INTERNATIONAL COURT OF JUSTICE

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)

REPLY OF THE KINGDOM OF BAHRAIN, THE ARAB REPUBLIC OF EGYPT, THE KINGDOM OF SAUDI ARABIA, AND THE UNITED ARAB EMIRATES

Volume I of II

27 MAY 2019

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GLOSSARY OF PRINCIPAL DEFINED TERMS, ABBREVIATIONS AND ACRONYMS

Appellants	The Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates
Bahrain	The Kingdom of Bahrain
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966
Chicago Convention	Convention on International Civil Aviation, Chicago, 7 December 1944
Egypt	The Arab Republic of Egypt
FIR(s)	Flight Information Region(s)
First Riyadh Agreement	First Riyadh Agreement, 23 and 24 November 2013
GCC	Gulf Cooperation Council
IASTA	International Air Services Transit Agreement, Chicago, 7 December 1944
ICAO	International Civil Aviation Organization
ICAO Application	Application (A) of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago, 1944), 30 October 2017
ICAO Council	Council of the International Civil Aviation Organization

ICAO Council Decision or **Decision**	Decision of the Council of the International Civil Aviation Organization on the Preliminary Objection in the Matter: The State of Qatar and The Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates (2017) – Application (A), 29 June 2018
ICAO Memorial	Memorial appended to Application (A) of the State of Qatar, Disagreement on the Interpretation and Application of the Convention International Civil Aviation (Chicago,1944), 30 October 2017
ICAO MID Office	ICAO Middle East Regional Office
ICAO Preliminary Objections	Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates in Re Application (A) of the State of Qatar Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on 7 December 1944, 19 March 2018
ICAO Rejoinder	Rejoinder to the State of Qatar's Response to the Respondents' Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates In Re Application (A) of the State of Qatar Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on 7 December 1944, 12 June 2018

ICAO Response to the Preliminary Objections	Response of the State of Qatar to the Preliminary Objections of the Respondents; In re Application (A) of the State of Qatar Relating to the Disagreement on the interpretation and application of the Convention on International Civil Aviation (Chicago, 1944), 30 April 2018
ICAO Rules	Rules for the Settlement of Disagreements, approved by the ICAO Council on 9 April 1957, and amended on 10 November 1975; ICAO document 7782/2
ICJ Application	Joint Application Instituting Proceedings, Appeal Against a Decision of the ICAO Council dated 29 June 2018 on Preliminary Objections (Application (A), Kingdom of Bahrain, Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates v. State of Qatar), 4 July 2018
ILC	International Law Commission
Implementing Mechanism	Mechanism Implementing the Riyadh Agreement, 17 April 2014
MENA	Middle East and North Africa
NOTAMs	Notices to Airmen
Qatar	State of Qatar
Riyadh Agreements	First Riyadh Agreement, 23 and 24 November 2013 Mechanism Implementing the Riyadh Agreement, 17 April 2014 Supplementary Riyadh Agreement, 16 November 2014

Rules of Procedure for the Council	Rules of Procedure for the Council, ninth edition, approved by the ICAO Council 2013, ICAO document 7559/9
Saudi Arabia	The Kingdom of Saudi Arabia
Supplementary Riyadh Agreement	Supplementary Riyadh Agreement, 16 November 2014
UAE	The United Arab Emirates

CHAPTER I
INTRODUCTION

1.1 This case concerns an appeal filed on 4 July 2018 by the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia, and the United Arab Emirates (together, the ***Appellants***) against the Decision of the Council of the International Civil Aviation Organization (***ICAO Council***) dated 29 June 2018 (***Decision***). Following the first round of written submissions, by Order dated 27 March 2019, the Court authorized the submission of a Reply by the Appellants and a Rejoinder by Qatar as the Respondent, and fixed 27 May 2019 as the time-limit for the filing of the Reply. This Reply is submitted pursuant to that Order.

1.2 As required by Article 49(3) of the Rules of Court, this Reply is directed to bringing out the issues that still divide the Parties in light of the Counter-Memorial submitted by Qatar on 25 February 2019. The Appellants note, however, that several of the arguments in Qatar's Counter-Memorial are substantially different to and contradict those that were presented before the ICAO Council. Further, and as set out below, Qatar's new position concedes several important points that have significantly narrowed the issues that divide the Parties.

1.3 By way of general observations, the Appellants note that Qatar's Counter-Memorial does not raise any issue as to the Appellants' contentions concerning the scope and character of the Court's appellate jurisdiction under Article 84 of the Convention on International Civil Aviation (***Chicago Convention***)[1]. In particular, it does not challenge the assertion that the second

[1] QCM(A), para. 1.5; **BESUM, Vol. II, Annex 1,** Convention on International Civil Aviation, Chicago, 7 December 1944, Art. 84.

and third grounds of appeal (ie the ICAO Council's lack of competence over the real issue in dispute between the Parties and Qatar's failure to satisfy the precondition of negotiation) involve a *de novo* consideration of the scope of the jurisdiction of the ICAO Council over Qatar's ICAO Application[2].

1.4 The Appellants observe furthermore that the Counter-Memorial does not respond to nor otherwise take issue with the following arguments: *(a)* that there is a distinction between jurisdiction and admissibility[3]; *(b)* that in addition to jurisdiction, admissibility may be raised as a distinct preliminary objection before the ICAO Council[4]; *(c)* that the same factual or legal situation may give rise to issues of both jurisdiction and admissibility[5]; and *(d)* that countermeasures constitute a circumstance precluding wrongfulness (assuming they are validly adopted)[6]. In addition, Qatar all but accepts that countermeasures in respect of obligations regarding counter-terrorism and non-

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2 BESUM, paras 1.19-1.20.

3 QCM(A), para. 3.73; BESUM, paras 4.11-4.31; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 177, para. 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 456-457, paras 120-121.

4 BESUM, paras 4.32-4.56; cf. QCM(A), para. 3.72, note 286 (merely noting that the objections as to admissibility can be resolved "without determining whether questions of admissibility of claims may be raised as a preliminary matter before the Council.").

5 See BESUM, paras 4.30-4.31; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 177, para. 29; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 456-457, paras 120-121 and p. 460, para. 129; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J. Reports 1996*, p. 621, para. 42. This point is not contested by Qatar in its Counter-Memorial, see, e.g. QCM(A), paras 3.71-3.75.

6 BESUM, paras 2.56-2.62; see QCM(A), para. 3.68 (noting the "preclusive effect of the countermeasures defence").

intervention, notably under the Riyadh Agreements, may in fact fall outside of the ICAO Council's competence, although it then proceeds to contradict itself by maintaining that the Council may nevertheless pass judgment on certain issues appertaining to countermeasures[7].

1.5 In respect of the first ground of appeal (the absence of due process), the Parties are in agreement that in exercising the judicial functions conferred upon it by Article 84 of the Chicago Convention, the ICAO Council is required to respect the fundamental principles of due process[8]. The Parties are also in agreement on a number of factual matters, including that the Council arrived at its Decision by secret ballot, that it did so without open deliberations, and that it failed to deliver a reasoned decision[9]. The two principal issues that still divide the Parties are as follows:

(a) First, Qatar invokes the judgment in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* to support its contention that the "supervisory authority" of the Court does not encompass procedural questions so long as the Council "reached the

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7 QCM(A), para. 3.55 ("the merits of Joint Appellants' countermeasures defence need not even be addressed by the Council in order to decide Qatar's claims"); *ibid.*, para. 3.68 ("[t]he Council could . . . find the aviation prohibitions wrongful under the Chicago Convention and its Annexes, and simply take judicial notice of Joint Appellants' countermeasures Defence"); *ibid.*, para. 3.69 ("the Council could assess the legality of Joint Appellants' countermeasures defence without addressing the substantive premise thereof. . . . The Council unquestionably has jurisdiction to assess whether Joint Appellants complied with the *other* necessary conditions governing countermeasures" (emphasis added)). Compare, *ibid.*, para. 1.18 ("both the availability of a countermeasures defence as a matter of principle and whether the conditions for their exercise have been met indisputably fall within the jurisdiction of the Council.").

8 BESUM, paras 3.4-3.12; QCM(A), para. 5.65.

9 BESUM, paras 3.2(b), (f) and (g); QCM(A), paras 5.29-5.41.

right conclusion"[10]. However, in that case, the Court found that the irregularities alleged by India did not "prejudice in any fundamental way the requirements of a just procedure"[11]. That stands in stark contrast to the manifest lack of due process in the present case. In fact, in another appellate proceeding decided immediately after *India v. Pakistan*, the Court clearly held that its supervisory authority extended to consideration of whether the original decision was reached in accordance with due process, such as the requirement that "judicial decisions . . . should be reasoned"[12].

(b) Second, Qatar makes the astonishing assertion that because "Council Member representatives are not appointed to the Council in their individual capacity . . . discharging the judicial function in their own individual capacity, rather than on behalf of their appointing States, is what would violate due process, not the other way around."[13] In other words, Qatar not only acknowledges but even endorses the fact that delegates on the ICAO Council took instructions from their capitals as to how to vote on the Appellants' Preliminary Objections, rather than approaching the dispute as neutral adjudicators. The Appellants' position remains that it is a manifest "contradiction to hold that a representative who receives instructions from a state as to how he should act with respect to a particular disagreement *could be seen to*

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10 QCM(A), paras 5.9 and 5.12.

11 *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, pp. 69–70, paras 44-45.

12 *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, *I.C.J. Reports 1973*, p. 210, para. 94.

13 QCM(A), para. 5.40.

act judicially."[14] Qatar's argument confirms that the Council did not exercise its judicial function properly. The political statements by certain Council Members in support of Qatar, together with the absence of open deliberations and the failure to deliver a reasoned decision, are manifest violations of due process, rendering the Decision a nullity *ab initio*.

1.6 In respect of the second ground of appeal (the ICAO Council's lack of competence over the "real issue" in dispute), "Qatar readily acknowledges that there is a dispute between the Parties concerning Qatar's compliance with its counterterrorism and non-interference obligations, including under the Riyadh Agreements."[15] This statement is in marked contrast with Qatar's prior, complete refusal to address the issue of countermeasures before the ICAO Council and its insistence then that this was solely a matter for the merits[16]. Despite Qatar's contention that the breaches alleged by the Appellants are "an artifice for escaping scrutiny of their aviation prohibitions"[17], the factual assertions in Chapter 2 of its Counter-Memorial—especially Qatar's vigorous defence of the Muslim Brotherhood and *Al Jazeera*—leave no doubt that there is a very real and substantial dispute between the Parties, which does not concern civil aviation issues. As set out below, the dispute includes in particular

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14 **BESUM, Vol. VI, Annex 126**, G. F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", (1974) 12 *Canadian Yearbook of International Law* 153, p. 169 (emphasis added).

15 QCM(A), para. 3.37.

16 **BESUM, Vol. IV, Annex 25**, Response of the State of Qatar to the Preliminary Objections of the Respondents; In re Application (A) of the State of Qatar Relating to the Disagreement on the interpretation and application of the Convention on International Civil Aviation (Chicago, 1944) and its Exhibits, 30 April 2018, (***ICAO Response to the Preliminary Objections***), paras 75–77.

17 QCM(A), Chapter 2 heading.

Qatar's violations of its express obligations under the 2013–14 Riyadh Agreements, including to refrain from supporting extremism and terrorism, not to support the Muslim Brotherhood, and to cease the use of *Al Jazeera* as a platform for hate speech and the support of extremism[18]. The dispute also concerns the question whether the Appellants' countermeasures were justified as a matter of customary international law or by virtue of Article 3 of the Implementing Mechanism[19].

1.7 Qatar also contradicts its earlier arguments regarding the competence of the ICAO Council[20]. While arguing that the "availability" of and "conditions"[21] for the exercise of countermeasures fall within the Council's jurisdiction, Qatar now contends that violations of obligations in respect of counter-terrorism and non-intervention—on which violations the lawfulness of countermeasures depends—may in fact fall outside the Council's competence[22]. Qatar maintains therefore that the Council has competence over the lawfulness of the civil aviation restrictions irrespective of the lawfulness of the corresponding countermeasures. Qatar attempts to reconcile its contradictory positions by suggesting *inter alia* that the Council should simply take judicial notice of the Appellants' invocation of countermeasures without deciding its lawfulness[23].

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18 See below, Chapter II, especially paras 2.4-2.34.

19 **BESUM, Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Art. 3.

20 Cf **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, paras 75–77.

21 QCM(A), paras 1.18 and 3.69.

22 See above, note 7; QCM(A), paras 3.55, 3.68 and 3.69, cf para. 1.18.

23 QCM(A), paras 3.68–3.69.

1.8 There are two key issues that divide the Parties on that score:

(a) Whether the subject-matter of the dispute encompasses not only the aviation restrictions but also the question of Qatar's support of terrorism and its other internationally wrongful acts, which gave rise to the countermeasures imposed by the Appellants. This requires the Court to determine the subject-matter of the dispute by application of the "real issue" test[24] and to determine whether it has jurisdiction over that dispute, including as to the Appellants' invocation of countermeasures. (*The jurisdictional objection*.)

(b) If Qatar were correct that its Application concerns a dispute falling *prima facie* within Article 84 of the Chicago Convention, whether that dispute is, as a matter of judicial propriety and fairness, capable of being decided by the ICAO Council without deciding the disputed issues about Qatar's support for terrorism and its interference in other States' internal affairs and the countermeasures relied upon by the Appellants. (*The admissibility objection*.)

1.9 In respect of the third ground of appeal (the requirement under Article 84 that the dispute be one which "cannot be settled by negotiation"), Qatar asserts that the ICAO Council "properly held that Qatar satisfied the negotiation

[24] BESUM, paras 5.56-5.57. See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 602, para. 26; see also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, pp. 26-27, para. 50 ("'[W]hether there exists an international dispute is a matter for objective determination' by the Court . . . [which] 'must turn on an examination of the facts.'"); *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections,* Judgment of 6 June 2018, p. 17, para. 48 ("it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim").

requirement"[25]. Contrary to its earlier arguments before the Council, Qatar now recognizes that negotiations are a precondition to jurisdiction, and it no longer argues that the severance of diplomatic relations meant that negotiations were impossible[26]. It asserts instead that "the absence of diplomatic channels . . . made it much more difficult for Qatar even to attempt to negotiate"[27].

1.10 The Parties are largely in agreement as to the applicable international law standard that "in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiations is not met", notwithstanding a few points on which they continue to disagree[28]. The principal issue that divides the Parties is whether Qatar in fact complied with this requirement. Qatar points to various communications, including statements before the ICAO Council, which it claims constitute genuine attempts to negotiate or to initiate negotiations. None of these, however, was specifically addressed to the Appellants, and none made reference to the subject-matter of the dispute in respect of the relevant obligations under the Chicago Convention. In light of their content, the circumstances in which they were made, and the applicable requirements resulting from the Court's prior jurisprudence, none can properly be regarded as constituting a "genuine attempt" to negotiate, such that the precondition is not satisfied and the ICAO Council was without jurisdiction.

1.11 This Reply consists of six chapters and is accompanied by one volume of supporting documents.

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25 QCM(A), Chapter 4, Section I heading.

26 *Ibid*., paras 4.6-4.7 and 4.29.

27 *Ibid*., para. 4.29.

28 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, para. 159 (emphasis added).

1.12 **Chapter II** addresses the assertion in Qatar's Counter-Memorial that the Appellants' "real dispute" argument is "an artifice for escaping scrutiny of their aviation prohibitions"[29]. Its focus is on rebutting Qatar's denials and contradictions in respect of the breach by Qatar of its obligations under international law, including in particular the 2013–14 Riyadh Agreements. Those obligations consist, *inter alia,* of its express obligations to refrain from supporting extremism and terrorism, to withdraw its support of the Muslim Brotherhood, to cease the use of *Al Jazeera* as a platform for hate speech, and to end all hostile *Al Jazeera* broadcasts against Egypt, particularly during the period of exceptional instability from 2013 onwards. The Reply does not address Qatar's various counter-accusations against the Appellants, which are baseless, and in any case wholly irrelevant to the issues before the Court; nor does it address Qatar's allegations as to breach by the Appellants of their obligations, which form the merits of Qatar's claims before the ICAO Council.

1.13 **Chapter III** addresses the first ground of appeal regarding lack of due process. It concerns Qatar's astounding argument that *not* following instructions from capitals would have been a violation of due process. It also explains why the Court should exercise its supervisory authority in respect of procedural deficiencies in the Council's adjudication of the claims submitted to it. The Chapter discusses Qatar's denial that the grave and widespread defects in the procedure adopted by the ICAO Council mean that the Decision should be set aside. Further it sets out why the Appellants cannot be held to have waived their right to complain about those defects before the Court. The Appellants thus invite the Court to set aside the Decision of the Council as a procedural nullity.

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[29] QCM(A), Chapter 2 heading.

1.14 **Chapter IV** addresses the second ground of appeal regarding the characterization of the real issue in dispute and the ICAO Council's consequent lack of competence over the dispute between the Parties. It explains why the real issue in dispute does not concern "the interpretation or application" of the Chicago Convention and its Annexes, meaning that there is no jurisdiction. It also addresses Qatar's denial that the claims are, nevertheless, inadmissible, as the aviation aspects cannot be severed from the broader dispute. Further, it explains why, in any event, the suggestion by Qatar that the Council does not have to decide (at least in full) the question of countermeasures should be rejected by the Court. The Chapter concludes that the Court should find either that the ICAO Council lacks jurisdiction or, in the alternative, that the claim is inadmissible because it would be judicially improper for the Council to determine it.

1.15 **Chapter V** addresses the third ground of appeal regarding the precondition of negotiation. It explains why Qatar is wrong to assert that the precondition of negotiations has been satisfied. It sets out why, as a matter of law, without a "genuine attempt" to negotiate first being made, it is not possible to satisfy the precondition even where the disputing Party considers that any such attempt would be futile. It further addresses why Qatar is wrong to suggest, as a matter of fact, that it complied with the precondition. In addition, the Chapter sets out why, in the alternative, Qatar is wrong to deny that its claims are inadmissible as a result of its non-compliance with Article 2(g) of the ICAO Rules for the Settlement of Differences (***ICAO Rules***). The Chapter concludes that the Court should hold that the ICAO Council is without jurisdiction due to Qatar's failure to comply with the precondition of negotiations and, in any event, find that Qatar's claim is inadmissible due to its failure to comply with the relevant procedural rules.

1.16 **Chapter VI** contains a short summary of the Appellants' reasoning. The Reply concludes with the Appellants' Submissions.

CHAPTER II
THE REAL ISSUE IN DISPUTE

2.1 This Chapter responds to Qatar's assertions in Chapter 2 of its Counter-Memorial regarding the issues that comprise the real dispute between the Parties. Contrary to its position before the ICAO Council that it would only address the issue of countermeasures at the merits stage of the proceedings[30], "Qatar [now] readily acknowledges that there is a dispute between the Parties concerning Qatar's compliance with its counterterrorism and non-interference obligations, including under the Riyadh Agreements"[31]. Further, Qatar maintains that the countermeasures taken by each of the Appellants in reaction to Qatar's breaches of these obligations (which Qatar denies) were "unjustifiable"[32].

2.2 It is therefore odd that Qatar should go on to allege that the Appellants' position as to the implications of this dispute for the competence of the ICAO Council—the "real dispute" preliminary objection—is "an artifice for escaping scrutiny of their aviation prohibitions"[33]. And in fact, as set forth below, Qatar's response on the elements of the dispute is most notable for its failure adequately to address the assertions raised by the Appellants in the Memorial. Qatar has pursued a strategy of deflection, by making baseless accusations against the Appellants that are wholly irrelevant to the question before the Court, which is

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30 **BESUM, Vol. IV, Annex 25**, Response of the State of Qatar to the Preliminary Objections of the Respondents; In re Application (A) of the State of Qatar Relating to the Disagreement on the interpretation and application of the Convention on International Civil Aviation (Chicago, 1944) and its Exhibits, 30 April 2018, (***ICAO Response to the Preliminary Objections***), paras 75–77.

31 QCM(A), para. 3.37.

32 *Ibid*., para. 2.3.

33 *Ibid*., Chapter 2 heading.

that the civil aviation restrictions adopted by the Appellants are merely part of a set of countermeasures, which were in turn adopted in the context of a broad dispute that is wholly unrelated to civil aviation. By contrast with Qatar's strategy, this Chapter focuses on responding to those issues that properly belong to the real issue in dispute between the Parties.

2.3 To be clear, the Appellants are not required to respond to any of these factual matters, since Qatar has admitted that there does in fact exist a dispute between the Parties which goes well beyond civil aviation and relates to matters different from civil aviation[34]. Nevertheless, the Appellants are constrained to correct some of the most egregious inaccuracies (to put the matter at its lowest) set out in Qatar's Counter-Memorial. **Section 1(A)** highlights Qatar's failure to address its responsibility for supporting extremist and terrorist groups and its interference in the affairs of other States. The Counter-Memorial confirms that Qatar has no convincing answer to the Appellants' claims as to its violations of these obligations, whether arising under the Riyadh Agreements or under general international law. **Sections 1(B) to 1(D)** set out specific responses to the most important of Qatar's denials of breach of its international law obligations. It focuses on Qatar's support for terrorism and extremism, including its continued support for the Muslim Brotherhood, and its support for hate-speech and interference in the internal affairs of other States, through the use of State-owned or -controlled media outlets, notably *Al Jazeera*. Finally, **Section 2** responds briefly to certain aspects of Qatar's patently inaccurate characterization of the airspace restrictions and the contingency measures adopted by the Appellants. These restrictions were adopted by the Appellants as legally justified and proportionate countermeasures in response to Qatar's prior

[34] *Ibid.*, para. 3.37; see below, para. 4.2.

wrongful conduct, while fully preserving the safety of civil aviation. In so doing, the Appellants note that the scope and legality of the airspace restrictions under the Chicago Convention are matters going to the merits of Qatar's claims to the ICAO Council, and thus are not for the Court to determine in the present proceedings in any case.

Section 1. Qatar's manifest violations of the Riyadh Agreements and other international law obligations

A. The real dispute between the Parties concerns Qatar's Violations of the Riyadh Agreements and other international law obligations

2.4 In their Memorial, the Appellants explained how Qatar's conduct in violation of its international law obligations—in particular its support for a variety of extremist and terrorist groups and its intervention in the affairs of other States—resulted in the adoption of various measures against Qatar, including the imposition of the airspace restrictions beginning on 5 June 2017[35]. Those measures were adopted to induce Qatar to comply with its obligations and constitute valid countermeasures. Its support for extremism and terrorism, and its interference in the affairs of other States, are thus at the heart of the dispute between the Parties.

2.5 Paramount among the relevant international law obligations binding upon Qatar were those set out in the Riyadh Agreements[36]. While (or perhaps

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[35] BESUM, Chapter II, particularly, paras 2.10-2.16, 2.34-2.46 and 2.48-2.50 detailing Qatar's Support for extremist and terrorist groups; paras 2.51-2.55 detailing the measures adopted by the Appellants to induce Qatar's compliance with its obligations. As to the particular international law obligations, see, *ibid.*, para. 2.37.

[36] **BESUM, Vol. II, Annex 19,** First Riyadh Agreement, 23 and 24 November 2013, Accession of the Kingdom of Bahrain and the United Arab Emirates to the Riyadh Agreement, 24 November 2013; **BESUM, Vol. II, Annex 20,** Implementing Mechanism, 17 April 2014; **BESUM, Vol. II, Annex 21,** Supplementary Riyadh Agreement, 16 November 2014. See also, BESUM, paras 2.17-2.32.

because) these Agreements are critical to understanding the real dispute between the Parties, Qatar almost entirely ignores them in its Counter-Memorial[37]. These Agreements, however, were entered into precisely in an attempt to resolve disputes between Qatar and other members of the Gulf Cooperation Council (***GCC***), including in particular as regards Qatar's conduct with respect to Egypt. The Riyadh Agreements contain express and specific obligations, which bear repetition[38], including: non-interference in the internal affairs of the other parties[39]; cessation of support for individuals or groups inciting violence or hatred towards GCC States[40]; prohibiting persons inciting violence or hatred towards GCC States from using State-controlled media as a platform for expressing their views[41]; banning organizations or groups seeking to undermine the stability of GCC States, such as terrorist or extremist groups[42]; cessation of support for the Muslim Brotherhood and deportation of Muslim Brotherhood figures who are not citizens of the State[43]; cessation of efforts to weaken the security and stability of Egypt, including by ensuring that *Al Jazeera*, particularly its Arabic language channels, cease airing antagonistic media content directed against Egypt[44]; and cessation of support for political or

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37 See, e.g. QCM(A), paras 2.43-2.46 and 2.52.

38 See also, BESUM, paras 2.17-2.32.

39 **BESUM, Vol. II, Annex 19**, First Riyadh Agreement, 23 and 24 November 2013, Art. 1.

40 *Ibid*, Arts. 1 and 2.

41 **BESUM, Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Art. 1.

42 *Ibid.*, Art. 1(b), (c) and (d).

43 *Ibid.*, Art. 2(a) and (b).

44 **BESUM, Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, Art. 3(d).

militia groups in Yemen, Syria or any other country lacking political stability if such groups pose a threat to the security and stability of GCC States[45].

