

Translation prepared by the ICAO Secretariat

27 November 2023

To: President of the ICAO Council
Copy: Secretary General of ICAO

From: Agent for the Russian Federation in the proceedings

Subject: **Resolution of the disagreement: Australia and Kingdom of the Netherlands and the Russian Federation (2022)**

Sir,

Australia and the Netherlands, in their Application dated 14 March 2022, claim that the aircraft on flight MH17 was shot down by a surface-to-air missile that was launched from “a Russian Federation Buk Transporter Erector Launcher and Radar (Buk-TELAR), which was transported to, deployed and used in the east of Ukraine by the Russian Federation and operated by a Russian military crew.”

This allegation of Russian “responsibility” for the plane crash is the basis for all the Applicants’ requests to the Council.¹

I hereby wish to inform you that, in addition to Australia, which is officially a party to the dispute, 12 other States Members of the Council openly support the Applicants’ version and blame the Russian Federation for the crash of flight MH17, pending consideration of the merits of the dispute.

In particular, in their statement on MH17 of 15 July 2018, the G7 Foreign Ministers asserted that “we are united in our support of Australia and the Netherlands as they call on Russia to account for its role in this incident . . .”.² The G7 member countries are the following ICAO Council Member States: France, Germany, Italy, Japan, United Kingdom, USA and Canada.

The official statement of the Council of the European Union of 16 July 2022 on the subject of the crash of flight MH17 asserted that “the European Union takes note of all legal proceedings that are taking place in this regard and expects Russia to accept its responsibility...”³ Of the EU member States, France, Germany, Italy, Austria, Spain and Romania are members of the ICAO Council.

Paragraph 7 of Resolution 2452 (2022) of 23 June 2022, adopted by the Parliamentary Assembly of the Council of Europe, states that “the Assembly considers the most convincing scenario by far to be that flight MH17 was shot down by a Buk missile made available by the Russian military to the military units controlled by the Russian Federation”.⁴ Among the parliamentarians who supported the Resolution were the representatives of France, Italy, Iceland, Spain and Romania.

¹ The present letter is being transmitted without prejudice to the position maintained by Russia that the ICAO Council has no competence to consider this case.

² https://www.mofa.go.jp/fp/pc/page25e_0002_10.html.

³ <https://www.consilium.europa.eu/en/press/press-releases/2022/07/16/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-occasion-of-the-8th-anniversary-of-the-downing-of-flight-mh17/>.

⁴ <https://pace.coe.int/en/files/30200/html>.

On 25 May 2018, NATO Secretary General Jens Stoltenberg called on the Russian Federation to “accept responsibility” for the crash of flight MH17.⁵ The members of NATO include the following Member States of the ICAO Council: United Kingdom, Germany, Iceland, Spain, Italy, Canada, Romania, France and USA.

The version of events of the disaster promoted by the Applicants has been separately and repeatedly supported, including by the United Kingdom⁶ and the United States of America.⁷

In addition, the position held by Austria, Germany, Iceland, Spain, Italy, Canada, Romania, the United Kingdom, the USA and France on the dispute of Australia and the Netherlands with Russia is indisputably influenced by the fact that all these Member States of the Council are themselves respondents to the Russian Federation’s claim that they have violated the provisions of the Chicago Convention in the case “*Settlement of differences: Russian Federation and 37 Member States (2023)*”.

Representatives of Malaysia, the airline that owned the crashed airliner, along with representatives of Australia and the Netherlands, were members of the Joint Investigation Team and supported its findings. These findings are relied upon by the Applicants in their requests to the Council. In addition, the Permanent Representative of the Netherlands to the United Nations, in his letter dated 10 January 2023 addressed to the President of the Security Council (S/2023/31), welcomed, including on behalf of Malaysia, the judgment of the District Court of The Hague of 17 November 2022, the findings of which are also cited by the Applicants in support of their allegations about Russia’s “responsibility” for the crash.⁸

Thus, 12 States Members of the Council (Austria, United Kingdom, Germany, Iceland, Spain, Italy, Canada, Malaysia, Romania, United States of America, France and Japan) have a direct interest in the outcome of the dispute “*Settlement of differences: Australia and the Kingdom of Netherlands and the Russian Federation (2022)*” and are effectively parties to the dispute, along with Australia and the Netherlands.

According to Article 50 of the Chicago Convention, the ICAO Council consists of 36 contracting States, which appoint their own representatives. At the same time, as the International Court of Justice stated in its judgment of 14 July 2020 in the case of the Qatari air blockade, “the Council is a permanent organ, responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity...”. Thus, the possibility of the representatives of the said 12 States in the Council being swayed by Russia’s arguments to take a different position in the dispute is ruled out.

⁵ Statement by the NATO Secretary General on MH17 Investigation. Available at https://www.nato.int/cps/en/natohq/news_154585.htm.

⁶ UK demands Russia answer for its actions after report into downing of flight MH17 <https://www.reuters.com/article/us-ukraine-crisis-mh17-britain-idUSKCN1IQ1FU/>; see also <https://www.gov.uk/government/news/flight-mh17-trial-verdict-foreign-secretarys-statement>.

⁷ United States Assessment of the Downing of Flight MH17 and its Aftermath. Available at: <https://web.archive.org/web/20140721001159/http://ukraine.usembassy.gov/mobile/statements/asmt-07192014.html>; see also <https://osce.usmission.gov/calling-russia-to-account-for-its-role-in-the-downing-of-malaysia-airlines-flight-mh-17/>; <https://www.state.gov/verdict-in-dutch-trial-against-mh17-suspects/>.

⁸ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/012/06/pdf/N2301206.pdf?OpenElement>.

The participation of the aforementioned 12 Member States of the ICAO Council in voting on the merits of the case “*Settlement of Disputes: Australia and the Kingdom of the Netherlands and the Russian Federation (2022)*” would be contrary to the principles of justice and international law under which all international disputes must be resolved, in accordance with Article 1 of the Charter of the United Nations. It would be contrary, in particular, to the principle of *nemo iudex in propria causa* (no one can be a judge in their own case).

The ICAO Council can and should prevent infringements of the above-mentioned principles which may occur as a consequence of imperfections in the current *Rules for the Settlement of Differences* (Doc 7782/2), which contain no provisions on the prohibition of voting (recusal) by Member States of the Council that have a direct interest in the outcome of a dispute of other States, but are not formally parties to it.

To this end, I request that, at its 231st session, the ICAO Council consider the interest of the Council’s Member States (Austria, Canada, France, Germany, Iceland, Italy, Japan, Malaysia, Romania, Spain, the United States of America and the United Kingdom) in a resolution of the disagreement between Australia, the Netherlands and Russia. In the light of its outcome, I request the Council to invite these States either to intervene as parties under Article 19 of the *Rules for the Settlement of Differences* (Doc 7782/2) or to undertake to refrain from participating in the investigation and from voting on the merits of the case “*Settlement of Disputes: Australia and the Kingdom of the Netherlands and the Russian Federation (2022)*”.

(Signed)

D.E. Grunis