an extraordinary or special session of the Council shall be convened to consider the request as soon as practicable, in accordance with the *Rules of Procedure for the Council*.

(6) The Council may at any time, at the request of a party in the case or on its own initiative, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification. Any application by a party proposing such a revocation or modification shall specify the change in the situation considered to be relevant. Before taking any decision under this paragraph, the Council shall afford the parties an opportunity of presenting their observations on the subject.

(7) The Council may request information from the parties in the case on any matter connected with the implementation of any provisional measures it has indicated.

Drafting Notes

(1) A majority of the Members of the Working Group expressed support for including an express provision on provisional measures in the Rules. A new Article clarifying the role of the Council in indicating provisional measures has therefore been proposed.

(2) The text of the new Article is based in part on relevant provisions of the rules of procedure for the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and arbitrations under the International Centre for Settlement of Investment Disputes (ICSID), with suitable adjustments to reflect the unique role of the Council of ICAO in the settlement of disputes under the Chicago Convention, Transit Agreement, and Transport Agreement

(3) The new Article also seeks to address some of the issues and concerns raised by Delegations in connection with this matter, namely:

- (a) That the purpose of such provisional measures is to limit the potential damage to, and preserve, the rights and interests of the parties in a case, or the interests of the safety or security of international civil aviation, while the dispute is still pending before the Council;
- (b) That the provisions on provisional measures should provide a clear and precise framework and a commitment by the Council to act within the said framework when determining provisional measures;
- (c) That the parties in a case should be given the opportunity to be heard in the Council's consideration of provisional measures; and
- (d) That any such provisional measures should be flexible, and subject to periodic review and adjustment, in tandem with the evolution of the underlying dispute.

(4) The Working Group considered that it is not necessary to provide in this Article that a request for provisional measures will be forwarded to the other parties in the case, since Article 3 (2) of the Rules already provides that copies of all subsequent pleadings or other documents submitted by a party to the Council shall be forwarded by the Secretary General to the other party or parties in the case

(5) In particular, Article 34 (5) has been drafted with reference to Rule 19 of the Rules of Procedure for the Council (Doc 7559/11).

Article 35Practice Directions

The Council may adopt practice directions or guidelines regarding procedural matters, which shall not involve any amendment to these Rules. In the event of any inconsistency, these Rules shall prevail.

Drafting Notes

*An overwhelming majority of Delegations supported a suggestion to include provisions on practice directions or guidelines in the Rules. The Working Group has therefore proposed the inclusion of a new Article on practice directions in the Rules. The provision makes it clear that any such practice directions or guidelines shall only relate to procedural matters, and shall not involve any amendments to the Rules (for which there is already an existing provision – Article 33 of these Rules). The provision further clarifies that in the event of any inconsistency between the Rules and the practice directions or guidelines, the former shall prevail.*

Article 36Virtual proceedings

The Council may decide, as an exceptional measure, for public health, security or other compelling reasons, to hold any part of the proceedings under these Rules in a virtual format, having regard to the availability to the parties of the technological means for virtual proceedings. Before a decision is made on the organization of such virtual proceedings, the parties shall be consulted.

Drafting Notes

*An overwhelming majority of the Members of the Working Group supported a revision of the Rules to provide for virtual hearings.*

*The Working Group has therefore proposed the inclusion of a new article in the Rules, which clarifies that any part of the proceedings under the Rules can be held in a virtual format, while also clarifying that this option should be restricted to exceptional circumstances, and that the parties should be consulted on the organization of such virtual proceedings. The text uses the term virtual “proceedings” to cover both hearings, as well as proceedings where the Council renders its decision.*

*In particular, the proposed revisions also take into account a comment made during the 38th Session of the Legal Committee, when a Delegation indicated that virtual proceedings, even in exceptional circumstances, can pose technical challenges for some States, particularly for developing States. The new Article therefore explicitly notes that the availability to the parties of the technological means for virtual proceedings should be considered in connection with such virtual proceedings.*

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## Appendix B

### Non-exhaustive list of subjects that could potentially be addressed by practice directions issued by the Council

#### A) Administrative Matters

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).

#### B) Submission of documents

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.

#### C) Oral hearings and arguments before the Council

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.

#### D) Conduct of virtual proceedings

12. Guidelines on the conduct of virtual proceedings.