2.6 The Riyadh Agreements called upon Qatar to cease these activities and set up implementation mechanisms to monitor its conduct, through which the GCC States would meet to discuss complaints of non-compliance[46]. The implementation mechanisms also reinforced other standing obligations in international law[47]. The Riyadh Agreements also established that, in the event of their violation by a party, each of the other parties would have the right to take any appropriate measures to protect their security and stability. This right is set forth in the following unqualified terms:

> "If any country of the GCC Countries fail[s] to comply with this mechanism, *the other GCC Countries shall have the right to take an[y] appropriate action to protect their security and stability*."[48]

2.7 Thus, Qatar was on notice that its compliance with the Riyadh Agreements would be continuously monitored; and Qatar had given advance consent to the other parties taking appropriate action against it if it failed to live up to its commitments. The latter element is of course unusual in treaty practice, which bears out the extraordinary nature of the circumstances that the provision addressed. And the right which it sets forth—"to take an[y] appropriate action"—is capacious, encompassing the customary law entitlement

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45 **BESUM, Vol. II, Annex 19**, First Riyadh Agreement, 23 and 24 November 2013, Art. 3; **BESUM, Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Art. 2(c).

46 **BESUM, Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014.

47 BESUM, paras 2.28, 2.37, 2.44 and 2.49.

48 **BESUM, Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Art. 3 (emphasis added).

to countermeasures but also going beyond it. Furthermore, the "appropriate[ness]" of the "action" to be taken is left to be judged by the State taking it.

2.8 While Qatar acknowledges that the Riyadh Agreements are legally binding[49], Qatar's Counter-Memorial confirms its purported repudiation of these obligations[50], including on the basis that the Appellants' insistence that Qatar live up to its obligations constitutes an imposition on its "sovereignty"[51]. Qatar claims, for example, that *Al Jazeera* does not incite violence and that it has no control over the content of its broadcasts[52]. But it does not explain why, if Qatar indeed had no control over *Al Jazeera*, Qatar specifically committed to "ceasing all media activity directed against the Arab Republic of Egypt in all media platforms, whether directly or indirectly, including all the offenses broadcasted on Al-Jazeera, Al-Jazeera Mubashir Masr, and to work to stop all offenses in Egyptian media"[53]. Qatar insists similarly that the Muslim

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49 QCM(A), para. 2.52, note 144.

50 See also, BESUM, para. 2.47. Qatar's only response to the Appellants' reliance on its letter of 19 February 2017 repudiating its obligations under the Riyadh Agreements is to quibble with an immaterial aspect of the translation: QCM(A), para. 2.52, note 144. The Appellants are content to accept the revised translation proposed by Qatar (**QCM(A), Vol. III, Annex 40**). As is clear on either translation, Qatar considered that the Riyadh Agreements were no longer relevant, were not in keeping with the principles of the GCC, and that they were now "moot", and as such, it called for their termination. Qatar even called for an amendment of the GCC Charter. Seen in light of Qatar's continued thwarting of its obligations under the Riyadh Agreements, this letter was viewed by the Appellant States as amounting to a repudiation of its obligations under those Agreements.

51 QCM(A), para. 2.52; citing **BESUM, Vol. IV, Annex 25**, ICAO Response to Preliminary Objections, Exhibit 40, Foreign Minister: Any Threat to Region is Threat to Qatar dated 6 July 2017.

52 QCM(A), paras 2.54–2.56.

53 **BESUM, Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, Art. 3(d).

Brotherhood is a legitimate political organization[54]. Again, Qatar fails to explain why it specifically committed to providing "[n]o support to the Muslim Brotherhood, whether financially or through media"[55] and likewise no support to "any of the organizations, groups or individuals that threaten the security and stability of the Council states"[56].

2.9 Nor has Qatar responded to the irrefutable evidence provided by the Appellants demonstrating their disagreements with Qatar over its failure to adhere to the commitments laid out in the Riyadh Agreements, which culminated in the measures adopted on 5 June 2017. This evidence includes, *inter alia*, the withdrawal of the Appellants' ambassadors from Qatar in February and March 2014 due to their belief that Qatar was gravely failing to comply with its obligations under the Riyadh Agreements[57]; the agreed minutes from several meetings held in July and August 2014 between Qatar and the other signatories of the Riyadh Agreements, in which Qatar's broken promises to implement the agreements were again raised[58]; and the evidence that Qatar called for the termination of the Riyadh Agreements and the renegotiation of the GCC Charter in February 2017[59].

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54 QCM(A), para. 2.55.

55 **BESUM, Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Art. 2(a)-(b).

56 **BESUM, Vol. II, Annex 19**, First Riyadh Agreement, 23 and 24 November 2013, Art. 2.

57 BESUM, paras 2.20-2.21.

58 See BESUM, para. 2.27; **BESUM, Vol. V, Annex 64**, Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014; **BESUM, Vol. V, Annex 65**, Summary of Discussions in the Sixth Meeting of their Highnesses and Excellencies the Ministers of Foreign Affairs, Jeddah, 30 August 2014.

59 BESUM, para. 2.47; **BESUM, Vol. V, Annex 72**, Letter of 19 February 2017 from the Minister of Foreign Affairs of the State of Qatar to the Secretary-General of the GCC; **QCM(A), Vol. III, Annex 40**, Letter from Mohamed Bin Abdul Rahman Bin

2.10 For instance, in the July 2014 meeting of the Implementation Committee, the UAE representative complained that the "State of Qatar did not implement the basic provisions of the Riyadh Agreement . . . whereas the Muslim Brotherhood has not been deported, in fact they are being received, honored and provided with financial and moral support"[60]; while Bahrain called on Qatar to cease its support for Al Qaeda and affiliates[61]. On the contentious issue of Qatar naturalizing dissident citizens of other GCC States in order to shield them from extradition or other legal measures, the representative of Bahrain complained that "the naturalization continues, in fact more increasingly" and called on Qatar to "immediately stop" that practice[62]. The minutes from a subsequent meeting held between the Foreign Ministers of the GCC States in August 2014, following yet another round of diplomacy, record Qatar's further, empty promises, to mend its ways[63]. Yet these efforts were all for naught.

2.11 Since Qatar is unable to refute this evidence, it instead chooses to ignore it almost entirely in its Counter-Memorial[64]. It further seeks to downplay and mischaracterize the significance of its obligations under the Riyadh Agreements and the other international law obligations with which it was

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Jassim Al Thani, Minister of Foreign Affairs of State of Qatar, to Abdul Latif Bin Rashid Al-Ziyani, Secretary-General of GCC (19 Feb. 2017). See also, note 50, above.

60 **BESUM, Vol. V, Annex 64**, Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014.

61 *Ibid*.

62 *Ibid*.

63 **BESUM, Vol. V, Annex 65**, Summary of Discussions in the Sixth Meeting of their Highnesses and Excellencies the Ministers of Foreign Affairs, Jeddah, 30 August 2014.

64 QCM(A), para. 2.51.

required to comply, maintaining that the "Appellants are not genuinely concerned about Qatar's (non-existent) support for terrorism or interference in their internal affairs"[65].

2.12 In addition, Qatar further attempts to argue that the Appellants' allegations as to its support for terrorism and extremism have "been rejected by the international community at large"[66]. If Qatar is to be believed, it is recognized as a "global leader in anti-terrorism cooperation"[67] and commended for its "leadership role in countering terrorism and extremism"[68]. For all that, Qatar concedes, as it must, that there is a dispute as to its compliance *vel non* with the legally binding obligation set out in the Riyadh Agreements[69].

2.13 In stark contradiction to Qatar's denials, the Appellants' Memorial establishes that Qatar remains in breach of virtually all the specific obligations established under the Riyadh Agreements. For instance, Qatar notably has failed to prosecute or extradite designated terrorists living in and operating from Qatar, including Yusuf Al-Qaradawi[70]. It has supported openly the Muslim Brotherhood and undermined Egypt's stability[71], including by providing the

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65 *Ibid*., para. 2.25.

66 *Ibid*., para. 2.25.

67 *Ibid*., para. 2.41.

68 *Ibid*., para. 2.26.

69 *Ibid.*, para. 3.37.

70 **BESUM, Vol. V, Annex 68**, Note Verbale from the Embassy of the Arab Republic of Egypt in Doha to the Ministry of Foreign Affairs of the State of Qatar, Extradition Request concerning Yusuf Abdullah Aly Al-Qaradawi, 21 February 2015; **BESUM, Vol. VI, Annex 118**, "Amir Hosts Iftar banquet for scholars, judges and imams", *Gulf Times*, 30 May 2018; ***Reply of Bahrain, Egypt, Saudi Arabia and United Arab Emirates [BESUR]*, Vol. II, Annex 31**, A. Gennarelli, "Egypt's Request for Qatar's Extradition of Sheikh Yusuf Al-Qaradawi", *Center for Security Policy*, 27 May 2015.

71 See e.g., the Egyptian Court of Cassation judgment confirming that, between 2011 and 2013, former President Morsi and other leaders of the then Muslim Brotherhood

Muslim Brotherhood with a platform on *Al Jazeera*[72]. Moreover, Qatar's continued funding of extremist groups operating in Syria, Libya and other locations—whether directly, through the making of ransom payments, or indirectly—stands in direct violation of its undertaking to cease support for "militia groups" in any country lacking political stability.

2.14 In short, it should now be beyond contention both that there is a dispute as to Qatar's failure to meet its international law obligations, including under the Riyadh Agreements, and that it constitutes the real issue in dispute between the Parties, and the subject-matter of that dispute, as is set out in Chapter IV.

B. QATAR'S UNLAWFUL SUPPORT FOR TERRORISM AND EXTREMISM

2.15 Qatar's claim that ". . . all of Joint Appellants' allegations about Qatar's alleged 'support of terrorism and extremism' are false"[73] cannot be reconciled with widely and publicly available evidence. It is irreconcilable also with a considerable body of evidence that is highly sensitive and therefore not in the public domain.

2.16 Qatar has no answer to the numerous reputable sources that have concluded that it supports terrorism and extremism, as set out in detail in the

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Government were paid by Qatari intelligence agents to disclose military and secret information relating to Egypt: **BESUM, Vol. VII, Annex 137**, *Morsi and others v. Public Prosecution*, Case No. 32611, Judgment of the Court of Cassation of the Arab Republic of Egypt (Criminal Chamber), 16 September 2017.

72 **BESUR, Vol. II, Annex 26**, Video Excerpt of Gamal Nassar, *Al-Jazeera Television*, 17 August 2013; **BESUR, Vol. II, Annex 17**, Video Excerpt of Muhammad Salim Al-Awa, *Al-Jazeera Television*, 16 September 2010; **BESUR, Vol. II, Annex 20**, Video Excerpt of Asim Abdul Majid, *Al-Jazeera Television*, 25 June 2013.

73 QCM(A), para. 2.41.

Appellants' Memorial[74]. Indeed, it is no secret that Qatar was implicated in widespread support for and funding of extremism and terrorism[75]. Even after agreeing to its obligations in the Riyadh Agreements, Qatar has persisted in its support for Al-Qaida, its Syrian branch Al-Nusra Front, ISIL (Da'esh), the Muslim Brotherhood, Hamas and various Iranian-backed militias and extremist groups operating in Syria, Libya, Egypt and other States[76]. Those reports also

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74 BESUM, paras 2.11-2.15, 2.19, 2.36-2.39, 2.48-2.50; see also, **BESUR, Vol. II, Annex 28**, "German minister accuses Qatar of funding Islamic State fighters", *Reuters*, 20 August 2014, (Statement by German Minister for International Development, Gerd Müller: "You have to ask who is arming, who is financing ISIS troops. The keyword there is Qatar".); **BESUR, Vol. II, Annex 43**, "Qatar accused of financing Muslim Brotherhood activities in Europe", *The Arab Weekly*, 29 October 2017, (Belgian Member of Parliament Koen Metsu accused Doha of "allocating millions of dollars to Muslim Brotherhood activities in Europe" and using the Muslim Brotherhood in Europe as "its own pressure group to increase its power and influence among the Arab and Muslim communities").

75 See e.g., **BESUR, Vol. II, Annex 21**, M. Mazzetti, C. J. Chivers and E. Schmitt, "Taking Outsize Role in Syria, Qatar Funnels Arms to Rebels", *The New York Times*, 29 June 2013; **BESUM, Vol. VII, Annex 133**, United States Department of Treasury Press Release, "Treasury Designates Al-Qa'ida Supporters in Qatar and Yemen", 18 December 2013; **BESUR, Vol. II, Annex 24**, J. Schanzer, "Confronting Qatar's Hamas Ties", *Politico*, 10 July 2013.

76 See BESUM, paras 2.11-2.15, 2.19, 2.36-2.39, 2.48-2.50; **BESUM, Vol. VI, Annex 106**, E. Dickinson, "How Qatar Lost the Middle East", *Foreign Policy*, 5 March 2014; **BESUM, Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 19, Remarks of Under Secretary for Terrorism and Financial Intelligence David Cohen before the Center for a New American Security on "Confronting New Threats in Terrorist Financing", 4 March 2014; **BESUR, Vol. II, Annex 18**, "Hamas political leaders leave Syria for Egypt and Qatar", *BBC News*, 28 February 2012; **BESUR, Vol. II, Annex 37**, J. S. Block, "Qatar is a financier of terrorism. Why does the U.S. tolerate it?", *Los Angeles Times*, 9 June 2017 ("One week after welcoming U.S. Defense Secretary Jim Mattis in April, Qatar hosted a conference by Hamas. The Al-Thani family is a major backer of the terrorist organization, pouring millions every year into the Gaza Strip to cement Hamas' grip on power. Last year alone, Qatar transferred $31 million to Hamas, and the country is expected to pledge an additional $100 million to Gaza."); **BESUM, Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 19, Remarks of Under Secretary for Terrorism and Financial Intelligence David Cohen before the Center for a New American Security on "Confronting New Threats in Terrorist Financing", 4 March 2014 ("But a number of fundraisers operating in more permissive jurisdictions – particularly in Kuwait and *Qatar* – are soliciting donations to fund extremist insurgents, not to meet legitimate humanitarian needs. The recipients of these funds are often terrorist groups, including

reveal that Qatar has continued to give sanctuary to dangerous extremists listed on United Nations and other terrorist sanctions lists[77]. In Syria, in particular, Qatar supported a range of extremist and terrorist groups, including ISIS and the Al-Nusra Front[78].

2.17 Further, Qatar has reportedly distributed to extremist groups millions of dollars raised by Qatar-based "charities"[79]; and paid very large sums to

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al-Qa'ida's Syrian affiliate, al-Nusrah Front, and the Islamic State of Iraq and the Levant (ISIL), the group formerly known as al-Qa'ida in Iraq (AQI).") (emphasis added); **BESUR, Vol. II, Annex 46**, C. Coughlin, "White House calls on Qatar to stop funding pro-Iranian militias", *The Telegraph*, 12 May 2018 ("senior members of the Qatari government are on friendly terms with key figures in Iran's Revolutionary Guard"); **BESUR, Vol. II, Annex 40**, "Egypt: Qatar is the main funder of terrorism in Libya", *Asharq Al-Awsat,* 28 June 2017 ("Ambassador Tariq Al-Kouni, Deputy Foreign Minister for Arab Affairs [of Egypt], said that Qatar is the main financier to terrorist groups and organizations in Libya . . . During a meeting that was held yesterday (Tuesday) in New York . . . with the participation of all UN Member States, Al-Kouni outlined the forms of support that Qatar granted to terrorism in Libya, and pointed out the impact of terrorism on the situation in Libya which has become a safe haven for terrorism."); **BESUR, Vol. II, Annex 42**, "New Human Rights Report Accuses Qatar of 'Harbouring Terrorism in Libya'", *Asharq Al-Awsat*, 24 August 2017.

77 **BESUM, Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 15, Narrative Summary: QDi.253 Khalifa Muhammad Turki Al-Subaiy, United Nations Sanctions List issued by the Security Council Commission pursuant to Security Council Resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh) Al-Qaida and Associated Individuals Groups Undertakings and Entities, last updated on 3 February 2016; **BESUR, Vol. II, Annex 45**, "'Wanted Terrorist' finished second in Qatar triathlon", *The Week*, 28 March 2018.

78 **BESUR, Vol. II, Annex 38**, "Al-Nosra, the Qatari Terrorist Arm in Syria", *Sky News Arabia*, 17 June 2017; **BESUR, Vol. II, Annex 21**, M. Mazzetti, C. J. Chivers and E. Schmitt, "Taking Outsize Role in Syria, Qatar Funnels Arms to Rebels", *The New York Times*, 29 June 2013; **BESUR, Vol. II, Annex 37**, J. S. Block, "Qatar is a financier of terrorism. Why does the U.S. tolerate it?", *Los Angeles Times*, 9 June 2017 ("Qatar has channeled weapons and money to Islamist rebels, notably to the notorious organization Ahrar al-Sham, which has known ties to Al Qaeda. Far from being a force of moderation, Ahrar al-Sham has fought alongside Jabhat al-Nusra, also known as Al Qaeda in Syria.").

79 **BESUR, Vol. II, Annex 29**, T. Ross, R. Mendick and A. Gilligan, 'Charity Commission: British charities investigated for terror risks', *The Telegraph,* 1 November 2014 ("Analysts fear that millions of dollars of so-called charitable

terrorist and extremist groups as "ransom" (whether genuine or concocted) for the release of hostages[80]. Notably, in April 2017, it was widely reported that Qatar paid US$1 billion as a "ransom" to entities affiliated with known terrorist organizations, including Al Qaeda[81]. In its Counter-Memorial, Qatar's response to this is once again deceptive, saying simply that "the funds in question were received by the Government of Iraq, which still had possession of them"[82]. The Iraqi Prime Minister Haider al-Abadi, however, has stated that the funds were "brought in without the approval of the Iraqi government", were intended for "armed groups"; and that the money had been "seized" by Iraqi authorities[83]. In any case, Qatar has not responded to the publicly released exchange of text messages showing that payments were made to these groups[84].

2.18 Qatar's support for extremist groups in Libya since the events of 2011 has been repeatedly pointed out by numerous sources[85]. Likewise, the United

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donations raised inside Qatar and Kuwait have been used to buy weapons and supplies for jihadists in Iraq and Syria.").

80 **BESUR, Vol. II, Annex 36**, E. Solomon, "The $1bn hostage deal that enraged Qatar's Gulf rivals", *The Financial Times*, 5 June 2017.

81 **BESUM, Vol. VI, Annex 120**, P. Wood, "'Billion Dollar Ransom': Did Qatar Pay Record Sum?", *BBC*, 17 July 2018.

82 QCM(A), para. 2.40.

83 **BESUR, Vol. II, Annex 35**, "Abadi: Iraqi government is 'holding' Qatari ransom money", *Al Araby*, 25 April 2017.

84 BESUM, para. 2.48; **BESUM, Vol. VI, Annex 117**, J. Warrick, "Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages", *The Washington Post*, 28 April 2018; **BESUM, Vol. VI, Annex 121**, "Hacked Phone Messages Shed Light on Massive Payoff that Ended Iraqi Hostage Affair", *The Washington Post* (undated).

85 **BESUR, Vol. II, Annex 50**, E. Chorin, "Libya's Perpetual Chaos", *Foreign Affairs*, 19 April 2019; **BESUR, Vol. II, Annex 40**, "Egypt: Qatar is the main funder of terrorism in Libya", *Asharq Al-Awsat*, 28 June 2017; See also **BESUR, Vol. II, Annex 42**, "New Human Rights Report Accuses Qatar of 'Harbouring Terrorism in Libya'", *Asharq Al-Awsat*, 24 August 2017 ("The latest Libyan human rights report accused the State of Qatar of supporting terrorism. The report prepared by the Libyan

States Government has requested Qatar to cease funding and supporting Iran-backed extremist militias in the region[86].

2.19 It is thus impossible to credit Qatar's denials of its continuing support for terrorist and extremist groups that threaten the stability of the Middle East and North Africa (***MENA***) region[87].

C. QATAR'S UNLAWFUL SUPPORT FOR THE MUSLIM BROTHERHOOD

2.20 Qatar undertook in the First Riyadh Agreement the unambiguous obligation to provide "no support to the Muslim Brotherhood"[88] and in the

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'Justice First' Organization, which is headquartered in Cairo, mentioned that it has put all its reports and information on the Libyan entities and individuals on the list of Arab countries at the disposal of the counterterrorism authorities."). Qatar's support for extremist groups in Libya has also threatened Egypt's security to the west. Qatar's only response is to suggest unconvincingly that, in being the *only* State to reject the Arab League resolution of 18 February 2015 (condemning ISIL's beheading of 21 Egyptian Coptic Christians in Libya): see **BESUM, Vol. V, Annex 67**, Press Release of the Arab League, "Consultative Meeting of the Council of the League at the level of Permanent Representatives on the condemnation of the barbaric terrorist act which killed twenty-one Egyptian citizens by ISIS in Libya", 18 February 2015, para. 2), it was motivated by "concerns about the unilateral use of force in a fellow Member State of the Arab League, the possibility of civilian casualties, and the desire not to strengthen any particular party in the Libyan civil war before the conclusion of the then-ongoing UN-sponsored peace talks" (QCM(A), para. 2.39). In other words, Qatar maintains that the recognized, legitimate authorities in Libya—which, as the Council of the Arab League acknowledged, supported Egypt's right of self-defence—should have been treated as an equal party to ISIL (Da'esh) in the Libyan civil war.

86 **BESUR, Vol. II, Annex 46**, C. Coughlin, "White House calls on Qatar to stop funding pro-Iranian militias", *The Telegraph*, 12 May 2018 ("The Trump administration has called on Qatar to stop funding pro-Iranian militias following revelations about the Gulf state's dealings with terror groups in the Middle East. US security officials have expressed concern about Qatar's links to a number of Iranian-sponsored militias, many of them regarded as terrorist organisations by Washington.").

87 QCM(A), paras 1.16, 2.1, 2.23 and 2.26.

88 **BESUM, Vol. II, Annex 19**, First Riyadh Agreement, 23 and 24 November 2013, Art. 2.

Implementing Mechanism "[n]ot to support [the] Muslim Brotherhood with money or via media in the GCC Countries or outside"[89].

2.21 In their Memorial, the Appellants provided extensive evidence that Qatar "continued to embrace the organization, including by providing its leader Yusuf Al-Qaradawi with a platform for hate speech and incitement on *Al Jazeera*"[90]. Qatar's evasive responses to this evidence and its defence of the Muslim Brotherhood are telling. In fact, Qatar does not deny its violation of these obligations. Instead, it tries to deflect attention from them, even as it continues to support and promote the ideology of the Muslim Brotherhood throughout the world[91]. For example, Qatar seems to suggest that because the Muslim Brotherhood is not a "UN-designated terrorist organisation, or listed as such in the GCC terrorist organisations list", Qatar was entitled to support it and to provide it with a media platform through *Al Jazeera*, flatly ignoring its obligations under the Riyadh Agreements[92].

2.22 In addition, Qatar seeks to deflect attention from its harbouring and providing a platform for Yusuf Al-Qaradawi, the spiritual leader of the Muslim Brotherhood. Qatar seeks to legitimize him as a respected "Sunni theologian"[93] facing "baseless" accusations[94], downplaying his close and long-standing

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89 **BESUM, Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Art. 2(a).

90 BESUM, para. 2.19.

91 See, e.g. **BESUR, Vol. II, Annex 49**, "How Qatar funds Muslim Brotherhood expansion in Europe", *Gulf News,* 17 April 2019.

92 QCM(A), para. 2.55.

93 *Ibid*., para. 2.46.

94 In regard to Qatar's assertion that the accusations against Al-Qaradawi are "baseless" (QCM(A), para. 2.46), the Appellants note that Interpol issued its Red Notice against Al-Qaradawi in response to an Egyptian arrest warrant: **BESUR, Vol. II, Annex 54**, Interpol Red Notice for Yousf Al Qaradawi, 20 November 2014 (Redacted). Shortly thereafter Iraq also issued an arrest warrant against Al-Qaradawi for inciting the

relationship with the Emir of Qatar[95], and ignoring his long history of preaching the most vile hate speech[96]. Qatar further omits to mention that in December 2014, shortly after the conclusion of the Riyadh Agreements, Al-Qaradawi and his Doha-based International Union of Muslim Scholars were expelled from the International Islamic Council for Da'wa and Relief for mixing religion with politics[97]. That Qatar will not condemn Al-Qaradawi merely confirms its support for the Muslim Brotherhood's extremist ideology, notwithstanding its explicit commitment to cease such support in the Riyadh Agreements.

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assassination of Iraqi Prime Minister Nouri Al-Maliki on *Al Jazeera*. In September 2017, Interpol confirmed the validity of the Red Notice but it was suddenly annulled, shortly before submission of the Appellants' Memorial. Egypt protested this arbitrary decision, and requested reinstatement of the Red Notice, consistent with the January 2015 judgment *in absentia* of the Egyptian courts that Al-Qaradawi acted "to create chaos in the country, bring down the state with its associations, train armed elements to carry out hostile acts in the country, attack and assault police stations and prisons and free prisoners", see: **BESUR, Vol. II, Annex 55**, Public Prosecution, Office of the Attorney General of Egypt, "Request to Reconsider the Decision of the Commission for the Control of INTERPOL's Files (CCF) issued on the 17th of October 2018, in Session No. 106, according to provisions of Article 42 of the statute of the Commission regarding the Egyptian sentenced: Yusuf Al-Qaradawi under extradition No. 22 of 2014 (International Cooperation Bureau)", 9 March 2019. Qatar also refers (QCM(A), para. 2.47) to the pre-trial remand of Al-Qaradawi's daughter, Ola Qaradawi, and her husband, pursuant to an arrest warrant of 30 June 2017. But Qatar conspicuously fails to mention the serious crimes of which they were accused, which include financing terrorism using resources from foreign parties (namely, Qatar), joining the Muslim Brotherhood and attacking State institutions, all during a period in which Ms Qaradawi was employed at the Qatari embassy in Cairo. Their detention has been repeatedly reviewed and approved by Egyptian courts: **BESUR, Vol. II, Annex 41**, "Egypt: Qaradawi's Daughter, Son-in-Law Jailed for Financing 'Brotherhood'", *Asharq Al-Awsat*, 4 July 2017; **BESUR, Vol. II, Annex 48**, "Egypt remands dissident cleric's daughter for 45 days", *BBC News*, 18 March 2019.

95 BESUM, para. 2.34; **BESUM, Vol. VI, Annex 118**, "Amir Hosts Iftar banquet for scholars, judges and imams", *Gulf Times*, 30 May 2018; **BESUM, Vol. VI, Annex 119**, D. McElroy, "US Advisers Quit Qatar Role as Emir Dines with Muslim Brotherhood Leader", *The National*, 7 June 2018.

96 As is extensively detailed in the Appellants' Memorial, BESUM, para. 2.19; and below, paras 2.27-2.29.

97 **BESUR, Vol. II, Annex 30**, "Islamic Council for Da'wa and Relief cancels Qaradawi's Membership", *Egypt Independent*, 9 December 2014.

2.23 Nor does Qatar have any response to the 2017 Judgment of the Court of Cassation of Egypt in the case of *Morsi and others v. Public Prosecution*[98] detailing numerous instances where Qatari intelligence operatives and *Al Jazeera* staff made substantial payments to senior Muslim Brotherhood officials to obtain documents containing State secrets[99]. The Counter-Memorial has nothing to say about the substance of this evidence of grave intervention in the internal affairs of Egypt[100]. Qatar's espionage was focused on obtaining detailed information on (among other topics) Egyptian military positions and capabilities in the Sinai Peninsula[101], corresponding to information later broadcast on *Al Jazeera* amidst a terrorist insurgency in the Sinai Peninsula[102].

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98 **BESUM, Vol. VII, Annex 137**, *Morsi and others v. Public Prosecution*, Case No. 32611, Judgment of the Court of Cassation of the Arab Republic of Egypt (Criminal Chamber), 16 September 2017.

99 **BESUM, Vol. VII, Annex 137**, *Morsi and others v. Public Prosecution*, Case No. 32611, Judgment of the Court of Cassation of the Arab Republic of Egypt (Criminal Chamber), 16 September 2017, p. 10.

100 Qatar merely questions the "quality of evidence" without providing any explanation whatsoever. It also questions the impartiality of the trial, asserting that President el-Sisi has the power to select judges based on a new Egyptian law: QCM(A), para. 2.50. Qatar fails to mention however, that *none* of the judges presiding in that case where appointed by the President of Egypt. The evidence relied on by Qatar itself makes clear that the new law permitted the Egyptian President to appoint only the Chief Justice of the Court of Cassation (which he must choose from three nominees put forward by the Supreme Judiciary Council) and the head of the State Council (the chief justice of the Supreme Administrative Court) from among three nominees put forward by the State Council's general assembly: **QCM(A), Vol. IV, Annex 119**, "The Battle over Appointing Judges in Egypt", Carnegie Endowment for International Peace, 16 January 2018. It further bears noting that the Court of Cassation and the State Council are entirely separate from the High Court of Appeals (Criminal Circle) which was the court of first instance in *Public Prosecutor v Morsi and others*.

101 **BESUM, Vol. VII, Annex 137**, *Morsi and others v. Public Prosecution*, Case No. 32611, Judgment of the Court of Cassation of the Arab Republic of Egypt (Criminal Chamber), 16 September 2017, pp. 34 and 42.

102 **BESUR, Vol. II, Annex 47**, Video Excerpt "Zero Distance", *Al-Jazeera Television*, 29 July 2018 and 5 August 2018.

Moreover, Muslim Brotherhood leaders have supported this insurgency[103], notwithstanding the numerous atrocities committed against civilians, such as the massacre of 305 worshippers at Al-Radwa Sufi Mosque in the Sinai Peninsula on 24 November 2017[104].

2.24 Another instance of Qatar's overt support of the Muslim Brotherhood is its portrayal of armed extremists inciting jihad against the Egyptian Government in Raba'a Square during August 2013 as "peaceful protestors"[105]. In the days preceding the violent clash in Raba'a Square and other locations in Egypt, *Al Jazeera* gave blanket coverage to speeches by extremists including, for example, the notorious Muslim Brotherhood leader, Asim Abdul Majid, on 25 June 2013, calling for "Upper Egypt" to raise an army of "a hundred thousand men" against the opponents of an "Islamist revolution", including secularists, Marxists, Jews, and Coptic Christians, and threatening that the Government would be "burnt by Upper Egypt"[106]. The Independent Commission on the Events of 30 June 2013, headed by the respected former Judge of the International Criminal Tribunal for the former Yugoslavia, Fouad Riad, found that some of the purported protestors at Raba'a Square were in fact armed with "different types of firearm, edged weapons, explosives, chemical materials, and other materials"[107]; used civilians as human shields; and killed

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103 **BESUR, Vol. II, Annex 27**, Video Excerpt of Mohamed El-Beltagy, *Al-Jazeera Television*, 16 August 2014.

104 **BESUR, Vol. II, Annex 44**, "Egypt attack: IS flags carried by gunmen, say officials", *BBC News*, 25 November 2017.

105 QCM(A), para. 2.45.

106 **BESUR, Vol. II, Annex 20**, Video Excerpt of speech delivered by Asim Abdul Majid, *Al-Jazeera Television*, 25 June 2013.

107 **BESUR, Vol. II, Annex 53**, "Findings of Fact-finding Report Issued by the Independent National Commission on Events Concurrent with June 30th, 2013", 11 March 2014, p. 10.

numerous police and other security officers[108]. The Commission also described violence by Muslim Brotherhood supporters against Coptic Christians, including the burning of 52 churches and Christian facilities[109].

2.25 As for Qatar's claim that the Muslim Brotherhood is unobjectionable because Bahrain has not banned it as an organization[110], this argument fails to address the substance of the Appellants' complaint against the Muslim Brotherhood, which concerns the acts of extremism and incitement perpetrated by members of the Muslim Brotherhood. Bahrain has consistently opposed such actions by members of the Muslim Brotherhood, as indeed by any other organisation, and has called for Qatar to meet its obligations under the Riyadh Agreements in this respect.

D. QATAR'S USE OF STATE-OWNED MEDIA AS A PLATFORM FOR HATE SPEECH AND EXTREMISM

2.26 Qatar undertook in the Riyadh Agreements to cease hostile *Al Jazeera* broadcasts, including those promoting extremism and terrorism. Against these facts, Qatar's assertions in its Counter-Memorial that the Appellants "are not genuinely concerned about Qatar's (non-existent) support for terrorism or interference in their internal affairs", and that their real intention is "to force Qatar to abandon its commitment to freedom of expression and political tolerance"[111], are cynical and disingenuous. Similarly, its assertions as to the "high regard" and "international esteem" in which *Al Jazeera* is held[112], and its

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108 *Ibid.,* pp. 10, 12, 18 and 21–22.

109 *Ibid.*, p. 23.

110 QCM(A), para. 2.55.

111 *Ibid.*, para. 2.25.

112 *Ibid.*, para. 2.54.

"complete journalistic, editorial independence" are baseless[113]. Qatar also ignores the significant differences between the English and Arabic *Al Jazeera* channels, the latter of which have been the source of most of the objectionable broadcasts in support of violent extremist groups[114].

2.27 Far from being held in "international esteem", as Qatar suggests, these channels have, if anything, promoted hatred and violence. Examples of *Al Jazeera*'s broadcasting include television broadcasts in which one of its most prominent journalists openly expressed enthusiastic support for Al-Qaida's ideology, and an extended and highly favourable interview on *Al Jazeera* with the Al Nusra Front leader Muhammad Al-Jolani that has been described as Qatar's "infomercial" for the terrorist group[115]. It is perhaps not surprising that 81% of respondents to an online *Al Jazeera* poll in 2015 indicated that they supported ISIL (Da'esh)[116].

2.28 The Counter-Memorial is also silent on *Al Jazeera*'s regular broadcasts of the sermons of Al-Qaradawi. For example, as set out in the Appellants' Memorial, Al-Qaradawi has on his show referred to the Holocaust as "divine punishment" of the Jews[117]. Further, he openly prayed on *Al Jazeera*: "O Allah, take this oppressive, Jewish, Zionist band of people, . . . do not spare a single one of them. . . . [C]ount their numbers, and kill them, down to the very last

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113 *Ibid*., para. 2.55.

114 BESUM, para. 2.42, and see also, below, paras 2.29-2.31.

115 **BESUR, Vol. II, Annex 34**, M. Fahmy, "The Price of Aljazeera's Politics", *The Washington Institute for Near East Policy*, 26 June 2015.

116 **BESUR, Vol. II, Annex 32**, "Voting", *Al Jazeera*, 28 May 2015.

117 BESUM, para. 2.19, citing **BESUM, Vol. VI, Annex 101**, Video Excerpt of Yusuf Al-Qaradawi, *Al-Jazeera Television*, 28-30 January 2009.

one"[118]. In yet another *Al Jazeera* broadcast, a senior Muslim Brotherhood member asserted that President el-Sisi is secretly Jewish and part of a "premeditated" conspiracy to destroy Egypt consistent with "[t]he Protocols of the Elders of Zion", a notorious anti-Semitic forgery[119]. *Al Jazeera* has also provided a platform for Al-Qaradawi and Muslim Brotherhood leaders to incite hatred and violence against Coptic Christians, Egypt's largest religious minority, demonizing them with accusations of anti-Islamic conspiracies[120], including amassing weapons in churches in order to kill Muslims[121]. Notwithstanding the grave consequences of this hate speech and incitement to violence, Qatar has refused to terminate such broadcasts[122].

2.29 Qatar's Counter-Memorial also ignores Al-Qaradawi's *Al Jazeera* talk show "Sharia and Life"—provided as a further example by the Appellants—in which he called on Muslims to become suicide bombers[123]. He has similarly declared that suicide bombings are not merely a "legitimate right", but instead a "duty"[124].

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118 **BESUR, Vol. II, Annex 16**, Video Excerpt of Yusuf Al-Qaradawi, *Al-Jazeera Television*, 9 January 2009.

119 **BESUR, Vol. II, Annex 26**, Video Excerpt of Gamal Nassar, *Al-Jazeera Television*, 17 August 2013.

120 **BESUR, Vol. II, Annex 25**, Video Excerpt of Yusuf Al-Qaradhawi, *Al-Jazeera Television*, 27 July 2013.

121 See e.g., **BESUR, Vol. II, Annex 17**, Video Excerpt of Muhammad Salim Al-Awa, *Al-Jazeera Television*, 16 September 2010.

122 QCM(A), paras 2.54–2.56.

123 **BESUM, Vol. VI, Annex 102**, Video Excerpt of Yusuf Al-Qaradawi, 'Sharia and Life', *Al-Jazeera Television*, 17 March 2013.

124 **BESUR, Vol. II, Annex 15**, A. Barnett, "Suicide bombs are a duty, says Islamic scholar", *The Guardian*, 28 August 2005. This is but one respect in which *Al Jazeera*'s Arabic channels may be seen as inspiring, supporting, celebrating and promoting terrorism.

2.30 It should come as no surprise—as set out in the Memorial[125]—that the suicide bomber who killed numerous Coptic Christian worshippers at the Church of Saints Paul and Peter in December 2016 had, according to the Egyptian Interior Ministry, visited Qatar "where he had close connection with some of the Muslim Brotherhood's leaders" who instructed him "to start preparing and planning terrorist operations targeting the Copts with the aim of provoking a large sectarian crisis during the coming period"[126]. Qatar's only answer to this contemporaneous statement is that the culprit had also visited North Sinai where he could have been further radicalized[127].

2.31 Indeed, any suggestion that *Al Jazeera* is independent of Qatar is a complete fabrication: *Al Jazeera* is wholly-owned by Qatar and its chairman is a member of the Qatari royal family[128]. Qatar acknowledged its absolute control over *Al Jazeera* by its commitment in the Riyadh Agreements to stop supporting "antagonistic media"[129], and to "ceas[e] all media activity directed against the Arab Republic of Egypt", including on *Al Jazeera* and its Arabic channel in Egypt, *Al Jazeera Mubashir Masr*.[130] Such an *obligation de résultat* would be impossible for Qatar to undertake had *Al Jazeera* not been under its full control.

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125 BESUM, para. 2.35.

126 **BESUM, Vol. V, Annex 71**, Official Statement of the Ministry of Interior of the Arab Republic of Egypt, 12 December 2016, para. 3.

127 QCM(A), para. 2.48.

128 The Chairman is Sheikh Hamad bin Thamer Al Thani, a cousin of the Emir of Qatar. See also: **BESUR, Vol. II, Annex 19**, D. Sabbagh, "Al-Jazeera's political independence questioned amid Qatar intervention", *The Guardian*, 20 September 2012.

129 **BESUM, Vol. II, Annex 19,** First Riyadh Agreement, 23 and 24 November 2013, Art. 1.

130 **BESUM, Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, Art. 3(d).

2.32 The links between Qatar, *Al Jazeera*, and the Muslim Brotherhood, are particularly manifest in the case of Egypt. In 2013, Egypt faced massive protests in which millions of Egyptians demanded the resignation of President Morsi's Muslim Brotherhood Government, amidst sectarian violence and economic collapse, which had brought Egypt to the brink of chaos and civil war[131]. During this period, *Al Jazeera* gave blanket coverage to supporters of the Muslim Brotherhood. Its broadcasts of incitements to hatred and violence were so serious that, in July 2013, immediately before the violent clashes in Raba'a Square, twenty-two *Al Jazeera* journalists resigned in protest at the "biased coverage" of the channel's Arabic service[132].

2.33 It is clear that Qatar used *Al Jazeera* as a tool to interfere in the internal affairs of other States, particularly Egypt. Mohamed Fahmy, a Canadian-Egyptian journalist who was previously the acting Bureau Chief at *Al Jazeera* English in Cairo, and who was prosecuted in Egypt in connection with his work for the network, explains that *Mubashir Masr* (the Arabic service of *Al Jazeera* in Egypt) was banned by Egypt as it "was perceived as a Qatari-sponsored propaganda mouthpiece for the Brotherhood"[133]. Fahmy described *Al Jazeera* as a "pernicious . . . tool of [Qatar's] foreign policy"[134], and "a mouthpiece for extremism"[135]. According to Fahmy:

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131 **BESUR, Vol. II, Annex 22**, "By the Millions, Egyptians Seek Morsi's Ouster", *The New York Times*, 30 June 2013.

132 **BESUR, Vol. II, Annex 23**, "Al Jazeera staff resign after 'biased' Egypt coverage", *Gulf News*, 8 July 2013.

133 **BEUR, Vol. II, Annex 33**, "How Qatar Used and Abused Its Al Jazeera Journalists", *The New York Times*, 2 June 2015, p. 2.

134 *Ibid*., p. 2.

135 **BEUR, Vol. II, Annex 34**, M. Fahmy, "The Price of Aljazeera's Politics", *The Washington Institute for Near East Policy*, 26 June 2015, p. 1.

> "The [*Al Jazeera*] network knowingly antagonized the Egyptian authorities by defying a court-ordered ban on its Arabic-language service. Behind that, I believe, was the desire of the Qatari royal family to meddle in Egypt's internal affairs."[136]

> "When I started meeting with and interviewing members of the Muslim Brotherhood and their sympathizers, they specifically told me they had been filming [the fake] protests and selling [them] to [A]l-Jazeera and dealing fluidly with the network and production companies in Egypt associated with the network."[137]

2.34 Thus, despite Qatar's clear obligation under the principle of non-intervention and pursuant to the Riyadh Agreements to cease airing antagonistic media content directed against Egypt[138], it has emerged that it was instead directly funding the opposition by providing video cameras and paying for footage of so-called protests of the Muslim Brotherhood. This is but one example of the myriad ways in which Qatar has directly fuelled sectarian hatred, political violence and serious instability in Egypt, as well as in other countries in the region.

Section 2. The Aviation Restrictions were imposed as proportionate countermeasures to Qatar's wrongful actions

2.35 In response to Qatar's conduct, the Appellants were fully entitled to adopt the aviation restrictions, so as to induce Qatar's compliance with its international law obligations[139]. The question of determining the scope and

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136 **BESUR, Vol. II, Annex 33**, "How Qatar Used and Abused Its Al Jazeera Journalists", *The New York Times*, 2 June 2015, p. 2.

137 **BESUR, Vol. II, Annex 39**, E. Lake, "Al-Jazeera and the Muslim Brotherhood", *Asharq Al-Awsat*, 25 June 2017, p. 2.

138 See above, para. 2.31.

139 BESUM, paras 2.53-2.55.

legality of those restrictions is plainly a matter for the merits. As such it is not a matter for the Court in the present proceedings, since its mandate is confined to the three grounds of appeal submitted by the Appellants as to the competence of the ICAO Council.

2.36 Nevertheless, in its Counter-Memorial, Qatar has persisted in making untruthful allegations that the Appellants limited the overflight rights of Qatar-registered aircraft through Notices to Airmen (***NOTAMs***) without prior warning[140] and that the Appellants did not co-operate in a timely manner with ICAO or Qatar in establishing contingency routes[141].

2.37 The Appellants reject any suggestion that the airspace restrictions were wrongful. The Appellants' present response is thus intended merely to reiterate that, contrary to Qatar's assertions, each of the Appellants made timely and proper notification of the airspace restrictions, in accordance with all relevant rules and safety requirements, and in full cooperation with all relevant authorities, including ICAO[142]. Furthermore, they promptly adopted contingency measures in order to preserve the safety of civil aviation, as outlined below.

A. BAHRAIN

2.38 As Qatar acknowledges, Bahrain made contingency routes available for Qatar-registered aircraft through the Bahrain Flight Information Region

140 QCM(A), para. 2.6.

141 *Ibid*., para. 2.14 *et seq*.

142 BESUM, paras 2.53-2.55.

(***FIR***)[143]. Bahrain did so at the same time as adopting the restrictive measures, on 5 June 2017, having notified these measures in advance.

2.39 Further, numerous contingency routes have been added over time by the Appellants under the auspices of the ICAO Middle East Regional Office (***ICAO MID Office***), which commended the efforts of the Appellants in this regard[144]. For example, as Qatar acknowledges, on 31 January 2019, a new inbound contingency route to Doha via the Bahrain Flight Information Region (***FIR***) became effective, which allows Qatar-registered aircraft to fly through the Tehran FIR, enter into the Bahrain FIR and arrive at the Doha airport[145]. This route was agreed in principle between Bahrain and Iran in April 2018[146], and the required technical and operational rearrangements within the two FIRs were completed by November 2018. Bahrain and Qatar entered into negotiations to agree to amend their operational agreement as required to implement this contingency arrangement[147], which concluded in January 2019. The route opened as soon as it was approved by Qatar's Civil Aviation Authority, on 28 January 2019.

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143 QCM(A), para. 2.15.

144 **QCM(A), Vol. III, Annex 27**, ICAO Council, Third ATM Contingency Coordination Meeting for Qatar, Summary of Discussions, ICAO Doc. ACCM/3 (5-6 Sept. 2017), para. 6.2 ("The Chairman congratulated the MID Region for the continuous improvements of the implemented contingency plan. He highlighted that the meeting is an evidence of the high level of regional commitment related to safe air traffic operations across the MID Region.").

145 QCM(A), note 59.

146 **QCM(A), Vol. III, Annex 34**, Fourth ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions*, ICAO Doc ACCM/4, 28 April 2018, para. 6.7.8.

147 *Ibid*.

B. EGYPT

2.40 It is also untrue, contrary to Qatar's assertion, that Egypt "continued to reject or delay" Qatar's proposals for contingency routes[148]. In fact, the evidence included with Qatar's Counter-Memorial indicates the opposite. At the ICAO Council contingency coordination meeting held on 6 July 2017, the Egyptian representatives "indicated their willingness to support the efforts contributing to ensure the safe air transport in the region"[149]. At the same meeting, Egypt accepted in principle (with minor modifications only) Qatar's proposal for a contingency route for flights by Qatar-registered aircraft between Beirut and Tunis over the high seas through the Cairo FIR, noting that making this route operational would require coordination with Malta and Libya[150]. At an extraordinary session of the ICAO Council held on 31 July 2017, it was confirmed that authorities in Tripoli had agreed to the proposed contingency route and that this route would become operational the following day. A revised NOTAM for the Cairo FIR had been issued for this purpose[151].

2.41 Qatar's description of this route in its Counter-Memorial as being "of little to no operational value"[152] is unsupported by the evidence it cites[153] and,

148 QCM(A), para. 2.18.

149 **QCM(A), Vol. III**, **Annex 26**, ICAO Council, First ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions*, ICAO Doc. ACCM/1, 6 July 2017, para. 6.6.

150 *Ibid*., p. 3.

151 **BESUM**, **Vol. V**, **Annex 41**, ICAO Council – Summary Minutes of the Meeting of the Extraordinary Session of 31 July 2017, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, 22 August 2017, paras 41 and 59.

152 QCM(A), para. 2.19.

in any case, is not a reflection of any fault on Egypt's part, given that the route matches closely the route which Qatar itself proposed.

C. UAE

2.42 Regarding the UAE, Qatar complains that a proposed contingency route over UAE territory was rejected[154] without providing more details or any other factual information about the UAE's contributions to ensure safe and efficient air traffic operations in the region. From the beginning, the UAE has seen it as a priority to ensure the safe operation of civil aviation in the Middle East and has contributed to the implementation of various contingency measures within the adjacent FIRs. All along, the UAE has continuously been cooperating with ICAO and IATA, as well as with Bahrain, Iran and Oman to implement a safe and appropriate contingency plan to avoid the disruption of air traffic in the region. The ICAO recognized that the UAE's plan was safe and appreciated the UAE's efforts[155].

2.43 Qatar also neglects to mention that the UAE could not approve Qatar's proposed route after a detailed technical safety assessment based on factual data undertaken in accordance with ICAO requirements, on the grounds that, amongst others, Qatar's proposal to fly on ATS route L305 was not recommended for implementation exclusively for operational safety reasons as

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153 The document which Qatar cites states only that, as a matter of fact, one of the contingency routes through the Cairo FIR "ha[d] not been yet used by Qatar registered aircraft" by 5 September 2017: **QCM(A)**, **Vol. III**, **Annex 27**, ICAO Council, Third ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions*, ICAO Doc. ACCM/3, 5-6 September 2017, para. 6.5.

154 QCM(A), para. 2.17.

155 *See* **QCM(A), Vol. III, Annex 26**, ICAO Council, First ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions*, ICAO Doc. ACCM/1, 6 July 2017, paras 6.9, 6.13, 7.1, 7.3.

it would result in unacceptable safety concerns[156]. The proposed route would have crossed the main traffic flows of the busiest Emirati airports. It would have created five conflict points with routes to or from the Bahrain FIR[157], two conflict points with eastbound traffic from the Tehran FIR[158], and even more dangerously, it would have conflicted with the UAE's main arrival holding pattern DESDI for arrivals into the Northern UAE's busy airports[159]. It is also important to note that historically L305 was avoided by Qatar traffic overflying the UAE FIR due to safety concerns with other traffic. Nonetheless, as recognized by Qatar, the UAE approved an additional contingency route proposed by Qatar[160]. In any case, in compliance with the UAE's international obligations and as agreed with the ICAO MID Office, UAE airspace and airports were available at all times for Qatar registered aircraft in case of emergency[161].

D. SAUDI ARABIA

2.44 In Saudi Arabia, contingency plans and other arrangements are in place to ensure safety and the orderly and efficient flow of air traffic in the region

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156 *Ibid*., paras 6.9, 6.13.

157 **QCM(A), Vol. III, Annex 26**, ICAO Council, First ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions*, ICAO Doc. ACCM/1, 6 July 2017, Appendix B, UAE General Civil Aviation Authority, *UAE airspace measures on the State of Qatar*, pp. 15-16.

158 *Ibid*., p. 17.

159 *Ibid*., p. 18.

160 QCM(A), para. 2.19; **QCM(A), Vol. IV, Annex 135**, *Appendices of Working Paper 14640: Contingency Arrangements and ATM Measures in the MID Region* by Kingdom of Bahrain, Arab Republic of Egypt, Kingdom of Saudi Arabia and United Arab Emirates (2017), p. 16.

161 **QCM(A), Vol. III, Annex 26**, ICAO Council, First ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions*, ICAO Doc. ACCM/1, 6 July 2017, Appendix B: UAE presentation, p. 20.

following the revoked access to Saudi airspace for Qatar-registered aircraft[162]. Revoked access only applies to aircraft registered in Qatar. All other flights from or to Qatar are managed pursuant to applicable air traffic management rules and procedures, and provided with normal Air Navigation Services. Although Saudi air space is closed to aircraft registered in Qatar, all required assistance will be offered to any aircraft encountering emergency or any kind of distress[163].

2.45 In this regard it may be noted that on 5 June 2017 Saudi Arabia released two flight levels, FL310 and FL350, to Oman in an amended agreement between the Jeddah and Muscat Area Control Centres in order to best support safe and consistent air travel[164]. Additionally, acting at the request of Yemen, a NOTAM was issued only for Yemeni air space, but routes over the high seas within the Sana FIR remain open to aircraft registered in Qatar[165].

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2.46 Qatar also makes an allegation that Bahrain communicated its intention to establish a buffer zone adjacent to its territorial waters and to intercept

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162 **BESUM**, **Vol. V**, **Annex 41**, ICAO Council – Summary Minutes of the Meeting of the Extraordinary Session of 31 July 2017, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, 22 August 2017, para. 33; **BESUM, Vol. V, Annex 37**, ICAO Working Paper presented by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates, Council – Extraordinary Session, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, ICAO document C-WP/14640, 19 July 2017, Appendix B, Part 3 – Measures by Saudi Arabia, para. 8.

163 **BESUM, Vol. V, Annex 37**, ICAO Working Paper presented by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates, Council – Extraordinary Session, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, ICAO document C-WP/14640, 19 July 2017, Appendix B, Part 3 – Measures by Saudi Arabia, paras 7-8.

164 *Ibid*., para. 4.

165 *Ibid.*, para. 6.

militarily any Qatar-registered aircraft entering into that buffer zone[166]. Bahrain emphatically denies these allegations, which are as vague and unparticularized as they are groundless. Qatar fails to identify the date of the alleged communication (said to have been a telephone call), the officials involved, or the subject-matter or content of the alleged call. In fact, Bahrain did not establish any buffer zone, and it remains committed to providing safe and efficient services to all traffic within its FIR, in all respects[167]. To that end, at all times since 5 June 2017, Bahrain's FIR and its airports have remained available for Qatar-registered aircraft in case of emergency or unexpected weather conditions. Furthermore, Bahrain has never intercepted any Qatar-registered aircraft within its FIR, nor has it ever threatened to do so.

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2.47 The foregoing shows that the Appellants acted promptly within the framework of the Chicago Convention to minimize the impact of their measures, which they were legally justified in adopting to induce Qatar to comply with its legal obligations.

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166 QCM(A), para. 2.9, referring to **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 3, letter of the Qatar Civil Aviation Authority to the President of the Council, dated 8 June 2017, ref. 2017/15984.

167 **QCM(A), Vol. III, Annex 26**, ICAO Council, First ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions*, ICAO Doc. ACCM/1, 6 July 2017, Bahrain's presentation, page entitled "Assurance"; see also, **BESUM, Vol. V, Annex 37**, ICAO Working Paper presented by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates, Council – Extraordinary Session, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, ICAO document C-WP/14640, 19 July 2017, Appendix B, Measures taken by the Kingdom of Bahrain, Egypt, Saudi Arabia and the United Arab Emirates, Part 1(C)(h) and (D)(b) – Measures by the Kingdom of Bahrain ("No changes to normal military routes or operational training areas have been made. No military "Buffer Zones" have been applied or imposed.").

CHAPTER III
FIRST GROUND OF APPEAL: THE DECISION OF THE ICAO COUNCIL FALLS TO BE SET ASIDE DUE TO GRAVE VIOLATIONS OF DUE PROCESS

3.1 For reasons more fully set out in the Memorial, the Decision of the ICAO Council should be recognized as a procedural nullity—a *non est*—and accordingly set aside. In short, the procedure adopted by the ICAO Council was manifestly flawed and in violation of the fundamental principles of due process.

3.2 In this Chapter, the Appellants respond to Qatar's arguments that (a) the Court has no jurisdiction to set aside a decision of the ICAO Council on due process grounds and (b) that "there were no irregularities in the procedure adopted by the Council" or that any such defects were, in any event, "irrelevant" or "harmless".

3.3 Before turning to address these arguments, it is important to deal at the outset with a broader, systemic implication of Qatar's pleaded case. The Appellants state in their Memorial that the absence of deliberations by the Council (or indeed any substantive debate among the Members of the ICAO Council or with the Parties in the Council) strongly indicates that the Council delegates were voting on instruction from their capitals rather than exercising the adjudicative function conferred by Article 84 of the Chicago Convention[168]. In its Counter-Memorial Qatar purports to turn this vice into a virtue, arguing that *not* following instructions would have been a violation of due process[169]. This astounding argument is the subject of **Section 1**. Then, **Section 2** explains why the Court should exercise its supervisory authority in respect of the

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168 BESUM, para. 3.2(g).

169 QCM(A), para. 5.40.

procedural deficiencies in the Council's adjudication of legal disputes. **Section 3** proceeds to describe the grave and widespread defects in the procedure adopted by the ICAO Council, which ultimately tainted its Decision. This is followed by **Section 4**, which sets out why the Appellants cannot be held to have waived their right to complain about those defects before the Court. Concluding this Chapter, the Appellants respectfully invite the Court to set aside the ICAO Council Decision (**Section 5**).

Section 1. On Qatar's own case, the ICAO Council is not apt as a legal forum

3.4 Qatar does not deny that in the present dispute the ICAO Council was carrying out a judicial function conferred upon it by Article 84 of the Chicago Convention. As the Council President reminded Council members at the outset of the hearing of 26 June 2018,

> "the Council [is] *sitting as a judicial body under article 84 of the Chicago Convention*, taking its decisions on the basis of the submission of written documents by the Parties, as well on the basis of oral arguments."[170]

3.5 In their Memorial, the Appellants referred to the structural difficulties faced by the ICAO Council in acquitting itself of its judicial function under Chapter XVIII of the Chicago Convention, referring to the views of commentators that the ICAO Council was equipped to resolve disputes of a technical nature only[171].

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170 **BESUM, Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 6, (emphasis added).

171 BESUM, para. 3.8.

3.6 In this regard, the Appellants set out the procedural history of the ICAO Council proceedings to date, taking issue with multiple, manifest violations of due process. They stressed, in particular, the absence of any deliberations at all and the absence of any reasons provided in the Decision of the Council, which consisted only of one line[172].

3.7 Qatar does not contest the procedural defects described by the Appellants. Instead, it contends that those defects are, in the circumstances, "irrelevant"[173] and "harmless"[174]. Qatar also argues that even if the Council delegates did act on instruction from their governments in deciding on the Appellants' Preliminary Objections, that would be in keeping with judicial process. Qatar goes on to assert that—

> "when ICAO Council Member representatives are acting in Article 84 proceedings, discharging the judicial function in their own individual capacity, rather than on behalf of their appointing States, is what would violate due process, not the other way around."[175]

3.8 That is an astounding proposition. Instructions are inimical to the judicial function, which comports a duty to act only upon one's professional conscience, in a manner that is independent and impartial—as the Council President said, "on the basis of the submission of written documents by the Parties, as well on the basis of oral arguments"[176], *and nothing else*. Given that

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172 *Ibid.*, Chapter 3, particularly para. 3.2.

173 QCM(A), para. 1.7.

174 *Ibid*., para. 5.51.

175 *Ibid*., para. 5.40.

176 **BESUM, Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 6, (emphasis added).

several of the governments which participate in the ICAO Council had made political statements about the underlying dispute between the Parties[177], Qatar's position thus confirms the conclusion that the Decision had been pre-determined. This entails that the Council was structurally incapable of adjudicating upon the Appellants' Preliminary Objections in a proper judicial manner.

3.9 That structural concern with the ICAO Council is also borne out by the minutes of the Council proceedings concerning the 1971 dispute between India and Pakistan, which record the wish of certain Council members to await instructions from their governments before rendering a decision[178].

3.10 Commentators, too, have pointed out this serious issue in analysing the judicial functions of the Council[179]. And as these commentators have rightly noted, the Council's judicial function cannot be conflated with its other functions, such as setting aviation-safety standards or delimiting FIRs. The judicial function of the Council is to be discharged by the individuals sitting on the Council from time to time, in their individual capacity. For it is settled law that when a State has been designated as an arbitrator or judge, once the individual adjudicator has been designated by the State, it is that individual who

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177 **BESUM, Vol. V, Annex 41**, ICAO Council – Summary Minutes of the Meeting of the Extraordinary Session of 31 July 2017, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, 22 August 2017, paras 69-84.

178 **BESUM, Vol. V, Annex 27**, ICAO Council – 74th Session, Minutes of the Fifth Meeting, ICAO document 8987-C/1004, 28 July 1971, paras 7, 10.

179 **BESUM, Vol. VI, Annex 126**, G. F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", (1974) 12 *Canadian Yearbook of International Law* 153, p. 169.

must act, in their personal capacity, not on instruction[180]. As Gerald Fitzgerald—the senior legal officer of ICAO at the time of the hearing in the dispute between India and Pakistan—has stated:

> "[I]t is a contradiction in terms to say that a state can be a judge. It is also a contradiction to hold that a representative who receives instructions from a state as to how he should act with respect to a particular disagreement *could be seen to act judicially*."[181]

3.11 Two conclusions follow from the foregoing. First, that Qatar's position vindicates the view, expressed by several commentators, that at present the ICAO Council is not an apt legal forum (but instead a political forum)[182]. Secondly, that it falls to the Court, as the guardian of the integrity of the international judicial process, to exercise its supervisory authority in order to provide the Council with necessary direction on how to comply with the duties of due process that are incumbent upon any adjudicator.

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180 S. Rosenne, *The Law and Practice of the International Court 1920-2005* (4th ed., 2006), Vol. I, p. 355, stating with respect to members of the Court that if "political factors momentarily enter into play at the time of the election of the members of the Court, once elected the Court is granted every facility to maintain the proper degree of judicial independence".

181 **BESUM, Vol. VI, Annex 126**, G. F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", (1974) 12 *Canadian Yearbook of International Law* 153, p. 169, (emphasis added).

182 **BESUM, Vol. VI, Annex 128**, E. Warner, "Notes from PICAO Experience", (1946) 1 *Air Affairs* 30, p. 37; **BESUM, Vol. VI, Annex 125**, T. Buergenthal, *Law-making in the International Civil Aviation Organization* (1969), pp. 195-197; **BESUM, Vol. VI, Annex 126**, G. F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", (1974) 12 *Canadian Yearbook of International Law* 153, p. 157; **BESUM, Vol. VI, Annex 122**, R. I. R. Abeyratne, "Law Making and Decision Making Powers of the ICAO Council – A Critical Analysis", (1992) 41 *Zeitschrift für Luft- und Weltraumrecht* 387, p. 394; **BESUM, Vol. VI, Annex 123**, J. Bae, "Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication", (2013) 4(1) *Journal of International Dispute Settlement* 65, p. 70.

Section 2. Due process falls within the Court's appellate jurisdiction

3.12 The next issue of debate between the Parties concerns whether litigants before the ICAO Council are entitled to due process or not. The Appellants submit that they are; from which follows that an appeal under Article 84 of the Chicago Convention must be capable of encompassing procedural complaints. Qatar submits the contrary, from which it must necessarily follow that litigants are not entitled to due process.

3.13 Qatar argues that the Chicago Convention does not expressly authorize the setting aside of a decision of the Council on grounds of due process[183]. But the supposed need for such an express authorization is one of Qatar's own making. In fact, Article 84 of the Chicago Convention provides for a broad right of appeal, without restricting the grounds available. If one accepts, as one must, that due process is a fundamental entitlement of litigants in any judicial forum, it is inherent in the notion of *appeal* that it may encompass review of every aspect of the proceedings. In this regard, in his separate opinion appended to the Court's judgment in the *India v. Pakistan* appeal, Judge Jiménez de Aréchaga noted, with specific reference to Article 84:

> "The right of appeal granted by Article 84 of the Chicago Convention comprises not only the right to obtain a pronouncement from the Court on whether the decision of first instance is correct from the point of view of substantive law but also on whether that decision was validly adopted in accordance with the essential principles of procedure which must govern

[183] QCM(A), para. 5.11.

> the quasi-judicial function entrusted to the organ of first instance."[184]

3.14 In *Application for Review of Judgment No. 158 of the UN Administrative Tribunal, (Advisory Opinion)*, the Court held that a decision of the UN Administrative Tribunal could be appealed on grounds not explicitly set forth in the Statute of the Tribunal:

> "The fact that failure to state reasons was not expressly mentioned in the list of grounds for review does not exclude the possibility that failure to state reasons may constitute one of the errors in procedure comprised in Article 11[185]. Not only is *it of the essence of judicial decisions that they should be reasoned*, but Article 10, paragraph 3, of the Tribunal's Statute, which this Court has found to be a provision 'of an essentially judicial character' (I.C.J. Reports 1954, p. 52), requires that: 'the judgements shall state the reasons on which they are based'."[186]

3.15 Similarly, in the *Arbitral Award of 31 July 1989*, the Court held that it had jurisdiction to rule on the alleged nullity and inexistence of an arbitral award on the basis of the declarations made by Senegal and Guinea-Bissau under Article 36(2) of the Statute, even though neither declaration expressly

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184 Separate Opinion of Judge Jiménez de Aréchaga, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, para. 37.

185 Article 11 of the Statute of the Administrative Tribunal of the United Nations 1955, as amended by Resolution 957(X) on 8 November 1955, allowed applicants to appeal a judgment if the Tribunal had "committed a fundamental error in procedure which has occasioned a failure of justice". See: *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 170, para. 12.

186 *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 210, para. 94 (emphasis added).

allowed the Court to set aside decisions tainted by a failure to follow rules of due process[187].

3.16 What is more, the policy implications of Qatar's argument are unsound and inimical to the Court's function. It is indeed the function of the Court to set and supervise judicial decision-making standards in the international legal system[188]. There can therefore be no serious dispute that failure to abide by fundamental guarantees of due process entitles—indeed requires—the Court to set aside a decision that emanates from a flawed process.

3.17 In *India v. Pakistan*, the Court referred to its appellate function under the Chicago Convention and International Air Services Transit Agreement (***IASTA***) as follows:

> "In thus providing for judicial recourse by way of appeal to the Court against decisions of the Council concerning interpretation and application – a type of recourse already figuring in earlier conventions in the sphere of communications – the Chicago Treaties gave member States, and through them the Council, *the possibility of ensuring a certain measure of supervision by the Court over those decisions. To this*

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187 *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991*, pp. 61-63, paras 22-27.

188 J. Crawford, "The International Court of Justice, Judicial Administration and the Rule of Law", in D. W. Bowett and others, *The International Court of Justice, Process, Practice and Procedure* (1997), pp. 113-114, noting that "[t]he Court is the principal judicial organ of the organised international community as a whole, and not less than that". See also Separate Opinion of Judge Lachs, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. UK), I.C.J. Reports 1992*, p. 26, in which Judge Lachs elaborated on the censorial role for the Court: "In fact the Court is the guardian of legality for the international community as a whole, both within and without the United Nations".

extent, these Treaties enlist the support of the Court for the good functioning of the Organization."[189]

3.18 The Court can help ensure the "good functioning" of ICAO only if it is able to exercise supervisory authority in respect of procedural deficiencies occurring in proceedings before the Council in hearing and adjudicating upon a dispute submitted to it. There can be no doubt—and Qatar has not argued otherwise—that due process is an elementary aspect of any judicial proceeding, independently of the substantive outcome, such that a decision emanating from a flawed process should not be allowed to stand. It is therefore open to the Court to review the procedure followed by the ICAO Council in reaching its Decision, just as it is open to the Court to review the substantive rectitude of the decision.

3.19 Procedural deficiencies were also at issue before the Court in the *India v. Pakistan* case. On the facts, the Court concluded that India's alleged irregularities did not rise to the level of "prejudic[ing] in any fundamental way the requirements of a just procedure"[190]. That decision rested on the facts of that case. Far from holding that procedural irregularities are "irrelevant", as Qatar submits in its Counter-Memorial[191], the Court held that such irregularities, in that case, were not important enough to trigger its "supervisory authority".

3.20 In contrast to the proceedings in *Pakistan v. India*, the ICAO Council in the present case did in fact prejudice the requirement of a just procedure in a fundamental way. The procedural defects in this case are greater in number and

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189 *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, para. 26 (emphasis added).

190 *Ibid.*, para. 45.

191 QCM(A), para. 5.12.

magnitude than those at issue in *Pakistan v. India*—so much so that the present Decision must be recognized as a nullity:

(a) The Council heard oral submissions from the Parties, took a vote, and issued its decision in just *one* afternoon. In *Pakistan v. India*, by contrast, the Council held a *five*-day hearing to rule on India's preliminary objection.

(b) What is more, the four Appellants, being treated as a single party, were given the same length of time as Qatar (40 minutes) to defend their position—plainly insufficient time given that each of the four States was appearing as a respondent party in its own right and given that presenting a collective case required additional time as compared to that needed by Qatar. In the *India v. Pakistan* appeal before the Court, there was no allegation by India that the principles of equality of arms and reasonable opportunity to be heard had been violated.

(c) The Appellants submitted two separate and distinct Preliminary Objections, each being of itself dispositive of the ICAO Council's competence to hear the dispute before it. The Appellants thereby contested the jurisdiction of the ICAO Council to adjudicate the claims formulated by Qatar in its Application or, in the alternative, the admissibility of those claims. The President conflated the two objections into one, and the ICAO Council disposed of the two Preliminary Objections raised by the Appellants as a single plea. Thus, unlike in *Pakistan v. India*, the Council fundamentally misunderstood and could not properly have applied its collective mind to the objections that were before it.

(d) The Council acknowledged but effectively abdicated its duty to rule on requests for clarification formulated by the Appellants, in violation of the Chicago Convention. In the *India v. Pakistan* appeal before the Court, there was no allegation that the Council improperly abdicated its judicial function.

(e) The Council proceeded to hold a vote *immediately* after hearing the parties' oral submissions. In *Pakistan v. India*, members of the Council were given an opportunity to put questions to the parties, and in fact made use of that opportunity.

(f) Nor were there any deliberations between the members of the Council[192]. In *Pakistan v. India*, there was a recess in the Council's meeting to allow members to deliberate[193].

(g) The Decision was taken by secret ballot despite a request by the Appellants for a roll call vote with open voting. In *Pakistan v. India*, by contrast, India requested and obtained a roll call vote[194].

3.21 Disregarding the Court's prior holding, Qatar urges the Court to repudiate its supervisory function in respect of procedural matters, and to leave the ICAO Council without guidance as to how to conduct judicial proceedings before it. In that regard, to date the ICAO Council has handled only seven

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192 **BESUR, Vol. II, Annex 6**, ICAO Council – 74th Session, Minutes of the Second Meeting, ICAO document 8956-C/1001, "Discussion: Pakistan versus India", 27 July 1971, p. 141, para. 4; **BESUM, Vol. V, Annex 27**, ICAO Council – 74th Session, Minutes of the Fifth Meeting, ICAO document 8987-C/1004, "Discussion: Pakistan versus India", 28 July 1971, pp. 255-256, para. 83.

193 **BESUM, Vol. V, Annex 27**, ICAO Council - 74th Session, Minutes of the Fifth Meeting, ICAO document 8987-C/1004, "Discussion: Pakistan versus India", 28 July 1971, pp. 255-256, paras 83-86.

194 *Ibid*., p. 268, paras 3-6.

disputes judicially, five of which were ultimately resolved (or are being resolved) consensually by the parties (*Pakistan v. India* being one of them), the sixth one being the present case, and the seventh being Qatar's claim under the IASTA. There is no wealth of procedural experience in the Council, and the ICAO Rules are both sparse and antiquated[195]. As the guardian of the integrity of the international judicial process, it falls to the Court to exercise its supervisory authority in respect of procedural deficiencies by the ICAO Council in this case.

Section 3. Violations of due process and the ICAO Rules

3.22 Qatar argues that even if the Court were to deem it appropriate to rule on the procedural irregularities raised by the Appellants, this ground of appeal would have to be rejected by the Court because "there were no irregularities in the procedure adopted by the Council"[196] and any defects were in any event "irrelevant" and "harmless". This is contradicted by the procedure followed by the ICAO Council, detailed in the sub-sections below. These defects, individually and cumulatively, demonstrate ICAO's inability to discharge its judicial function in this case.

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195 In September 2018, the ICAO Secretariat directed the ICAO Legal Committee to consider whether the ICAO Rules needed to be revised and "realigned with the current ICJ Rules": see **BESUM, Vol. V, Annex 54**, ICAO, Working Paper of the Secretariat submitted to the Legal Committee for consideration at its 37th Session, ICAO document LC/37-WP/3-2, 27 July 2018. para. 3.2.1.

196 QCM(A), para. 1.20.

A. ABSENCE OF DELIBERATIONS AS A COLLEGIAL FORMATION

3.23 The requirement to hold deliberations after having heard the parties is essential for judicial bodies to function in a collegial manner[197]. Yet, as the minutes of the ICAO Council meeting of 26 June 2018 show, the following decisions were either taken by the Council without *any* deliberation or by the President of the Council acting alone:

(a) The decision that the majority required to rule on the Appellants' Preliminary Objections was that of all members of the ICAO Council (19 votes instead of 17, ie a majority of the eligible votes) was taken by the Director of Legal Affairs: there was no discussion, deliberation, or decision by members of the Council on the point—and this notwithstanding a specific motion for a decision submitted by the Appellants[198].

(b) The President directed the Council—without any further discussion, decision or vote by the ICAO Council—to proceed on the basis that

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197 O. Hoijer, *La solution pacifique des litiges internationaux* (1925), p. 262 in J. C. Witenberg, *L'organisation judiciaire – La procédure et la sentence internationale* (1937) p. 270 ("Une décision ne sera réputée exacte et sérieuse que si des observations ont été échangées entre tous les membres du tribunal, s'ils ont fait valoir les raisons qui les amènent à se décider dans tel ou tel sens, parce que c'est seulement dans ces conditions que la sentence est l'expression finale de l'opinion qui s'est dégagée de la discussion générale."). See also **BESUM, Vol. VI, Annex 124**, D. Bowett, J. Crawford, I. Sinclair & A. Watts, "Efficiency of Procedures and Working Methods: Report of the Study Group established by the British Institute of International and Comparative Law as a contribution to the UN Decade of International Law", (1996) 45 *The International Court of Justice: Efficiency of Procedures and Working Methods* 1, paras 46 and 47; H. Lauterpacht, *The Development of International Law by the International Court* (reprinted ed., 1982), p. 65.

198 **BESUM, Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 111 *et seq*.

"in essence for each of Qatar's Application (A) and Application (B) the Respondents had a preliminary objection for which they provided two justifications"[199], thereby ignoring the Appellants' repeated clarifications that there were in fact two distinct Preliminary Objections which were to be assessed separately[200].

(c) The ICAO Council proceeded to vote on what the President had (incorrectly) characterized as "the Preliminary Objection" (in the singular), once again without any discussion or deliberation[201].

3.24 Qatar does not deny that the Council failed to engage in any deliberations in ruling on each of these decisions. Its principal response is that deliberations would have made no practical difference and are to be seen as "harmless"[202]. It contends that the absence of deliberations was a consequence of the Council's decision to vote by secret ballot[203] and that the procedure adopted by the Council was "established in the Rules of Procedure"[204]. This is incorrect: neither the ICAO Rules nor the ICAO Rules of Procedure for the Council (***Rules of Procedure for the Council***) prevent deliberations or even contemplate that there will be none. Indeed, there is no reason why the members of the Council could not hold deliberations and then proceed to vote by secret ballot (if the disputing parties were content with closed voting). That is how the Council proceeded in *Brazil v. US*, a case that Qatar relies upon—

199 *Ibid*., para. 123.

200 *Ibid*., para. 121.

201 *Ibid.*, para. 124.

202 QCM(A), para. 5.51.

203 *Ibid*., para. 5.29.

204 *Ibid.*, para. 5.41.

wrongly—to demonstrate that the Council's practice is to adopt a decision without deliberation[205]. In fact, the Council did hold deliberations in that case, as the Council's decision records[206].

3.25 By contrast, no deliberations at all were held in the present case. That this was irregular was plain to all, given that the President intervened at the hearing to observe that proceeding to a vote without deliberations would be a departure from the Council's own previous practice[207].

B. FAILURE TO DELIVER A REASONED DECISION

3.26 A fundamental requirement of due process is that judicial bodies give the necessary reasons in support of their decisions[208]. As Judge Lauterpacht observed (writing in his scholarly capacity):

> "A tribunal which fails to give full reasons for its decision invites the reproach that it lays down new law Absence of reasons—or of adequate reasons—unavoidably creates the impression of arbitrariness . . . When a tribunal, by failing to base a decision on articulate grounds, makes it difficult to scrutinise the law underlying the decision, it leaves the door wide

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205 *Ibid*., para. 5.35.

206 **BESUM, Vol. V, Annex 32**, Decision of the ICAO Council on the Preliminary Objections in the Matter "Brazil v. United States", 23 June 2017.

207 **BESUR, Vol. II, Annex 8**, Bahrain and UAE comments on draft Minutes C-MIN 214.8 Closed circulated by the Secretariat, 2 August 2018, Bahrain comments, para. 108.

208 J. C. Witenberg, *L'organisation judiciaire – La procédure et la sentence internationale* (1937), p. 292. See also J. L. Simpson and H. Fox, *International Arbitration* (1959), pp. 224 and 255 ("Failure to state reasons is now generally regarded as a ground for treating the award as a nullity . . . [O]nly a comprehensive exposition of the considerations upon which the award is based . . . can suffice, and failure to support part of the award with reasons will vitiate the award as a whole . . .").

> open for imputing motives extraneous to the proper exercise of the judicial function."[209]

3.27 The requirement to state reasons has been recalled by the Court in several decisions, including notably in *Arbitral Award of King of Spain*[210]. The ICAO Council itself seems to have been aware of its fundamental duty to provide reasons when acting judicially. In every decision handed down since the Court's judgment in the *India v. Pakistan* appeal, the Council has provided reasons for its decisions. Thus, in *US v. 15 EU States*, the President of the Council recalled, by specific reference to the Court's judgment in *India v. Pakistan*, that–

> "the Court also indicated that Article 15 of the [ICAO] Rules [laying down the requirement to provide reasons] applies to such a decision [regarding the ICAO Council's jurisdiction], including the requirement to give reasons for the Council's decision in writing."[211]

3.28 Qatar does not address this fundamental requirement, stating simply that no reasons could be given in the circumstances because the Council did not

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209 H. Lauterpacht, *The Development of International Law by the International Court* (reprinted ed., 1982), pp. 39-40.

210 *Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960: I.C.J. Reports 1960*, p. 216: in this case, the Court dealt with a contention that the award was a nullity on ground of alleged inadequacy of reasons in support of the conclusions reached by the arbitrator, and found that: "an examination of the Award shows that it deals in logical order and in some detail with all relevant considerations and that it contains ample reasoning and explanations in support of the conclusions arrived at by the arbitrator". See also *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991*, paras 43 and 63.

211 **BESUR, Vol. II, Annex 7**, Settlement of Differences: United States and 15 European States (2000), Note on Procedure: Preliminary Objections (Working Paper Presented by the President of the Council), ICAO document C-WP/11380, 9 November 2000, para. 6.2.

hold deliberations[212]. But that is to justify one wrong by another. The absence of deliberations that could have generated reasons is in no way a justification for the absence of reasons. Thus, it remains the case that reasons should have been provided but the Council failed so to do. Instead, the Decision of the Council amounts to no more than a one-line *dispositive* stating that: "the Preliminary Objection of the Respondents is not accepted"[213].

C. THE APPELLANTS DID NOT HAVE A REASONABLE OPPORTUNITY TO BE HEARD

3.29 Patently insufficient time was allocated to the Appellants to present their case before the ICAO Council[214]. On 13 June 2018, the President of the ICAO Council informed the Parties that the ICAO Council would consider the Preliminary Objections in a half-day session[215]. The scheduling of only one half-day session for the hearing of their Preliminary Objections was met with strong objections by the Appellants, who indicated that it would not permit them sufficient time properly to co-ordinate and present their case[216].

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212 QCM(A), para. 5.29.

213 **BESUM, Vol. V, Annex 52**, Decision of the ICAO Council on the Preliminary Objection in the Matter: the State of Qatar and the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates (2017) – Application (A), 29 June 2018, p. 2.

214 In its Counter-Memorial, Qatar alleges that if anyone was prejudiced by the decision to schedule only one half-day session for the hearing, it was Qatar, not the four States (QCM(A), para. 5.22). Qatar fails, however, to explain how it was in any way prejudiced, in particular in circumstances where it declined to ask to be allowed to file a second-round written submission.

215 **BESUM, Vol. V, Annex 50**, Letter of 13 June 2018 from the President of the ICAO Council to the Appellants, attaching Working Paper in respect of Application (A), ICAO document C-WP/14778, 23 May 2018.

216 **BESUM, Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 9.

3.30 What is more, the Appellants were treated as a single party and given the same length of time as Qatar in circumstances where:

(a) One of them, Saudi Arabia was not even a party to the case brought under the IASTA (Application (B));

(b) Each was a party in its own right;

(c) Each was represented by its own Agent (and each was assisted by a team of counsel and advisors); and

(d) Presenting a position on the two separate and distinct Preliminary Objections required additional coordination.

3.31 Qatar alleges that the Appellants cannot complain about the fact that they were treated as a single party because they "themselves acted 'collectively' on numerous occasions before the ICAO Council"[217]. The issue is not, however, that the four States were acting collectively—plainly they had to, as they were named as joint respondents—but that they were given insufficient time to present their Preliminary Objections. As to this, Qatar argues that "due process required . . . that each side be treated equally"[218]. The Appellants agree, but emphasize that equality compels differential treatment when the parties are not in identical positions, as was in fact the case here. The good administration of justice requires that particular attention be given to the proper balancing of the written pleadings allowed and the time for oral presentations "to equalize

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217 QCM(A), para. 5.44.

218 *Ibid*., para. 5.43.

eventual unevenness among the Parties"[219], particularly where a claim is brought by one State against multiple States. The requirement that *all* parties be given a *reasonable* opportunity to present their case is also reflected in the ICAO Rules, which require "fair treatment", not just "equal treatment"[220].

3.32 Lastly, Qatar contends that the Parties (including Saudi Arabia) agreed to "proceed in this way"[221]. That is incorrect. All the Appellants agreed to was that the two sides would present their position on the Preliminary Objections consecutively, on the express condition that: "the Council would take separate decisions thereon given that Application (A) and Application (B) related to two different international air law instruments, namely, the Chicago Convention and the [IASTA], and that there were different Respondents thereto"[222]. The Appellants never agreed to the procedure adopted by the President, namely that the hearing would be held in just one afternoon, and that they would be given just 40 minutes to present their case (the same length of time as Qatar).

D. VIOLATION BY THE COUNCIL OF THE APPLICABLE PROCEDURAL RULES

3.33 The ICAO Council failed to abide by its own rules and the Chicago Convention in the procedure it adopted. This served to demonstrate the Council's inability to afford basic predictability to litigants, which is an

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219 R. Kolb, "General Principles of Procedural Law", in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm and C. Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2019), p. 969.

220 **BESUM, Vol. II, Annex 6**, ICAO, Rules for the Settlement of Differences, approved on 9 April 1957; amended on 10 November 1975, Art. 28(1).

221 QCM(A), para. 5.48.

222 **BESUM, Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 2.

elementary duty in exercising judicial functions[223]. The Council's failures on that score are as follows:

(a) As already described, the ICAO Council failed to state any grounds or reasons for the decision it took, although this is a requirement of Article 15 of the ICAO Rules.

(b) The Council incorrectly required a majority of 19 votes to uphold the Preliminary Objections, out of 33 members entitled to vote, even though Article 52 of the Chicago Convention requires a mere majority[224].

(c) The President's decision to put to a vote a question relating to "a preliminary objection" (singular) was neither introduced nor seconded by members of the Council[225], as required by Rule 40 read together with Rule 45 of the Rules of Procedure of the Council. The proposal that *was* introduced and seconded at the ICAO Council session of 26 June 2018 was that "*each of the Respondents' Preliminary Objections* with respect to Application (A) and Application (B)" be put to a vote[226]. However, the Council went on to vote on a "preliminary objection" as a single plea, not the two separate Preliminary Objections as set forth in the motion. Qatar contends in its Counter-Memorial that the original motion (that the two separate and distinct objections be put

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223 BESUM, para. 3.64 *et seq.*

224 See *ibid*., paras 3.59-3.63.

225 *Ibid*., para. 3.65(c).

226 **BESUM, Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, paras 106-108.

to a vote) proposed by the Representative of Mexico and seconded by the Representative of Singapore "was never changed or modified"[227]. In fact, that is precisely the problem. Rules 40 and 45 provide that motions cannot be voted upon unless they are introduced by a member of the Council and seconded by another member. That, as Qatar says, "[t]he President of the Council did not think it necessary to change the wording of the question"[228] is no answer to this procedural violation. In fact, it could only have further confused matters that the President directed the Council that there was one preliminary objection while leaving in place a motion referring to two separate Preliminary Objections.

Section 4. The Appellants did not waive their right to appeal

3.34 Qatar contends that the Appellants could and should have complained about the procedural irregularities before the Council and that, having failed to do so, they have waived their right to complain[229]. Qatar does not, however, identify and explain what circumstances called for protest on pain of waiver, nor does it demonstrate how any silence on the part of the Appellants could amount to acquiescence in the flawed process followed by the Council.

3.35 Acquiescence by silence or inaction arises only in rare cases where the circumstances clearly call for protest in order to preserve rights, such that the absence of protest can be said, by virtue of good faith, to amount to tacit

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227 QCM(A), para. 5.60.

228 *Ibid*., para. 5.61.

229 *Ibid*., paras 5.26 and 5.38.

consent to the relinquishment of those rights[230]. A finding of acquiescence is as rare as it is fact-specific[231]. The inference of consent must be "so probable as to [be] almost certain"[232], "manifested clearly and without any doubt"[233]. Qatar does not even come close to discharging this heavy burden.

3.36 In fact, the Appellants were deliberate and careful in interjecting complaints at every opportunity available in the brief, irregular procedural context of the ICAO Council proceedings. Thus:

(a) The Appellants complained about the fact that the hearing would be held in just one afternoon, which inevitably meant that there would be too little time for argument and for questions by the ICAO Council. The matter was discussed at a meeting with the President of the Council on 19 June 2018, where the Appellants' request for a longer hearing was overruled[234].

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230 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, para. 121; *Fisheries (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951*, pp. 138-139; and I. MacGibbon, "The Scope of Acquiescence in International Law" (1954) 31 *British Yearbook of International Law* 143, p. 143: Acquiescence "is used to describe the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights: it is not intended to connote the forms in which a State may signify its consent or approval in a positive fashion."

231 Separate Opinion of Judge Fitzmaurice, *Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 62; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, para. 130.

232 *The Grisbådarna Case (Norway v. Sweden)*, Award, 23 October 1909, (1910) 4 *American Journal of International Law* 226, p. 234; and J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012), p. 419.

233 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, para. 122.

234 BESUM, para. 3.27.

(b) The Appellants also placed on record that they had too little time at their disposal, through the speech for the Agent of the Kingdom of Saudi Arabia, who took the floor first among the four States. The summary record states: "Respondents had not been provided with sufficient or equal time to adequately present their case. Their right to be heard had thus been compromised"[235].

(c) The Appellants objected to the decision that 19 votes constituted the voting majority required under Article 52 of the Chicago Convention[236].

(d) The Appellants complained in respect of the President's improper conflation of their two Preliminary Objections into one. Qatar suggests that the Appellants should have appealed this decision under Article 36 of the Rules of Procedure of the Council[237]. The Appellants did object, through counsel who intervened to clarify the importance of properly understanding, and ruling upon, each Preliminary Objection separately[238]. Wrongly, the President (acting alone, without putting the matter to the Council) concluded that "in essence . . . the Respondents had a preliminary objection for which they provided two

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235 **BESUM, Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 9.

236 QCM(A), note 510; see *ibid.*, paras 113, 116 and 117 and see paras 129-130.

237 *Ibid.*, para. 5.62.

238 **BESUM, Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 121.

justifications"[239]. It would have obviously been futile for the Appellants to challenge for the second time that decision.

(e) The Appellants specifically called for open voting, but the Council decided against them.

(f) The absence of deliberations was remarked upon by the ICAO Council President himself as a departure from the Council's practice, but that failed to move the Council to deliberate.

(g) After the Decision had been handed down, when the Secretariat circulated a draft of the Minutes for comment by the Parties, the Appellants did not just correct inaccuracies relating to the names of participants, as Qatar alleges in its Counter-Memorial[240]. Rather, they made a number of substantive observations, including (i) reiterating that there were two distinct Preliminary Objections[241], (ii) proposing the insertion of language to make clear that the President had observed that failing to hold deliberations would be a departure from the Council's own practice[242], and (iii) clarifying that certain decisions were taken by the Secretariat (instead of the Council, as the Chicago Convention or the ICAO Rules required)[243]. None of these observations was taken up by the ICAO Council.

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239 *Ibid.*, para. 123.

240 QCM(A), para. 5.26.

241 **BESUR, Vol. II, Annex 8**, Bahrain and UAE comments on draft Minutes C-MIN 214.8 Closed circulated by the Secretariat, 2 August 2018, Bahrain comments paras 14, 18, 20-21, 26, 32 and 34-37.

242 *Ibid*., paras 108, 111 and 115.

243 *Ibid.*, para. 110.

3.37 In sum, on no reasonable interpretation of the facts can the Appellants be said to have acquiesced in the procedure followed by the Council. Indeed, it is difficult to see what other steps were reasonably open to them.

3.38 In any event, there was no duty on the part of the Appellants to complain about every single defect at every step of the process. This is exemplified by the case between *Cameroon v. Nigeria*, in which Nigeria relied on its acts of administration coupled with the absence of protest by Cameroon to argue that Cameroon had acquiesced in Nigeria's conduct *à titre de souverain* and it was no longer open to Cameroon to contest them. The Court held that even though Cameroon had confined its protests to a few incidents rather than reacting to the situation as it evolved, its firm protest to Nigeria's claim to sovereignty when that was first claimed by way of diplomatic note showed "that there was no acquiescence by Cameroon in the abandonment of its title in favour of Nigeria"[244].

3.39 The Appellants' appropriate "reaction, within a reasonable period", to use the well-known formulation from the *Temple of Preah* case[245], was to avail themselves of the right under the Chicago Convention to appeal the Decision before the Court, including on the basis of the procedural defects in the proceedings before the Council. That right was in fact exercised a matter of days after the Decision was formally handed down.

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244 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, para. 70.

245 *Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 23.

Section 5. Conclusion: the Decision is a nullity *ab initio*

3.40 There can be no serious debate that the ICAO Council failed to proceed in accordance with fundamental principles of judicial procedure and due process. In its Counter-Memorial, Qatar fails to grapple with the fact that in circumstances where the procedural irregularities are fundamental, a decision emanating from that process must be regarded as legally non-existent.

3.41 Unlike the earlier *India v. Pakistan* case, the procedural irregularities that vitiated the Decision here are such as to prejudice in a "fundamental way the requirements of a just procedure". The Court is respectfully invited to exercise its supervisory function and make a declaration to the effect that the Decision should be treated as *non est*.

CHAPTER IV
SECOND GROUND OF APPEAL: THE REAL ISSUE OBJECTION SHOULD BE UPHELD BY THE COURT

4.1 The Appellants' second ground of appeal requests the Court to uphold the preliminary objection to the competence of the ICAO Council on the basis that the real issue in dispute between the Parties does not relate to the interpretation or application of the Chicago Convention[246]. This objection is made both as a matter of jurisdiction and as a matter of admissibility[247], these being separate and distinct grounds[248].

4.2 Qatar's Counter-Memorial significantly narrows the issues between the Parties. Qatar now accepts that there is a dispute between the Parties arising out of its own conduct and the countermeasures adopted by the Appellants in response:

> "Qatar readily acknowledges that there is a dispute between the Parties concerning Qatar's compliance with its counterterrorism and non-interference obligations, including under the Riyadh Agreements."[249]

4.3 Qatar repeatedly underscores the differing, conflicting views held by the two sides in this dispute, both as to whether Qatar was in breach of a

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246 BESUM, paras 1.2(b) and 5.2.

247 *Ibid.*, para. 5.2.

248 See *ibid.*, paras 4.30-4.31; *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, Judgment, I.C.J. Reports 2003*, p. 177, para. 29; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 456-457, para. 120 and p. 460, para. 129; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J. Reports 1996*, p. 621, para. 42.

249 QCM(A), para. 3.37.

number of important international obligations and as to whether the Appellants were justified in adopting countermeasures to induce Qatar to comply with its obligations. Qatar says that the charges that it supports terrorism and interferes in other States' affairs are "false"[250] and "baseless"[251], and that the countermeasures adopted by the Appellants in response are "unjustifiable"[252]. Similarly, it accepts that "Qatar and [] Appellants appear to have a *fundamental difference of views* as to . . . what constitutes media incitement."[253] While "den[ying] in the strongest possible terms that it has ever violated any of the obligations [] Appellants claim"[254].

4.4 Thus, the nature and content of the dispute between the Parties is made manifest, *inter alia*, by Chapter 2 of Qatar's Counter-Memorial read side-by-side with Chapter II of the Appellants' Memorial.

4.5 Recognizing the validity of the Appellants' objection that the ICAO Council is not competent to determine the issue in dispute between Parties—which manifestly relates to a host of matters *other* than civil aviation—Qatar all but accepts that the Council lacks jurisdiction under Article 84 of the Chicago Convention, including in respect of the Appellants' invocation of countermeasures[255]. To overcome this difficulty, Qatar resorts to suggesting that the Council may have jurisdiction by way of *forum prorogatum*[256], or that

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250 QCM(A), para. 2.1.

251 *Ibid*., para. 2.25.

252 *Ibid*., para. 2.3.

253 *Ibid*., para. 2.56.

254 *Ibid*., para. 3.38.

255 See above, note 7; QCM(A), paras 3.55, 3.68 and 3.69, cf para. 1.18.

256 QCM(A), para. 3.73, note 290.

the Council should simply take judicial notice of the Appellants' invocation of countermeasures without deciding the question at all[257].

4.6 Accordingly, as noted above in Chapter II, Qatar's Counter-Memorial puts it beyond doubt that there exists a dispute over Qatar's non-compliance with its international obligations[258].

4.7 As such, the key questions for the Court to determine are these:

(a) Whether the subject-matter of the dispute encompasses not only the aviation restrictions but also the question of Qatar's support of terrorism and its other internationally wrongful acts, which gave rise to the countermeasures imposed by the Appellants. This requires the Court to determine the subject-matter of the dispute by application of the "real issue" test[259]. (*The jurisdictional objection.*)

If the answer to this question is yes, the inquiry can stop there, as the ICAO Council lacks jurisdiction because the Parties' dispute extends beyond the confines of Article 84 of the Chicago Convention.

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257 *Ibid.*, paras 3.68-3.69.

258 Above, para. 2.3, see also paras 4.2-4.3.

259 BESUM, paras 5.56-5.57. See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 602, para. 26; see also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, pp. 26-27, para. 50 ("'[W]hether there exists an international dispute is a matter for objective determination' by the Court . . . [which] 'must turn on an examination of the facts.'"); *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections,* Judgment of 6 June 2018, p. 17, para. 48 ("it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim").

(b) If Qatar were correct that its Application concerns a dispute falling *prima facie* within Article 84 of the Chicago Convention, whether that dispute is, as a matter of judicial propriety and fairness, capable of being decided by the ICAO Council without deciding the disputed issues relating to Qatar's support for terrorism and its interference in other States' internal affairs and the countermeasures relied upon by the Appellants. (*The admissibility objection*.)

4.8 This chapter is structured accordingly. **Section 1** sets out the response to paragraph 4.7(a) above, as to why the real issue in dispute does not concern "the interpretation or application" of the Chicago Convention and its Annexes, with the result that there is no jurisdiction. **Section 2** explains why the dispute is nevertheless inadmissible, in response to the question at paragraph 4.7(b) above, as the aviation aspects cannot on any view be severed from the broader dispute. **Section 3** then explains why, in any event, the suggestions by Qatar that the Council does not have to decide (at least in full) the issues relating to countermeasures are to be rejected by the Court. Finally, **Section 4** concludes Chapter IV.

Section 1. The real issue in dispute does not concern "the interpretation or application" of the Chicago Convention and its Annexes

A. THE "REAL ISSUE" TEST IS AN OBJECTIVE ONE THAT REQUIRES THE COURT TO LOOK BEYOND THE APPLICANT'S PLEADINGS

4.9 It is the long-standing practice of the Court that the test as to whether there is a dispute between States, and as to the subject-matter of that dispute, is an objective one[260].

[260] BESUM, paras 5.47-5.70.

4.10 While Qatar acknowledges that the "proper characterisation of a dispute 'is a matter for objective assessment'", it suggests that only an applicant's pleadings are to be taken into account in determining the real issue in dispute[261]. Qatar fails even to acknowledge that the Court must also look to the pleadings of the respondent, at both the written and the oral phase, as well as other surrounding materials[262]. Qatar maintains, as it did before the ICAO Council[263], that "international courts and tribunals will determine the 'real issue' in dispute *by reference to the stated object of the applicant State's claims*"[264] and that the question of the subject-matter of the dispute is to be determined according to a review of "Qatar's pleadings"[265]. This is plainly not the case.

4.11 The Appellants' Memorial referred extensively to numerous past decisions of the Court establishing that in order to ascertain the subject-matter of a claim, "the Court cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by claims of the Applicant."[266] For instance, in *Bolivia v. Chile*, the Court stipulated that it

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261 QCM(A), para. 3.30.

262 *Ibid*., para. 3.36 ("The Court has made clear that to identify the subject-matter of the dispute '[i]n particular, it takes account of the facts that the applicant identifies as the basis for its claim.'").

263 **BESUM, Vol. IV, Annex 25**, ICAO Response to Preliminary Objections, para. 44 ("The 'real' issue before the Council is the breach by the Respondents of the Chicago Convention and its Annexes; this is what the Applicant has put before the Council in the Application and the Memorial and it is plain and clear what the State of Qatar is requesting from the Council."); and *ibid.*, para. 48.

264 QCM(A), para. 3.51 (emphasis added).

265 *Ibid*., Part B, Section 1, para. 3.31 *et seq.* ("Qatar's pleadings before the ICAO Council indicate that the subject-matter of the dispute falls squarely within the scope of the Chicago Convention and its Annexes").

266 *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment I.C.J. Reports 1998*, p. 448, para. 29.

must identify the subject-matter of the dispute based on "the written and oral pleadings of the parties"[267]. As these decisions make clear, in order to ascertain the "real issue" the Court must have regard not only to the Application, but also to the written and oral pleadings of *both* sides, and any relevant diplomatic correspondence, public statements, and other documents before the Court[268].

4.12 That Qatar bluntly seeks to distance itself from the well-established practice of the Court is telling. The Appellants' submissions, and other official documents prior to the imposition of countermeasures, in fact make clear the real issue in dispute between the Parties[269]. Qatar also seeks to distract from the myriad public statements that it has made which reveal the nature and content

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267 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015,* p. 602, para. 26.

268 See *Right of Passage over Indian Territory, Merits, Judgment of 12 April 1960, I.C.J. Reports 1960,* pp. 33-34 (taking into account "the Application itself . . . the subsequent proceedings, the Submissions of the Parties and statements made in the course of the hearings"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30 ("[I]t is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of *the parties*, and in fact is bound to do so; this is one of the attributes of its judicial functions." (emphasis added)); *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment I.C.J. Reports 1998*, pp. 449-450, paras 31 and 33 ("The Court will itself determine the real dispute that has been submitted to it . . . It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements, and other pertinent evidence." and "[T]he Court will ascertain the dispute between Spain and Canada, taking account of Spain's Application, as well as the various written and oral pleadings placed before the Court by the Parties."); *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007* , p. 848, para. 38 ("[I]t is for the Court itself to determine the subject-matter of the dispute before it, taking account of the submissions of *the Parties*" (emphasis added)); *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections,* Judgment of 6 June 2018, p. 17, para. 48 ("[I]t is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim").

269 BESUM, paras 5.71-5.83.

of that dispute, many of which statements Qatar relied upon before the ICAO Council[270]. Further, Qatar has no answer to the Appellants' observation that these statements constitute clear evidence of the real issue in the dispute[271]. None of these statements refers to the airspace restrictions or the obligations of the Appellants under the Chicago Convention—while all of them make reference to the countermeasures imposed by the Appellants in response to Qatar's prior wrongful conduct.

4.13 But in any case, even on Qatar's pleadings alone, it is a straightforward matter for the Court to assess that the real issue does not concern the Chicago Convention. This is the inexorable conclusion from Chapter 2 of Qatar's Counter-Memorial, in which Qatar acknowledges the existence of an antecedent legal dispute with the four Appellant States concerning obligations not arising under the Chicago Convention.

B. THE "REAL ISSUE" IN DISPUTE DOES NOT CONCERN CIVIL AVIATION

4.14 While Qatar now accepts that there is a dispute between the Parties concerning its alleged wrongful conduct and the countermeasures adopted by the Appellants to induce its compliance with its obligations[272], the Parties disagree as to whether the aviation aspects of this dispute, as identified in Qatar's Application, may be determined as a cognisable dispute severed from the other aspects. The Appellants submit that:

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270 See **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, see for example, Exhibits 19, 20, 22, 23, 26, 34, 40, 41, 42 and 43, setting out the descriptions of Foreign Minister Sheikh Mohammed bin Abdulrahman Al-Thani and other Qatari officials of the accusations of Qatar's support for terrorism and the Appellants' so-called "illegal blockade" against Qatar.

271 BESUM, para. 5.81.

272 QCM(A), para. 3.37, see above, paras 4.2-4.3.

(a) this question is to be answered by application of the "real issue" test; and

(b) on a proper application of that test, the ICAO Council should have found that the subject-matter of Qatar's claim concerns the broader dispute, namely, the dispute as to Qatar's non-compliance with other international law obligations that justified the Appellants adopting the measures they did.

4.15 By contrast, Qatar says that "[t]he mere fact that the Parties' dispute involving other matters co-exists with the dispute about the aviation prohibitions does not convert those other matters into the 'real issue' in dispute before the Council."[273]

4.16 Further, Qatar wrongly represents that *"*[*e*]*ach and every time*" the Court has determined disputes that were intertwined with a broader dispute, "it has ruled that the existence of other, related disputes did not deprive it of jurisdiction."[274] As a matter of fact, this statement is incorrect. Many of the cases invoked by Qatar involved variations on the political question doctrine[275], which has never been invoked by the Appellants, is not accepted by the Court, and is wholly different from the "real issue" test which is accepted and has been consistently applied by the Court. More importantly, in at least two cases cited by the Appellants in their Memorial, the Court or a tribunal has determined that

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273 QCM(A), para. 3.38.

274 *Ibid*., (emphasis added).

275 *Ibid.*, para. 3.38, note 221.

it *was* without jurisdiction[276]. That was so in the *Aegean Sea* case before the Court and also in the *Chagos Islands* arbitration[277].

4.17 Qatar unsuccessfully attempts to distinguish the *Chagos Islands* arbitration, characterizing it as involving a "novel test" to determine "where the relative weight of the dispute lies"[278]. Yet the "real issue" test has a long pedigree within the practice of the Court, as the Appellants made clear in their Memorial[279]. Furthermore, the case now before the Court is closely analogous to the situation before the tribunal in the *Chagos Islands* arbitration, in that the aviation countermeasures are merely one, incidental aspect, of a broader dispute which involves a bloc of countermeasures[280]. In this case, the positions of the Parties on the question of the Appellants' compliance with the Chicago Convention is simply "one aspect of [the] larger dispute"[281]—as Qatar in fact now acknowledges[282]—concerning its compliance with the Riyadh Agreements and its other international obligations, and the imposition of countermeasures by the Appellants in response. That is clear from the entirety of the record,

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276 BESUM, para. 5.60.

277 See *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, pp. 35-37, paras 83, 87 and 88; *In the matter of the Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland)*, PCA Case No. 2011-03, Award, 18 March 2015, pp. 86-88, paras 207-212.

278 QCM(A), para. 3.50.

279 BESUM, paras 5.48-5.60 and 5.67-5.69.

280 See *In the matter of the Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland)*, PCA Case No. 2011-03, Award, 18 March 2015, p. 88, para. 212.

281 *Ibid*.

282 QCM(A), para. 3.37.

notably including each of the Appellants' official announcements of the June 2017 measures[283], and Qatar's own official descriptions[284].

4.18 Accordingly, the civil aviation aspects are merely a part—and indeed an inextricable part—of the broad dispute that both sides now recognize exists between the Parties[285]. It follows that the real issue before the ICAO Council was this broad dispute, including the question of countermeasures. And that dispute falls outside the Council's competence, as defined by Article 84 of the Chicago Convention.

C. Respondent's expansive reading of Article 84 of the Chicago Convention would extend it beyond the limits of the States Parties' consent

4.19 The conclusion that the real dispute falls outside of the Council's competence remains unaltered by Qatar's proposed expansive interpretation of the words "application and interpretation" in Article 84 of the Chicago Convention.

4.20 Qatar proposes:

> "In the area of international civil aviation, the Council is therefore empowered to exercise the dispute settlement functions Article 84 gives it 'to their full extent'. This means, at [the] very least, that the Council has jurisdiction to decide disputes 'relating to the interpretation or application' of the

283 BESUM, paras 2.4-2.8.

284 *Ibid*., para. 5.81; see **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, see, for example, Exhibits 19, 20, 22, 23, 26, 34, 40, 41, 42 and 43, setting out the descriptions of Foreign Minister Sheikh Mohammed bin Abdulrahman Al-Thani and other Qatari officials of the accusations of Qatar's support for terrorism and the Appellants' so-called "illegal blockade" against Qatar.

285 BESUM, paras 5.71-5.83.

> Chicago Convention and its Annexes notwithstanding a disputing party's defences raising issues falling outside the Convention, or the fact that the dispute in question arises in the context of a broader dispute between the parties."[286]

4.21 Qatar's Counter-Memorial suggests that the "full extent" wording is taken from the Court's decision on the request for an advisory opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[287]. But there is nothing in that Opinion suggesting that the Court intended this language also to apply to the interpretation of a compromissory clause in an international treaty, and in the context of a contentious case based on such a compromissory clause.

4.22 This position would, moreover, go against the practice of the Court, which has consistently interpreted compromissory clauses in accordance with the ordinary rules of treaty interpretation and consistently with the object and purpose of the treaty[288]. As Judge Higgins explained in her Separate Opinion in the *Oil Platforms* case, which elaborated on the Court's reasoning, "[t]he Court

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286 QCM(A), para. 3.8.

287 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996,* pp. 78-79, para. 25; in turn citing *Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J. Reports 1927, Series B, No. 14*, p. 64 ("As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive State with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.").

288 See, for example, *South West Africa Cases (Ethiopia v. South Africa*; *Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336 ("This contention is claimed to be based upon the natural and ordinary meaning of the words employed in the provision. But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.").

has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other."[289] The Court also applies the ordinary rules of treaty interpretation in considering declarations recognizing the jurisdiction of the Court as compulsory[290].

4.23 In any case, in the *Legality of the Use by a State of Nuclear Weapons* Opinion, the Court did not apply the "full extent" wording in the manner which Qatar suggests, namely to adopt an expansive interpretation of its jurisdiction. Rather than concerning the scope of the Court's jurisdiction, the issue was the scope of the power of the World Health Organization (***WHO)*** to request an

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289 Separate Opinion of Judge Higgins, *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 857, para. 35 ("It is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses. But equally, there is no evidence that the various exercises of jurisdiction by the two Courts really indicate a jurisdictional presumption in favour of the plaintiff. . . . The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.").

290 See, for example, *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 104 ("[T]he Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court"); *Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment of 26 May 1961, I.C.J. Reports 1961*, p. 32 ("[T]he Court considers that it must interpret Thailand's 1950 Declaration on its own merits, and without any preconceptions of an *a priori* kind, in order to determine what is its real meaning and effect if that Declaration is read as a whole and in the light of its known purpose . . . . In so doing, the Court must apply its normal canons of interpretations, the first of which, according to the established jurisprudence of the Court, is that words are to be interpreted according to their natural and ordinary meaning in the context in which they occur."). See also *Polish Postal Service in Danzig, Advisory Opinion, P.C.I.J. Reports 1925, Series B, No. 11*, p. 39 ("In the opinion of the Court, the rules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed. It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.").

advisory opinion. The Court held that this power had to be understood in light of the limited scope of the WHO's mandate to focus on world health, as defined by Article I of the WHO Constitution. Notwithstanding that the WHO had sought to characterize the issues in such a way as to construct a link with its mandate, by emphasizing the "health and environmental effects" of nuclear weapons, the Court held that the question did not have a "sufficient connection" to the functions of the WHO[291]. The notion of "to [the] full extent" was thus not adopted by the Court in reaching its decision, but merely cited in passing[292]. The Court determined that the WHO's power to request advisory opinions was to be seen in the context of its limited overall mandate as a specialized agency within the United Nations system[293].

4.24 In light of the rules of interpretation consistently applied by the Court in the exercise of its jurisdiction, it would be unreasonable, indeed absurd, to expand the jurisdictional limits of Article 84 of the Chicago Convention so as to cover a dispute falling outside that Convention: this would be inconsistent with the specialized nature of the Convention and of ICAO itself[294]. It would also open a back door to bring before the ICAO Council all manner of disputes

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291 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, pp. 76-77, para. 22.

292 *Ibid*., pp. 78-79, para. 25; in turn citing *Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J. Reports 1927, Series B, No. 14*, p. 64 ("As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive State with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.").

293 See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, pp. 79-80, para. 26.

294 It is of note that this consideration did not concern the Court in the *WHO Advisory Opinion,* since this was not a contentious case. On the role of consent in advisory opinions, see *Interpretation of Peace Treaties, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

outside the aviation sector, through the simple expedient of a connection or deemed connection to aviation—however remote, peripheral or artificial.

D. UPHOLDING THE "REAL ISSUE" OBJECTION WOULD POSE NO RISK TO THE INTERNATIONAL LEGAL ORDER

4.25 Finally, Qatar contends that the Appellants' argument that the subject-matter of the dispute does not fall within Article 84 is somehow to be seen as posing "dangers to the international legal order"[295]. Qatar says that this would permit the Appellants to "control [the] competence" of the Council by "casting a 'defence on the merits . . . in a particular form' (ie countermeasures)"[296], a result that (Qatar says) the Court rejected in *India v. Pakistan*[297]. According to Qatar, any State could simply invoke countermeasures to avoid obligations under a treaty[298]:

> "The crux of those arguments is that a body empowered to adjudicate a dispute concerning the 'interpretation and application' of a specific treaty is deprived of that power whenever the respondent State asserts a defence based on lawful 'non-reciprocal' countermeasures. . . . Respondent States would be able to avoid compulsory dispute settlement brought pursuant to a treaty compromissory clause whenever they so choose merely by asserting a 'lawful' countermeasures defence. . . . The law of countermeasures would thus become a trump card that would undermine the entire system of international dispute settlement."[299]

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295 QCM(A), para. 3.4.

296 *Ibid*., para. 3.23.

297 *Ibid*., para. 3.24.

298 *Ibid*., para. 3.23 *et seq*.

299 *Ibid*., para. 3.4.

4.26 However, Qatar's argument rests on a critical and unstated assumption that the Parties' dispute is to be characterized solely by reference to the narrow manner in which Qatar has now sought to formulate its claim. Given that the real issue in dispute between the Parties does *not* concern matters cognisable under the Chicago Convention[300], Qatar's reasoning breaks down. It is by application of this objective test that the dispute is to be regarded as falling outside the Chicago Convention, not because the Appellants rely on countermeasures.

4.27 By upholding the Appellants' objection, the Court will be upholding the limited jurisdictional scope of Article 84, consistent with the consent of the States Parties to the jurisdiction of the ICAO Council. Indeed, similar concerns about the threat to the international legal order arise from Qatar's unsupported argument that the broadest possible interpretation of Article 84 should be adopted[301]. That approach would extend the jurisdiction of the ICAO Council over matters lying far beyond its specialized, limited competence, in respect of which matters the States Parties did not consent to ICAO exercising a judicial function. The Appellants recall that the *India v. Pakistan* case did not concern a

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300 By way of contrast, the situation may be different where the defence or jurisdiction relied upon arises under the terms of the same treaty containing the compromissory clause which forms the basis of jurisdiction for the dispute, see, e.g. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Islamic Republic of Iran v. United States of America), Request for the Indication of Provisional Measures*, *Order, 3 October 2018*, p. 12, para. 42 ("The Court observes that Article XX, paragraph 1, defines a limited number of instances in which, notwithstanding the provisions of the Treaty, the Parties may apply certain measures. Whether and to what extent those exceptions have lawfully been relied on by the Respondent in the present case is a matter which is subject to judicial examination and, hence, *forms an integral part of the material scope of the Court's jurisdiction as to the 'interpretation or application' of the Treaty* under Article XXI, paragraph 2." (emphasis added)).

301 QCM(A), para. 3.8.

question of countermeasures[302]. While Qatar suggests that the Appellants' objection would allow respondent States to avoid compulsory dispute settlement pursuant to a treaty compromissory clause merely by asserting countermeasures, this would only be a concern if respondent States abusively invoked countermeasures in bad faith, in circumstances lacking any foundation in fact. Qatar admits that there is a dispute between the Parties concerning the legality of its other conduct[303]. While Qatar disagrees on whether, in the circumstances of the present case, countermeasures are available in law and in fact[304], it rightly does not suggest that they were invoked by the Appellants in bad faith[305].

Section 2. The adjudication of Qatar's Claims by the ICAO Council would be inconsistent with judicial propriety because the civil aviation aspects cannot be severed from the broader dispute

4.28 In addition, the Appellants have stressed that it would be "incompatible with the fundamental principle of the consensual basis of international jurisdiction, and therefore incompatible with judicial propriety and the ICAO Council's judicial function under Article 84 of the Chicago Convention for the ICAO Council to exercise jurisdiction over Qatar's claims."[306] Again, the simple point is that the Council cannot properly determine the civil aviation issues of the dispute without also adjudicating the

302 BESUM, paras 5.86-5.91.

303 See *ibid*., para. 3.37.

304 **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 77.

305 See QCM(A), paras 3.18-3.70.

306 BESUM, para. 5.2(b).

broader aspects of the dispute which fall outside of its jurisdiction, including the Appellants' reliance on countermeasures[307].

4.29 Qatar has raised no dispute as to the basic contours of objections to admissibility; further, Qatar no longer makes any argument that the ICAO Council may not properly rule on questions of admissibility as a preliminary matter[308]. Even so, while Qatar does not dispute the existence of the doctrine of judicial propriety as a ground for inadmissibility, it barely engages with the Appellants' arguments, essentially repeating its arguments on jurisdiction[309].

4.30 On the one hand, Qatar argues that the issue rests only on jurisdictional grounds, such that if the Court dismisses the Appellants' "real issue" objection, it need go no further; that countermeasures do not rule out a breach *in limine*; and that the Appellants would in any event have to demonstrate compliance with the procedural preconditions of countermeasures[310]. Notwithstanding these arguments, it is clear, however, that jurisdiction and admissibility are different

307 *Ibid.*, paras 5.122-5.127.

308 QCM(A), para. 3.72, note 286.

309 *Ibid*., paras 3.73 and 3.77.

310 *Ibid*., paras 3.71-3.73.

notions[311]; indeed, issues of admissibility go precisely to whether the Court should exercise a jurisdiction which it otherwise possesses[312].

4.31 On the other hand, Qatar simply points out that the current situation is not analogous to what it asserts (without any support) is a "closed set" of exceptional circumstances of inadmissibility[313]. But such an approach ignores the fact that considerations of judicial propriety are of necessity flexible: they must be adaptable to new factual situations, since their ultimate goal is to safeguard the integrity of the Court's judicial functions[314].

4.32 Since Qatar does not properly engage with this aspect of the Appellants' case, the Appellants rest upon the arguments made in their Memorial in this regard[315].

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311 See BESUM, paras 4.11-4.31; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, Judgment, I.C.J. Reports 2003*, p. 177, para. 29 ("Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 456-457, para. 120.

312 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 456-457, para. 120; see also BESUM, Chapter IV, particularly paras 4.1-4.2.

313 QCM(A), para. 3.74.

314 See *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29 ("There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity."); Dissenting Opinion of Judge Donoghue, *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, paras 7 and 19.

315 BESUM, paras 5.96-5.127.

Section 3. In any event, the Court should reject Qatar's suggestions as to how the ICAO Council might accept jurisdiction without deciding countermeasures

4.33 The disagreement submitted by Qatar to the ICAO Council would necessarily require the Council to adjudicate upon matters falling outside its jurisdiction, whether or not the Court accepts that the real issue in dispute concerns matters falling outside of the Chicago Convention. Indeed, as Qatar all but concedes, the ICAO Council does *not* have jurisdiction over the question whether the Appellants' countermeasures were justified by Qatar's prior conduct[316]. The logical conclusion of Qatar's position is that the Council must decline to exercise jurisdiction, whether as a matter of jurisdiction or admissibility. To avoid this result, Qatar makes a series of suggestions, none of which appears straightforward or proper, as to why the ICAO Council would nevertheless have jurisdiction to adjudicate on the merits of Qatar's claims[317]. Each of Qatar's three suggestions would require the Council to determine, in whole or in part, the Appellants' claim of countermeasures on the merits, which is improper at the jurisdictional phase of the proceedings. Quite apart from this, the arguments also lack any merit and are highly speculative. Thus, they merely serve to highlight the force of the Appellants' objection that the question of countermeasures falls outside the jurisdiction of the Council.

A. QATAR WRONGLY INVITES THE COURT TO FIND THAT COUNTERMEASURES ARE EXCLUDED BY THE CHICAGO CONVENTION

4.34 Qatar first makes *lex specialis* arguments, which are artefacts of recent vintage, absent from Qatar's pleadings before the ICAO Council[318]. Qatar

316 See above, note 7; QCM(A), paras 3.55, 3.68 and 3.69, cf para. 1.18.

317 QCM(A), paras 3.29-3.70.

318 *Ibid*., para. 3.59 *et seq.*; see **BESUM, Vol. IV, Annex 25**, ICAO Response to Preliminary Objections, paras 75-77 and 82.

suggests that "[t]he Council could very well find that the provisions of the Chicago Convention" constitute "'*derogation* clauses or other treaty provisions (e.g. those prohibiting *reservations*)'" and that these "may entail the exclusion of countermeasures" [319].

4.35 However, this argument fails to engage with the terms of the Riyadh Agreements, which clearly establish a broad and free-standing right of Contracting States to adopt "appropriate action"—without restriction or qualification—in case of another Contracting State's non-compliance[320]. Thus the Implementing Mechanism expressly provides:

> "The leaders shall take the appropriate action towards what the Ministers of Foreign Affairs raise to them regarding any country that has not complied with the signed agreement by the GCC Countries.
>
> . . .
>
> If any country of the GCC Countries failed to comply with this mechanism, the other GCC Countries shall have the right to take an[y] appropriate action to protect their security and stability."[321]

4.36 Naturally, the relationship between the Riyadh Agreements, the Chicago Convention, the IASTA, and the customary international law right of countermeasures is a matter for argument only at the merits stage, in the event that the Court were to uphold the ICAO Council's jurisdiction. But the simple

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319 QCM(A), para. 3.60, quoting from **BESUM, Vol. II, Annex 13**, International Law Commission (***ILC***), Articles on Responsibility of States for Internationally Wrongful Acts (2001), in *Report of the International Law Commission on the Work of its Fifty-third Session* (2001), doc. A/56/10, Chapter V, reproduced in *ILC Yearbook* 2001, Vol. II(2) (***ARSIWA***), Art. 50, Comment 10, p. 133.

320 **BESUM, Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014.

321 *Ibid*.

point is that the free-standing right to adopt "appropriate action" within the Riyadh Agreements is not subject to any preconditions, other than the requirement of a breach by Qatar, and is sufficiently broad to provide a justification for action that might otherwise be deemed inconsistent with the Chicago Convention.

4.37 Furthermore, in its *South West Africa* Advisory Opinion, the Court recognized the existence of–

> "the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character . . . The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded."[322]

4.38 The same fundamental principle applies here. That the Chicago Convention does not expressly reiterate the existence of the customary international law entitlement to take countermeasures may not be read as implying the exclusion of that entitlement.

4.39 Further, in the terms of the *Commentary* to the ILC Articles on State Responsibility, "derogation clauses or other treaty provisions" such as Qatar envisages may exclude a countermeasures defence only where they indicate that

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322 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 47, para. 96.

the relevant obligations are "intransgressible"[323]. The origin of that term underscores the exceptional nature of "intransgressible" obligations[324]. Qatar has provided no argument as to why obligations regarding civil aviation should be given a status akin to *jus cogens*.

4.40 Qatar wrongly claims that "the Convention contains only one derogation clause, Article 89, entitled "War"[325]. Qatar asserts that this clause operates as a specific "derogation" from the ordinary entitlement to resort to countermeasures[326]. Qatar implies that the supposed derogation amounts to an advance exclusion of countermeasures. No authority is supplied for this argument[327]; and none can be.

4.41 As noted, the institution of countermeasures is so fundamental to the international system, and accordingly preclusion of it by advance agreement so far-reaching in its effects, that specific, express agreement would be required[328]. Indeed, State practice contains multiple examples of States suspending

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323 **BESUM, Vol. II, Annex 13**, ARSIWA, Art. 50, Comment 10, p. 133; citing *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion, I.C.J. Reports 1996*, p. 257, para. 79.

324 The term "intransgressible" was used by the Court in the *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion, I.C.J. Reports 1996*, p. 257, para. 79. It is properly to be seen as a reference to *jus cogens* norms, which are, by definition, non-derogable. See Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, 1155 *United Nations,* Treaty Series (***UNTS***) 331, Art. 53 and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 141, para. 95.

325 In point of fact, Article 89 is entitled "War and Emergency Conditions", although it comes under a general Chapter heading of "War".

326 QCM(A), para. 3.60.

327 See *ibid*.

328 See **BESUM, Vol. II, Annex 13**, ARSIWA, Art. 50, Comment 10, p. 133 ("States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law.").

important international treaties under cover of countermeasures[329], even where those treaties already provide exceptions for different circumstances[330].

4.42 In addition, Article 89 serves a different purpose than the institution of countermeasures. It is an essentially defensive mechanism, granting contracting States "freedom of action" unfettered by the Chicago Convention in exceptional periods of war or national emergency[331]. By contrast, countermeasures serve the broader purpose of seeking to induce a law-breaking State to cease its unlawful conduct and adopt a lawful conduct[332]. Qatar's suggestion that Article 89 supplants and excludes a State's ability to resort to countermeasures

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329 See *Air Service Agreement of 27 March 1946 between the United States of America and France*, Award, 9 December 1978, *RIAA*, Vol. XVIII, p. 417.

330 See, for example, the aviation countermeasures imposed by certain western countries against Poland and the Soviet Union in 1981 and by certain European Community member States against the Federal Republic of Yugoslavia in 1998, discussed below, para. 4.45. An additional historic example can be found in Germany's withdrawal in 1936 from the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, signed at Locarno on 16 October 1925, 54 *UNTS* 1926 (***Locarno Treaty***), on the basis that France had breached it by signing the Treaty of Mutual Assistance between France and the Union of Soviet Socialist Republics, signed at Paris on 2 May 1935 (167 *LNTS* 395). For a discussion, see O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (1988), pp. 149-150. The principal obligation in the Locarno Treaty was that of Article 2 "Germany and Belgium, and also Germany and France, mutually undertake that they will in no case attack or invade each other or resort to war against each other", which was subject to certain exceptions set out in paragraphs (1)-(3) of the same article in case of self-defence, or actions taken under cover of the Covenant or the League of Nations.

331 Qatar also suggests at QCM(A), para. 3.61 that none of the Appellant States has so far formally notified the ICAO Council of a declaration of national emergency under Article 89 of the Chicago Convention, and that none of the situations under Article 89, namely, "war" or a declaration of "national emergency", "exists here". Plainly, these are not matters for the Court to consider in this appeal, as they pertain only to the merits. Nevertheless, it remains open to each of the Appellant States formally to issue Article 89 notifications. As the Appellants made clear in their 5 June 2017 statements, Qatar's transgressions clearly affect the security and stability of the declarant States, as well as the region, and as such, constitute the core interests protected by Article 89.

332 See **BESUM, Vol. II, Annex 13**, ARSIWA, Art. 49, Comment 1, p. 130.

conflates the separate functions of these norms—which may be complementary in a number of situations but nevertheless remain distinct from an analytical and a policy perspective.

4.43 Moreover, Qatar is incorrect to suggest that Article 89 is the *only* provision in the Chicago Convention that in some manner derogates from, provides an exception to, or otherwise qualifies the scope of the principal substantive obligations. The Chicago Convention contains a number of provisions, including both Article 89 and Article 9(b)[333], which illustrate that the obligations therein are not "intransgressible" and do not imply that they constitute an exhaustive list of the circumstances in which States may derogate from their obligations.

4.44 Nor are the substantive obligations of the Chicago Convention expressed in absolute terms. Rather, many of the provisions afford States considerable discretion in their application. For example, Article 5 provides a broad discretion for States to regulate non-scheduled flights for traffic purposes according to "such regulations, conditions, or limitations as it may consider desirable"[334]; while the obligation in Article 28 to provide air navigation

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333 **BESUM, Vol II, Annex 1,** Convention on International Civil Aviation, signed at Chicago on 7 December 1944, Art. 9(b) ("Each contracting State reserves also the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States.").

334 **BEUM, Vol II, Annex 1,** Convention on International Civil Aviation, signed at Chicago on 7 December 1944, Art. 5 (" . . . Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.").

facilities and the like applies only "so far as [each Contracting State] may find practicable"[335]. States may also choose to contract out of Article 6, which provides that "no scheduled international air service may be operated over or into the territory of a contracting State"[336].

4.45 Qatar represents that "no other State before [the] Appellants has ever sought to justify non-performance of obligations under the Chicago Convention on grounds of countermeasures"[337]. This assertion fails to acknowledge that aviation-related countermeasures are well-known in State practice. Examples include the following:

(a) The arbitral tribunal in the *Air Service Agreement of 27 March 1946 between the United States of America and France* determined that the United States was entitled to take countermeasures involving the suspension of performance under a bilateral aviation agreement in response to France's prior wrongful acts under the same treaty[338]. France did not suggest in that case that civil aviation obligations are intransgressible norms that may not be subject to countermeasures. Nor did the Tribunal so hold; in fact, it expressly concluded that countermeasures were, in principle, permissible.

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335 **BEUM, Vol II, Annex 1**, Convention on International Civil Aviation, signed at Chicago on 7 December 1944, Art. 28.

336 **BEUM, Vol II, Annex 1**, Convention on International Civil Aviation, signed at Chicago on 7 December 1944, Art. 6.

337 QCM(A), para. 3.61.

338 *Air Service Agreement of 27 March 1946 between the United States of America and France*, Award, 9 December 1978, *RIAA*, Vol. XVIII, p. 446, para. 99. See also **BESUM, Vol. II, Annex 13**, ARSIWA, Art. 22, Comment 2, p. 75, Art. 51, Comment 3, p. 134.

(b) In December 1981, in response to the imposition of martial law in Poland, the United States, United Kingdom, France, the Netherlands, Switzerland and Austria imposed various measures against Poland and the Soviet Union, including the immediate suspension of the landing rights of Aeroflot in the US and LOT in the United States, United Kingdom, France, the Netherlands, Switzerland and Austria[339].

(c) In 1986, the United States Congress passed the Comprehensive Anti-Apartheid Act, which suspended the landing rights of South African Airlines on United States territory[340]. The stated purpose of the measure was to induce South Africa "to adopt reforms leading to the establishment of a non-racial democracy"[341].

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339 See **BESUM, Vol. II, Annex 13**, ARSIWA, Art. 54, Comment 3, p. 138; **BESUR, Vol. II, Annex 51**, C. Rousseau, "Mesures prises par les Puissances occidentales à l'égard de la Pologne et de l'U.R.S.S. à la suite de l'établissement de l'état de guerre en Pologne le 13 décembre 1981", (1982) 86 *Revue Générale de Droit International Public* 603, pp. 603-610; **BESUR, Vol. II, Annex 3**, United States-Polish People's Republic Air Transport Agreement, signed at Warsaw on 19 July 1972, (1972) 23 *United States Treaties* 4269; **BESUR, Vol. II, Annex 1**, United States-Union of Soviet Socialist Republics Civil Air Transport Agreement, signed at Washington on 4 November 1966, (1967) 6 *International Legal Materials* 82; **BESUR, Vol. II, Annex 2**, Amendment to United States-Union of Soviet Socialist Republics Civil Air Transport Agreement, signed at Moscow on 6 May 1968, (1968) 7 *International Legal Materials* 571; see also W. M. Reisman and J. E. Baker, *Regulating Covert Action* (1992), p. 112; **BESUR, Vol. II, Annex 52**, M. E. Malamut, "Aviation: Suspension of Landing Rights of Polish Airlines in the United States", (1983) 24 *Harvard International Law Journal* 190.

340 See **BESUM, Vol. II, Annex 13**, ARSIWA, Art. 54, Comment 3, p. 138; **BESUR, Vol. II, Annex 4**, Comprehensive Anti-Apartheid Act of 1986, (1987) 26 *International Legal Materials* 77, § 306; United States-South Africa Air Services Agreement, 1947, 66 *UNTS* 233, 239 (1950), Annex, Sections I and III.

341 **BESUR, Vol. II, Annex 5**, Department of Transportation Termination of Air Carrier Operations between the United States and South Africa, 31 October 1986, (1987) 26 *International Legal Materials* 104, p. 105. See also **BESUM, Vol. II, Annex 13**, ARSIWA, Art. 54, Comment 3, p. 138. It may also be emphasized that a suspension of landing rights was not one of the measures that States Members of the United Nations were urged to adopt pursuant to UNSC resolutions on South Africa, such as

(d) In 1998, in response to the humanitarian situation in Kosovo, the European Union banned all Yugoslav carriers from flying between the Union and the Federal Republic of Yugoslavia, for any purpose[342].

(e) In May 2016, the European Union prohibited any aircraft operated by North Korean carriers or originating from North Korea from landing in, taking off from, or overflying European Union territory[343]. These measures were introduced in response to North Korea's nuclear and ballistic missile programme and are separate from the sanctions required by the United Nations Security Council[344].

4.46 Qatar also argues that the *Tehran Hostages* case is apposite, claiming that "[i]n that case, Iran, just like [] Appellants here, claimed that its conduct was justified by prior unlawful activities of the United States . . . [but] [t]he Court did not consider Iran's defence to fall outside its jurisdiction . . . [n]or did

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United Nations Security Council Resolution 569 (1985) of 26 July 1985: **BESUR, Vol. II, Annex 9**, United Nations, Resolution 569 (1985) adopted by the Security Council at its 2602nd meeting on 26 July 1985.

342 **BESUM, Vol. II, Annex 13**, ARSIWA, Art. 54, Comment 3, p. 138; **BESUR, Vol. II, Annex 10**, Common Position of 29 June 1998 defined by the Council on the basis of Article J.2 of the Treaty on European Union concerning a ban on flights by Yugoslav carriers between the Federal Republic of Yugoslavia and the European Community (98/426/CFSP) [1998] OJ L190/3, as implemented by **BESUR, Vol. II, Annex 11**, Council Regulation (EC) No 1901/98 of 7 September 1998 concerning a ban on flights of Yugoslav carriers between the Federal Republic of Yugoslavia and the European Community [1998] OJ L248/1.

343 See **BESUR, Vol. II, Annex 13**, European Union, Council Decision (CFSP) 2016/849 of 27 May 2016 concerning restrictive measures against the Democratic People's Republic of Korea and repealing Decision 2013/183/CFSP [2016] OJ L141/79, Article 17; **BESUR, Vol. II, Annex 14**, European Union, Council Regulation (EU) 2017/1509 of 30 August 2017 concerning restrictive measures against the Democratic People's Republic of Korea and repealing Regulation (EC) No 329/2007, [2017] OJ L224/1, Article 41.

344 Cf. **BESUR, Vol. II, Annex 12**, United Nations, Resolution 1718 (2006) adopted by the Security Council at its 5551st Meeting on 14 October 2006.

the Court consider that such a defence deprived it of its jurisdiction to entertain the United States' claims."[345]

4.47 In the *Hostages* case, it is notable that Iran did not appear, and, as the Court noted, neither did Iran seek to justify its detention of the diplomatic and consular staff as countermeasures[346]. As such, the Court was not required to determine whether the dispute, including Iran's defence, entailed the "interpretation or application of" the Vienna Conventions on Diplomatic Relations and on Consular Relations[347]. In any event, the Court held that the special regime of diplomatic and consular law excluded the possibility of recourse to countermeasures. It noted that the regime of diplomatic and consular law expressly foresees specific mechanisms in the case of breach (such as the termination of relations; recalling of ambassadors; or declaration of diplomats as *persona non grata*[348]), such that it can properly be seen as a self-

345 QCM(A), para. 3.66.

346 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, pp. 19-20, para. 36 ("[I]f the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States' Application, it was open to that Government to present its own arguments regarding those activities to the Court . . . by way of defence in a Counter-Memorial . . . .") and p. 38, para. 82 ("[I]f the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the Application it was open to Iran to present its own case regarding those activities to the Court by way of defence to the United States' claims. The Iranian Government, however, did not appear before Court.").

347 See Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, signed at Vienna on 18 April 1961, 500 *UNTS* 241, Art. 1, p. 242; Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, signed at Vienna on 24 April 1963, 596 *UNTS* 487, Art. 1, p. 488.

348 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, pp. 39-40, para. 85.

contained regime excluding the possibility of recourse to countermeasures[349]. Moreover, the relevant obligation of inviolability is a principle of fundamental importance underlying the diplomatic and consular regime, which States must respect even in case of war or a cessation of diplomatic relations[350]. By contrast, here, as already noted, it cannot be seriously suggested that countermeasures involving the suspension of performance of obligations under the Chicago Convention are impermissible.

B. THE COURT SHOULD REJECT QATAR'S SUGGESTION THAT THE ICAO COUNCIL MAY DETERMINE THE APPELLANTS' CONDUCT WITHOUT DETERMINING THEIR COUNTERMEASURES

4.48 Qatar's second argument is to suggest that even if countermeasures may be invoked, the real issue remains one arising under the Chicago Convention. The argument is that countermeasures "are only a *temporary* bar to State responsibility, not a defence *in limine*", such that "[t]he Council could still find the aviation prohibitions wrongful under the Chicago Convention and its Annexes, and simply take judicial notice of [] Appellants' countermeasures defence."[351] Qatar makes this argument notwithstanding its own acknowledgement of the "preclusive effect of the countermeasures defence"[352]. Qatar accordingly invites the Court to hold that the Council may determine that

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349 *Ibid*., pp. 38-40, paras 83-86 ("[D]iplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions" . . . The rules of diplomatic law, in short, constitute a self-contained régime . . .").

350 *Ibid*., p. 40, para. 86 ("[T]he principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime . . . [e]ven in the case of armed conflict . . . those provisions . . . must be respected by the receiving State."). See also **BESUM, Vol. II, Annex 13**, ARSIWA, Art. 50(2)(b).

351 QCM(A), para. 3.68.

352 *Ibid*.

the Appellants' conduct is "wrongful" under the Chicago Convention without determining countermeasures as a circumstance precluding wrongfulness[353].

4.49 The passage of the *Commentary* to the ILC Articles on State Responsibility cited by Qatar offers no support for this outcome[354]. The *Commentary* rightly observes that "circumstances precluding wrongfulness . . . do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists."[355] That statement merely reflects that the obligations are not terminated by the invocation of countermeasures but remain extant. That is of no moment here.

4.50 Furthermore, Qatar's selective quoting of the *Gabčikovo-Nagymaros Project* decision ignores the fact that, having determined that the putting into operation of "Variant C" amounted to an internationally wrongful act by Slovakia, the Court considered that "*it now has to determine* whether such wrongfulness may be precluded" on grounds of countermeasures[356]. Qatar's Counter-Memorial omitted the words in italics, which make clear that the Court considered it *mandatory* to determine the justification invoked by Slovakia before it could reach its overall conclusion as to the legality of Slovakia's conduct[357].

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353 *Ibid*., paras 3.56-3.57; citing *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment, I.C.J. Reports 1997*, p. 55, para. 82.

354 See QCM(A), para. 3.68.

355 **BESUM, Vol. II, Annex 13**, ARSIWA, Chapter V, Comment 2, p. 71.

356 *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment, I.C.J. Reports 1997*, p. 55, para. 82 (emphasis added).

357 *Ibid*., p. 57, para. 88 ("In the light of the conclusions reached above, the Court, in reply to the question put to it . . . finds that . . . Czechoslovakia was not entitled to put that Variant into operation from October 1992.").

4.51 Accordingly, the Court should not accept Qatar's suggestion that, in this case, the ICAO Council could "still find the aviation prohibitions wrongful under the Chicago Convention and its Annexes", by merely taking judicial notice of the Appellants' countermeasures justification[358]. This suggestion ignores the fact that countermeasures, by definition, preclude wrongfulness. As such, it is impossible for one to characterize the aviation restrictions as "wrongful", while leaving undetermined a justification that would—"*in limine*", to use Qatar's phrase[359]—exclude such a characterization.

4.52 The unprecedented outcome proposed by Qatar would result in an incoherent, inchoate decision, which, whilst acknowledging the breadth and nature of the real issue in dispute, would result in a *non liquet*—which is, of course, impermissible in contentious disputes[360]. As explained in the Appellants' Memorial[361], such a decision would be prejudicial to the interests of the Appellants since, on Qatar's proposed approach, the alleged "wrongfulness" of their conduct would be determined by the Council without regard to the fundamental justification for that conduct. In any case, this would not remove the prejudice to the Appellants of receiving a determination of wrongfulness in the absence of a determination of its justification.

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358 QCM(A), para. 3.68.

359 *Ibid*.

360 *Desgranges v. International Labour Organization* (1957) 20 *International Law Reports* 523, p. 530 ("One of the fundamental tenets of all legal systems is that no court may refrain from giving judgment on the ground that the law is silent or obscure").

361 BESUM, para. 5.121.

C. THE COURT SHOULD REJECT QATAR'S SUGGESTION THAT THE ICAO COUNCIL COULD DETERMINE ONLY THE PROCEDURAL ASPECTS OF COUNTERMEASURES

4.53 Qatar's third suggestion as to how the ICAO Council could deal with the Appellants' countermeasures is that it should determine only their procedural aspects, but not their substantive justification, namely Qatar's wrongful conduct[362]. This would be convenient for Qatar, of course: the substance of its misconduct would remain unchecked. In any event, however, Qatar fails to see this argument through to its logical conclusion by explaining what the Council would then do in the event it would hold that the Appellants had complied with the procedural aspects.

4.54 Qatar's suggestion is as novel as it is unwelcome. For the ICAO Council to consider only the procedural aspects of countermeasures, without also considering Qatar's transgressions that gave rise to them in the first place, would be incoherent, and result in an inchoate and partial decision. It would sever the procedural and substantive conditions for countermeasures without justification or explanation, in a misplaced attempt to avoid the jurisdictional objection made by the Appellants (which object concerns *all* requirements for countermeasures). The only way in which Qatar's suggestion could operate would be if Qatar were to admit, and thus remove from the scope of the dispute, that the substantive conditions for the imposition of countermeasures had been met, namely that it had breached various international obligations. But this Qatar has not done.

4.55 Finally, Qatar's suggestion that the Council would in any case have jurisdiction to determine the "substantive premise of the alleged

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362 QCM(A), para. 3.69.

countermeasures" on the basis of *forum prorogatum*[363] is incoherent[364]. The Appellants have at all stages disputed the Council's jurisdiction over precisely those issues; the suggestion that they have somehow thereby tacitly consented to the Council exercising that jurisdiction is fundamentally flawed.

Section 4. Conclusion

4.56 In conclusion on Chapter IV, the Court should find that the ICAO Council lacks jurisdiction. In the alternative, it should find that Qatar's claim is inadmissible, as it would be incompatible with judicial propriety and the ICAO Council's judicial function under Article 84 of the Chicago Convention for the

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363 QCM(A), para. 3.73, note 290 ("Even if the Council needed to determine the substantive premise of the alleged countermeasures, [] Appellants must be deemed to have implicitly consented to this determination via *forum prorogatum*. The doctrine of *forum prorogatum* 'is relevant . . . in determining . . . the extent to which [the respondent State] may tacitly have accepted jurisdiction over matters not covered by the original title relied on'. . . . There is no reason why the same logic should not apply to the respondent State when raising a countermeasures defence." (citing H. Thirlway, *The International Court of Justice* (2016), p. 53).).

364 A preliminary objection cannot be construed as forming consent for jurisdiction, not least because, in this case, the Council's lack of jurisdiction, including its jurisdiction to determine countermeasures, formed a core part of the Appellants' preliminary objection. See *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 114 ("The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court. But that Government has consistently denied the jurisdiction of the Court."). Yet, the consenting conduct must be "conclusive". See *Rights of Minorities in Upper Silesia (Minority Schools)*, *Judgment, P.C.I.J. Reports 1928, Series A, No. 15,* p. 24 ("And there seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts *conclusively establishing* it.") (emphasis added). In any case, the Appellants reserved their rights before the ICAO Council, stipulating that the Preliminary Objections were made "without prejudice to the Respondents' position on the merits of the claims made by Qatar"; that the "Respondents fully reserve their rights" and that "nothing in the present Preliminary Objections is to be taken as constituting an admission in relation to any matter pertaining to the merits of Qatar's claims." See **BESUM, Vol. III, Annex 24**, ICAO Preliminary Objections, paras 8-9; see also, *ibid*., para. 35.

Council to determine that claim in isolation from the numerous other aspects of the Parties' dispute as set out in Chapter II and as now acknowledged by Qatar.

4.57 The Court should find that the Council must decline to exercise any such jurisdiction as it possesses in order to safeguard the ICAO Council's judicial function and its judicial integrity when acting pursuant to its judicial function under Article 84 of the Chicago Convention[365].

4.58 This conclusion follows from the two important concessions made in Qatar's Counter-Memorial. *First*, Qatar concedes the existence of a dispute concerning its wrongful conduct under international law obligations other than the Chicago Convention[366]. *Second*, it appears that Qatar is no longer suggesting—as it did before the ICAO Council[367]—that the Council clearly has jurisdiction to determine the substantive premise of the invocation of countermeasures. Instead, it suggests only that the Council has jurisdiction over "the dispute between the Parties regarding their violations of the Chicago Convention."[368] This is a significant concession, demonstrating that Qatar recognizes the force of the preliminary objection raised by the Appellants.

4.59 The Preliminary Objection of the Appellants was made in good faith. The Appellants consider that the ICAO Council is not the appropriate forum to

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365 BESUM, paras 5.96-5.97.

366 See, for example, QCM(A), para. 3.37.

367 **BESUM, Vol. IV, Annex 25**, ICAO Response to Preliminary Objections, para. 77 ("At any appropriate later stage of the proceedings (merits) the State of Qatar will provide a robust defence on the facts and in law to the claim of the Respondents, which will show that the actions taken by the Respondents are not lawful countermeasures, or otherwise lawful in international law.").

368 QCM(A), para. 2.61. As before the ICAO Council, the Appellants' reliance on countermeasures is without prejudice to whether the airspace measures might otherwise be inconsistent with their obligations under the Chicago Convention, see **BESUM, Vol. III, Annex 24,** ICAO Preliminary Objections, paras 8-9 and 35.

consider the question as to whether they had a right to invoke countermeasures in response to Qatar's conduct[369]. They have not consented to the ICAO Council hearing such a dispute, and consider that any attempt to extend the scope of Article 84 by reading it expansively is to be resisted.

[369] See *ibid*.

CHAPTER V
THIRD GROUND OF APPEAL: THE ICAO COUNCIL ERRED IN REJECTING THE SECOND PRELIMINARY OBJECTION RELATING TO PRIOR NEGOTIATIONS

5.1 The Appellants' Third Ground of Appeal against the Decision of the ICAO Council relates to whether Qatar complied with Article 84 of the Chicago Convention, and Article 2(g) of the ICAO Rules, both of which require States to attempt to resolve a dispute through negotiation before submitting it to the Council.

5.2 This ground of appeal goes to the Council's jurisdiction over Qatar's claims in its Application, and in the alternative to the admissibility of those claims, insofar as (a) Article 84 of the Chicago Convention contains a "precondition of negotiations", which constitutes a limit on the jurisdiction of the Council, and (b) the ICAO Rules set out certain requirements relating to negotiations with which any Application and Memorial must comply. The Appellants consider that the latter issue gives rise to a question of admissibility.

5.3 At the outset, two comments are called for in connection with Qatar's assertion that the ICAO Council "properly held that Qatar satisfied the Negotiation Requirement"[370].

5.4 First, by referring to the "negotiation requirement", Qatar implicitly accepts the position of the Appellants that Article 84 of the Chicago Convention constitutes a "precondition of negotiation", which qualifies the consent of the

[370] QCM(A), p. 86, Section I.

States Parties to the jurisdiction of the Council, and compliance with which constitutes a precondition to valid seisin[371].

5.5 Second, contrary to Qatar's assertion, the Decision adopted by the ICAO Council provides no basis to conclude that the Council held that Qatar had in fact "satisfied the negotiation requirement"[372]. The Council disposed of the Preliminary Objections as to its competence to hear Qatar's claims by a single vote on the question of whether to accept the Appellants' "Preliminary Objection" (singular)[373]. The Council's Decision on its face contains no indication of the Council's reasoning; further, given that the Council deliberately eschewed any deliberation, the reasons underlying the Council's

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371 See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 128, para. 141.

372 QCM(A), Chapter 4, Section I heading ("The Council Properly Held that Qatar Satisfied the Negotiation Requirement").

373 **BESUM, Vol. V, Annex 52,** Decision of the ICAO Council on the Preliminary Objection in the Matter: the State of Qatar and the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates (2017) – Application (A), 29 June 2018, The Council… "***DECIDES*** that the preliminary objection of the Respondents is not accepted."

Decision cannot be discerned from the summary records of the Council's consideration of the Appellants' Preliminary Objections[374].

5.6 By way of a further preliminary observation, Qatar does not dispute much of what the Appellants submit, based on the Court's case-law, is required in order for a party to comply with such a precondition. Nevertheless, Qatar does take issue with a number of specific points of detail as regards the standard applicable to the precondition of negotiation.

5.7 **Section 1** of this Chapter deals with the objection to jurisdiction. In this regard, the Appellants first respond to Qatar's arguments on the applicable standards, and what is required to comply with the precondition of negotiations (**subsection 1(A)**). Qatar also argues that, notwithstanding the absence of any communication from it seeking to initiate negotiations with the Appellants, the precondition of negotiations has nevertheless been fulfilled as a matter of fact; the reasons why that assertion is wrong are dealt with in **subsection 1(B)**.

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[374] In this connection, it bears noting that before the Council, Qatar relied upon a number of arguments in respect of the Appellants' argument based on failure to comply with the requirement of negotiations, which, while formally maintained in its Counter-Memorial, are not now seriously pressed before the Court. These include:

(a) the argument, relying, *inter alia*, on the decision of the Permanent Court in *Mavrommatis Palestine Concessions*, that conduct subsequent to the filing of the Application could be taken into account in determining whether the "precondition of negotiation" was fulfilled: see **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, paras 99-101. Whilst Qatar formally maintains that argument, it is now confined to a footnote: see QCM(A), para. 4.38, note 347;

(b) the position that, in accordance with the ICAO Rules, only jurisdictional objections, but not objections to admissibility, could be raised by way of preliminary objection before the Council: see **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, paras 15 and 22; **BESUM, Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, paras 46-52. Qatar now suggests that the issue is not one requiring determination by the Court: see QCM(A), para. 3.72, note 286.

Section 2 deals with Qatar's response to the Appellants' argument that Qatar's claims are inadmissible as a result of its non-compliance with Article 2(g) of the ICAO Rules. **Section 3** provides a conclusion.

Section 1. The Objection as to Jurisdiction

A. LEGAL STANDARD FOR THE PRECONDITION OF NEGOTIATION

1. Introduction

5.8 As noted, Qatar largely does not take issue with the relevant law in respect of the jurisdictional limb of the Appellants' objection as set out in the Appellants' Memorial. Qatar thus appears to accept that:

(a) a distinction is to be drawn between objections to jurisdiction and objections to admissibility[375];

(b) whilst objections to jurisdiction concern whether a dispute falls outside the proper scope of the consent to jurisdiction, objections to admissibility are characterized by the contention that there exists a legal reason why the relevant court or tribunal should decline to hear the case or a specific claim therein, notwithstanding the fact that it may have jurisdiction[376];

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375 BESUM, paras 4.11-4.31; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, Judgment, I.C.J. Reports 2003*, p. 177, para. 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 456-457, para. 120.

376 BESUM, paras 4.20-4.21; *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, Judgment, I.C.J. Reports 2003*, p. 177, para. 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 456-457, para. 120.

(c) the requirement that a dispute must be one which "cannot be settled by negotiation" in Article 84 of the Chicago Convention constitutes a "precondition of negotiation", which qualifies the consent of States Parties to the exercise of jurisdiction by the Council and constitutes a precondition to seisin[377]; and

(d) as such, any failure to comply with the precondition of negotiations in respect of a particular dispute goes to the Council's jurisdiction over that dispute[378].

5.9 Qatar does, however, take issue with the Appellants' position on a number of discrete points relating to the standard to be applied in determining whether the precondition of negotiations has been fulfilled. Each of those points is aimed at supporting its position that it in fact complied with the precondition of negotiations. Thus, Qatar argues that:

(a) the precondition of negotiations is fulfilled "when a disputing party is confronted with an 'immediate and total refusal' to negotiate on the other side"[379], and that in such circumstances, "a disputing party is not required to even attempt to negotiate"[380];

(b) the precondition of negotiations can be fulfilled through general statements and calls for dialogue. Qatar asserts in this regard that all that is required is "that the 'subject-matter' of the treaty giving rise to

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377 BESUM, paras 6.7-6.25.

378 *Ibid*., paras 4.29 and 6.9; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88.

379 QCM(A), para. 4.8.

380 *Ibid.*, para. 4.20.

the dispute be addressed with 'sufficient clarity' to enable the other disputing party to conclude that 'there is, or may be, a dispute with regard to that subject matter'"[381];

(c) in support of its position that the precondition of negotiations was fulfilled through Qatar's actions before ICAO and/or the WTO, Qatar argues that what constitutes negotiations "should be assessed with flexibility"[382], and that "no specific format or procedure is required"[383];

5.10 In response, in the present Section the Appellants explain why Qatar's position is wrong. The Court's prior jurisprudence is clear that:

(a) the precondition of negotiations cannot be satisfied without a "genuine attempt" to negotiate first being made, even where the disputing Party considers that any such attempt would be futile (**Subsection 2**);

(b) the "subject-matter" of the Treaty and the content of the relevant obligations, the interpretation and/or application of which give rise to the dispute, must be identified with sufficient specificity; as to this requirement, the difference between the Parties appears to be one of emphasis rather than one in law (**Subsection 3**);

(c) **Subsection 4** then briefly discusses the apparent agreement between the Parties that whilst a certain degree of flexibility is required in assessing whether a genuine attempt at negotiations has been made,

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381 QCM(A), para. 4.15.

382 *Ibid.*, para. 4.16.

383 *Ibid.*, para. 4.17.

any such flexibility cannot override the legal requirements for the precondition to be made out.

2. The precondition of negotiations requires a "genuine attempt" to engage in negotiations

5.11 Qatar acknowledges and purports to accept the Court's decision in *Georgia v. Russia* that, where a jurisdictional provision contains language amounting to a "precondition of negotiation", what is required is "at the very least . . . a *genuine attempt* . . . to engage in discussions with the other disputing party, with a view to resolving the dispute"[384].

5.12 However, Qatar then attempts to qualify this clear statement of law by suggesting that the precondition of negotiations:

> "may be satisfied by a *genuine attempt* by one of the disputing parties to engage in discussions with the other with a view to resolving the dispute <u>if that attempt fails or becomes futile</u>"[385].

5.13 In this connection, Qatar proceeds to argue that where one disputing Party faces an "immediate and total refusal" to negotiate by the other side[386], it is not even required to make any attempt to negotiate[387].

5.14 However, as the Appellants explained in their Memorial[388], the Court in *Georgia v. Russia* made clear that the question of whether an attempt to

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384 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 132, para. 157. See BESUM, para. 6.28; QCM(A), paras 4.6-4.7.

385 QCM(A), para. 4.7 (italicised emphasis in original, underlined emphasis added).

386 *Ibid.*, para. 4.8.

387 *Ibid*., para. 4.20.

resolve the dispute through negotiations has in fact failed or become futile arises only if a genuine attempt has first been made:

> "Manifestly, *in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met*. However, *where negotiations are attempted or have commenced*, the jurisprudence of this Court and of the Permanent Court of International Justice clearly reveals that the precondition of negotiation is *met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked*"[389].

5.15 The primary and initial question is thus whether there has been a "genuine attempt" to engage in negotiations. It is only where such an attempt has in fact been made that the question of whether the negotiations "failed, became futile, or reached a deadlock" becomes relevant.

5.16 Thus, in *Georgia v. Russia*, the Court identified that it was required to address:

> "whether Georgia genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the Russian Federation's compliance with its substantive obligations under CERD. *Should it find that Georgia genuinely attempted to engage in such negotiations with the Russian Federation*, the Court would examine whether Georgia pursued these negotiations as far as possible with a view to settling the dispute. To make this determination, the Court would ascertain whether the negotiations failed, became

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388 BESUM, paras 6.6, 6.29-6.30.

389 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, para. 159 (emphasis added).

> futile, or reached a deadlock before Georgia submitted its claim to the Court."[390]

5.17 Similarly, in *Obligation to Extradite or Prosecute*, in considering whether there had been compliance with the precondition of negotiations contained in Article 30(1) of the United Nations Convention Against Torture, the Court stated that it:

> "must begin by ascertaining whether there was, 'at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute'."[391]

5.18 That a "genuine attempt" to engage in negotiations must first be shown to have been made is further confirmed by the fact that the Court in *Georgia v. Russia* assessed as a preliminary matter "[w]hether the Parties have held negotiations on matters concerning the interpretation or application of CERD"[392]. Having concluded that, on the evidence before it, there had been no such attempt, the Court held that the precondition of negotiations had not been met[393]. Accordingly, there was no need for the Court to address the further

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390 *Ibid.*, p. 134, para. 162 (emphasis added).

391 *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, pp. 445-446, para. 57, quoting *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157.

392 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 134, (heading b) before para. 163), and para. 163 ("the Court now turns to the evidence submitted to it by the Parties to determine whether this evidence demonstrates, as stated by Georgia, that at the time it filed its Application on 12 August 2008, there had been negotiations between itself and the Russian Federation").

393 *Ibid*., pp. 139-140, para. 182.

question of whether the negotiations had failed or become futile or reached a deadlock, and it did not do so[394].

5.19 The decision of the Court in this regard also makes clear that, in assessing the initial question of whether there has in fact been a "genuine attempt" to negotiate, issues of whether any such attempt would be likely to have failed or be futile are irrelevant. Notably, in reaching the conclusion that the precondition of negotiations was not satisfied, the Court rejected Georgia's submission that "Russia's refusal to negotiate with Georgia . . . is sufficient to vest the Court with jurisdiction"[395].

5.20 Qatar's attempt to exempt a party from the requirement of a "genuine attempt" to negotiate "if that attempt fails or becomes futile" thus conflates two analytically distinct steps[396]. In any event, Qatar's argument is on its face incoherent—a genuine attempt to negotiate is either made or it is not. It is not the genuine attempt to negotiate which may "fail or become futile"[397], but rather the *process* of negotiations; but reaching a conclusion as to the failure or futility of negotiations necessarily presupposes that a genuine attempt to negotiate has at the very least been made.

5.21 In support of its position as to the applicable standard for compliance with the precondition of negotiations, Qatar suggests that a precondition of negotiations is discharged "when a disputing party is confronted with an

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394 *Ibid*.

395 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 139, para. 182.

396 QCM(A), para. 4.7.

397 *Ibid*.

'immediate and total refusal' to negotiate on the other side"[398]. The real thrust of Qatar's argument in this regard is rendered apparent from its later assertion that "a disputing party is not required to attempt even to negotiate when faced with the other party's 'immediate and total refusal' to enter into any discussion on the matter"[399].

5.22 That argument is a clear attempt to bypass the requirement that there be "at the very least, a genuine attempt"[400] to negotiate with a view to resolving the dispute. Again, it misrepresents the issue; the question is not whether a party is required "to negotiate", but rather whether it has, at a minimum, made a "genuine attempt to engage in discussions with the other disputing party, with a view to resolving the dispute"[401].

5.23 Similarly, Qatar's assertion that a "contrary rule would allow one party to a dispute to frustrate the other's access to a dispute settlement mechanism conditioned on negotiations, merely by refusing to engage with it"[402], misrepresents the true position. What is required by the Court's jurisprudence where a clause containing a precondition of negotiations is applicable is a "genuine attempt" to initiate negotiations. If such a genuine attempt is in fact made, but is rebuffed, then the precondition is fulfilled and the other party is unable thereby to frustrate access to the relevant forum.

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398 *Ibid*., para. 4.8.

399 *Ibid.*, para. 4.20; see also the later statement, in the context of its discussion of its supposed attempts to negotiate that "a disputing party's 'immediate and total refusal' to negotiate, without more, dispenses with the need to examine the other party's attempt to negotiate" (*ibid*., para. 4.36).

400 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 132, para. 157.

401 *Ibid*.

402 QCM(A), para. 4.9.

5.24 Qatar's invocation of the dictum from *North Sea Continental Shelf* that parties "are under an obligation so to conduct themselves that the negotiations are meaningful"[403], does not further its position. The passage relied on by Qatar does not concern what is required in order to satisfy a jurisdictional precondition of negotiation, but rather relates to the different issue of how States are required to conduct themselves in the course of negotiations.

5.25 In support of its argument that the negotiation precondition is discharged in circumstances where a party opposes an "immediate and total refusal" to negotiate, Qatar also seeks to rely on the decision of the Court in *United States Diplomatic and Consular Staff in Tehran*[404]. That decision is inapposite for at least three reasons.

5.26 First, the jurisdictional provision at issue (Article XXI(2) of the US-Iran Treaty of Amity, Economic Relations and Consular Rights) does not contain a precondition of negotiation, but rather a requirement that the dispute be "not satisfactorily adjusted by diplomacy". Qatar's attempt to suggest in this connection that the Court "does not differentiate"[405] between such a requirement and a precondition of negotiations is simply wrong. As the Court recently emphasized when interpreting the same provision, the requirement that the dispute not be satisfactorily adjusted by diplomacy is an objective, factual

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403 *Ibid.*, para. 4.10; *North Sea Continental Shelf (Germany/Denmark; Germany/ Netherlands)*, Judgment, I.C.J. Reports 1969, para. 85(a).

404 QCM(A), para. 4.8. Tellingly, although Qatar quotes the words "immediate and total refusal" on various occasions in QCM(A), Chapter 4, Section 1 (see e.g., paras 4.8 and 4.20), it does not there provide any clear citation for the source of the quotation.

405 QCM(A), para. 4.8, note 307.

one[406]. In contrast to a situation involving a precondition of negotiation, there is no need to examine whether negotiations have taken place, or have even been attempted; the sole question is whether the dispute has been satisfactorily adjusted by diplomacy:

> "Article XXI, paragraph 2, of the 1955 Treaty is *not* phrased in terms similar to those used in certain compromissory clauses of other treaties, which, for instance, impose a legal obligation to negotiate prior to the seisin of the Court (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011(I)*, p. 130, para. 148). Instead, the terms of Article XXI, paragraph 2, of the 1955 Treaty are descriptive in character and focus on the fact that the dispute must not have been "satisfactorily adjusted by diplomacy". Thus, there is no need for the Court to examine whether formal negotiations have been engaged in or whether the lack of diplomatic adjustment is due to the conduct of one party or the other. It is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to it (see *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, pp. 210-211, para. 107)."[407]

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406 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Islamic Republic of Iran v. United States of America), Request for the Indication of Provisional Measures*, *Order, 3 October 2018*, para. 50.

407 *Ibid.*; Qatar's suggestion that the Appellants "do not differentiate between requirements to negotiate . . . and requirements to seek a satisfactory adjustment of a dispute by diplomacy . . ." (QCM(A), note 307) is likewise without foundation. The citation to the Appellants' Memorial provided in support (BESUM, para. 3.56(b), relates to the different question of whether the absence of diplomatic relations per se constitutes an obstacle to the ability of a State to attempt to initiate negotiations, or excuses a State from complying with applicable jurisdictional preconditions.

5.27 Second, the words "immediate and total refusal" relied upon by Qatar were used by the Court in discussing the other precondition to jurisdiction specified in Article XXI(2) that the parties had not agreed to settle the dispute through "some other pacific means", and after the Court had already determined that the dispute was one which "[c]annot be satisfactorily adjusted by diplomacy"[408].

5.28 Third, in any event, the Court held that the United States had in fact made genuine attempts to initiate negotiations with Iran in respect of the dispute[409].

5.29 For these reasons, Qatar is wrong to suggest that the Court held that the "Iranian Government's 'refusal . . . to enter into any discussion on the matter' . . . was sufficient to discharge the negotiation requirement under Article XXI, paragraph 2"[410].

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408 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, p. 27, para. 51 (emphasis added).

409 *Ibid*. Qatar's assertion that the Court did not mention "any attempts by the United States to negotiate after its efforts to make its views known to Iran were rebuffed" (QCM(A), para. 4.8) disregards the fact that the Court explicitly held that the United States had made "efforts to … open negotiations" (*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, p. 15, para. 26; see also *ibid*., p. 25, para. 47, and p. 27, para. 51). As such, if a precondition of negotiations had been applicable, it would have been satisfied.

410 In addition, Qatar also seeks to rely on paragraph 133 of the Court's decision in *Georgia v. Russia:* see QCM(A), para. 4.8, note 307. That paragraph, however, contains the Court's discussion of the application of the principle of effectiveness in the interpretation of the words "cannot be adjusted by negotiation" in Article 22 of CERD, and its relevance to Qatar's argument is entirely opaque. In any event, it may be noted that the Court later expressly noted the difference in formulations present in different jurisdictional provisions in treaties, before going on to consider prior decisions "concerning compromissory clauses comparable to Article 22 of CERD" (ie those which require that a dispute must be one which "cannot be settled by negotiations"): see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary*

5.30 It follows that Qatar is also wrong to suggest, by reference to the decision in *United States Diplomatic and Consular Staff in Tehran*, that the Court's jurisprudence makes clear that

> "a disputing party's 'immediate and total refusal' to negotiate, without more, dispenses with the need to examine the other party's attempts to negotiate."[411]

5.31 Instead, the true position is that, where a compromissory clause contains a precondition of negotiations, it is incumbent upon the State to make "at the very least, a genuine attempt" to initiate negotiations, even if it considers such negotiations to be futile. Qatar was thus, at a minimum, required to make such an attempt in order to satisfy the precondition of negotiations set out in Article 84 of the Chicago Convention.

3. The need to identify the specific obligations which form the subject-matter of the dispute

5.32 The precondition of negotiations contained in Article 84 of the Chicago Convention requires that the genuine attempt to negotiate by the State seeking to invoke jurisdiction must have particularly addressed (or at least sought to address) the specific question of interpretation or application of the treaty in dispute between the parties[412].

Objections, Judgment, I.C.J. Reports 2011, p. 126, para. 136. Notably, in the following discussion in that regard, no reference was made to the Court's decision in *United States Diplomatic and Consular Staff in Tehran*; that is for the simple reason that it is irrelevant. For the same reason, Qatar's observation that the Appellants referred to the decision in *United States Diplomatic and Consular Staff in Tehran* "only once and for a rather minor point" (QCM(A), note 310), whilst accurate so far as it goes, is nothing to the point.

411 QCM(A), para. 4.36.

412 *Ibid.*, para. 4.13, note 312, referring to BESUM, para. 6.31.

5.33 Qatar suggests, however, that the Court's decision in *Georgia v. Russia* requires only that:

> "the 'subject-matter' of the treaty giving rise to the dispute be addressed with 'sufficient clarity' to enable the other disputing party to conclude that 'there is, or may be, a dispute with regard to that subject-matter'."[413]

5.34 This disagreement between the Parties appears to be, at most, one of emphasis, since, in any event, it will be for the Court to determine on the basis of the particular facts whether the dispute was identified with sufficient specificity in any attempt to negotiate.

5.35 However, and in any event, Qatar's reading of *Georgia v. Russia* is misleading: it conflates and seeks to apply the Court's enunciation of the applicable test for determining the existence of a dispute with what is required to satisfy the precondition of negotiations[414]. The questions of whether there is a dispute, and whether the precondition of negotiations is met, are analytically distinct, and the relevant considerations are different[415]. Thus in *Georgia v. Russia*, the Court determined that to demonstrate the existence of a dispute, a complaining State must, at a minimum, have sufficiently identified the subject-matter of the relevant treaty in issue and in respect of which the dispute arises,

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413 QCM(A), para. 4.15, quoting *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 85, para. 30.

414 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 84, para. 29.

415 *Ibid.*, p. 84, para. 30 ("While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of a dispute and delineate its subject-matter.").

such that the State against which the claim is made is able to understand that there is or may exist a dispute in that regard[416].

5.36 By contrast, the Court later observed that "the concept of 'negotiations' differs from the concept of 'dispute'"[417] and referred in that context to the requirement that there should be "at the very least, . . . a genuine attempt to negotiate"[418]. As the Court then explained, such negotiations:

> "must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, *must concern the substantive obligations contained in the treaty in question*".[419]

5.37 Thus, while it is not necessary that the party invoking jurisdiction "express[ly] reference [] the treaty in question"[420], it is necessary that the negotiations or attempt to initiate negotiations at a minimum identify the relevant substantive obligations which are said to have been breached[421]. This requirement of specificity is particularly important in a situation such as the present, where the dispute alleged by Qatar forms only one part of a much broader international dispute between the Parties, as Qatar acknowledges.

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416 *Ibid*.

417 *Ibid*., p. 132, para. 157.

418 *Ibid.,* p. 132, para. 157.

419 *Ibid*., p. 133, para. 161 (emphasis added).

420 *Ibid*.

421 See e.g. *Ibid*., p. 134, para. 162, where the Court framed the issue as being "whether Georgia genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the Russian Federation's *compliance with its substantive obligations under CERD*." (emphasis added).

4. The need for flexibility in assessing negotiations

5.38 Qatar's other comments concerning the need for a degree of flexibility in assessing whether a genuine attempt to negotiate has taken place, and the need to avoid excessive formalism[422] can be dealt with far more briefly insofar as there appears to be no substantive disagreement between the Parties as to the applicable legal principles.

5.39 The Appellants do not dispute that, as a matter of principle, an attempt to negotiate may be held to have been made through the medium of diplomacy by conference or parliamentary diplomacy[423]. Nevertheless, any such flexibility cannot override the legal requirements for the precondition of negotiations to be satisfied, as set out above. Qatar does not appear to dispute this proposition in its Counter-Memorial.

5.40 Rather, the disagreement between the Parties concerns the facts of the case, and in particular whether Qatar's actions in international organisations, including in the context of ICAO, qualify as a "genuine attempt . . . to engage in discussions with the other disputing party, with a view to resolving the dispute"[424]. That question is addressed in the next section.

B. QATAR HAS FAILED TO SHOW THAT IT MADE ANY GENUINE ATTEMPT TO NEGOTIATE

5.41 Qatar has not fulfilled the precondition of negotiations contained in Article 84 of the Chicago Convention. It has not shown that at any point prior to

422 QCM(A), paras 4.15-4.17.

423 Cf. *ibid.*, para. 4.17; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 346.

424 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 132, para. 157.

submission of its Application to ICAO on 30 October 2017, it took any concrete steps to initiate negotiations with the Appellants in respect of its claims concerning the alleged breach by the Appellants of their obligations under the Chicago Convention[425].

1. Qatar's supposed efforts to settle the dispute through "direct means"

5.42 In their Memorial, the Appellants set out the reasons why the evidence put forward by Qatar before the ICAO Council to substantiate its compliance with the precondition of negotiations was ineffective for that purpose, *inter alia*, because it concerned calls or communications not addressed to the Appellants, and/or because it post-dated Qatar's filing of the Application with the Council[426].

5.43 Although Qatar's Counter-Memorial contains a section dealing with its supposed attempts to settle the dispute through "direct means"[427], it is striking that Qatar puts forward no evidence of even a single attempt to settle the dispute with the Appellants by seeking to engage in discussions as to the alleged breaches by the Appellants of their obligations under the Chicago Convention.

5.44 It is clear from other contexts that, where it suits its purposes, Qatar is fully capable of producing communications which, at least on their face, formally comply with relevant provisions requiring that a party make a genuine attempt to negotiate as a precondition to submitting a dispute for resolution.

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425 As explained in the Memorial (BESUM, paras 6.32-6.34), even if any attempts to negotiate had been made after the filing of the Application, they are irrelevant for the purposes of assessing compliance with the precondition of negotiation, which must have been fulfilled as at the date of seisin.

426 BESUM, para. 6.35 *et seq*.

427 QCM(A), paras 4.28-4.56.

Yet, in the present case, Qatar chose never to send to the Appellants any such communication seeking negotiations in respect of the claims it subsequently submitted to the Council.

5.45 Moreover, although Qatar refers to the fact that there were 147 days between the adoption by the Appellants of the measures on 5 June 2017 and the submission of the Application to the ICAO Council on 30 October 2017, and asserts that during this interval it sought to engage the Appellants in negotiations[428], it makes no reference to the fact that it submitted its original, abortive, applications just days after it says the dispute arose[429]. Nor does it refer to the fact that in those applications, dated just three days after the adoption of the measures, it had *already* taken the position that any attempt to initiate negotiations were "no longer possible" because of the severance of diplomatic relations[430]. That was plainly insufficient time for *any* genuine

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428 *Ibid*., para. 4.22.

429 See BESUM, paras 3.15-3.16 and 6.54-6.55; see also **BESUM, Vol. III, Annex 22**, Request for the Intervention of the ICAO Council in the Matter of the Actions of the Arab Republic of Egypt, the Kingdom of Saudi Arabia, the United Arab Emirates and the Kingdom of Bahrain to close their Airspace to aircraft registered in the State of Qatar, attaching Application (1) of the State of Qatar, Complaint Arising under the International Air Services Transit Agreement done in Chicago on 7 December 1944, and Application (2) of the State of Qatar, Disagreement Arising under the Convention on International Civil Aviation done in Chicago on 7 December 1944, 8 June 2017 and Memorials for Application (1) and (2).

430 See BESUM, para. 6.55; and see also **BESUM, Vol. III, Annex 22**, Request for the Intervention of the ICAO Council in the Matter of the Actions of the Arab Republic of Egypt, the Kingdom of Saudi Arabia, the United Arab Emirates and the Kingdom of Bahrain to close their Airspace to aircraft registered in the State of Qatar, attaching Application (1) of the State of Qatar, Complaint Arising under the International Air Services Transit Agreement done in Chicago on 7 December 1944, and Application (2) of the State of Qatar, Disagreement Arising under the Convention on International Civil Aviation done in Chicago on 7 December 1944, 8 June 2017 and Memorials for Application (1), p. 6 and Application (2), p. 9; see also **BESUM, Vol. V, Annex 31**, Request of the State of Qatar for Consideration by the ICAO Council under Article 54(n) of the Chicago Convention, 15 June 2017, p. 10 ("all

attempt to negotiate to have taken place, and Qatar has not suggested that any such attempt was made[431].

5.46 At the same time Qatar has also abandoned the position it previously took before the Council as to the impossibility of negotiations as a result of the severance of diplomatic relations. It no longer seeks to argue that the severance of diplomatic relations meant that negotiations were *per se* impossible, but argues instead that "[a]t they very least, the absence of diplomatic channels . . . made it much more difficult for Qatar even to attempt to negotiate"[432].

5.47 Qatar's retreat on this point is significant and constitutes a tacit recognition that its previous position was untenable. In particular, there is plainly no reason why the existence of diplomatic relations is required in order for a State to make a genuine attempt to initiate negotiations with a view to settling a dispute. For instance, negotiations could have been sought by a letter sent from Qatar's Embassy or Permanent Mission to an international

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diplomatic ties between the nations concerned have been ruptured and negotiations are no longer possible").

431 Notably, Qatar has abandoned any reliance upon the supposed telephone call on 5-6 June 2017, which it had initially relied upon before the Council in its Memorial: see **BESUM**, **Vol. III, Annex 23**, ICAO Memorial, Sec. (g) and BESUM, paras 6.49-6.51.

432 QCM(A), para. 4.29. The Appellants' relied on the *Diplomatic and Consular Staff in Tehran*, and *Oil Platforms* decisions for the factual proposition that the Court has never treated the absence of diplomatic relations as relevant to compliance by an applicant with jurisdictional preconditions of negotiation or that a dispute should not have been satisfactorily adjusted by diplomacy (see BESUM, para. 6.53(b) and note 439). Qatar's response (see QCM(A), note 332) is both strained and artificial. Moreover, it proceeds on the mistaken assumption that Article XXI(2) of the Iran-US Treaty of Amity, Economic Relations and Consular Rights, which was at issue in both cases, contains a precondition of negotiation, which is not the case, as explained above, at paras 5.25-5.30.

organization to the Embassy or Permanent Mission of the Appellants[433]. No such attempt was ever made by Qatar in this case.

5.48 Qatar attempts to divert attention from this fact by alleging that the Appellants agreed to engage with Qatar on only one occasion: during a brief telephone conversation between the Crown Prince of Saudi Arabia and the Emir of Qatar on 8 September 2017[434].

5.49 Although Qatar attempts to rebut the reasons already put forward by the Appellants in their Memorial as to why that telephone conversation could not on any view constitute a "genuine attempt" to initiate negotiations in relation to the dispute[435], the fundamental position remains that even putting the matter at its highest, the telephone conversation did not go beyond a general call for dialogue in relation to the wider dispute between the Parties as a whole, and which did not concern the alleged violations of the Chicago Convention[436]. As such, it cannot satisfy the requirement that Qatar should have made a genuine attempt to negotiate in respect of the subject-matter of the dispute as to the airspace restrictions subsequently submitted by Qatar to the ICAO Council,

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433 For example, the requirement in Article XXI(2) of the Iran-United States Treaty of Amity that the dispute was "not satisfactorily adjusted by diplomacy" was easily satisfied in the absence of diplomatic relations between Iran and the United States, with the Foreign Interests Section of the Embassy of Switzerland in Tehran serving as the channel for communication between the States: *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018,* para. 47.

434 QCM(A), para. 4.42 *et seq*.

435 See BESUM, paras 6.78-6.82.

436 See *Ibid*., paras 6.80-6.81.

which required that it should have concerned "the substantive obligations contained in the treaty in question"[437].

5.50 Moreover, although Qatar argues that the Appellants acted in concert, such that contacts with Saudi Arabia should, in effect, be attributed to all of the States[438], it provides no support for the argument that this should be the case.

5.51 Qatar's second fall-back position that it "repeatedly and publicly asserted its openness to dialogue and negotiation"[439] essentially reproduces the position it took before the Council, and has already been dealt with in the Memorial[440].

5.52 As explained above, in accordance with the Court's previous jurisprudence in respect of compromissory clauses containing a precondition of negotiation, what is required first and foremost is a "genuine attempt" to engage in discussions with the Appellants with a view to resolving the dispute under the Chicago Convention. Such an attempt must involve more than general calls for dialogue, but instead, must "relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question"[441]. Qatar has signally failed to reach this threshold and its attempts to reformulate the tests laid down by the Court cannot succeed, either as a matter of law or, indeed, as a matter of fact.

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437 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, para. 161.

438 QCM(A), para. 4.46.

439 *Ibid.*, para. 4.38.

440 BESUM, para. 6.76.

441 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, para. 161.

5.53 Qatar also attempts to rely upon the public statements, reported in the press, of 28 June 2017[442], 5 July 2017[443], and 22 July 2017[444] which refer in very general terms to "air links", "the blockade" and "contentious issues". However, even if such statements had been addressed to the Appellants (which they were not), they are in any event incapable of satisfying the requirement of negotiations, since they do not identify nor seek to initiate negotiations in relation to the dispute as to the Appellants' compliance with their relevant substantive obligations contained in the Chicago Convention.

5.54 As a consequence, Qatar's suggestion that it "tried repeatedly to engage with Joint Appellants to settle the dispute before it instituted proceedings before the ICAO Council", does not reflect the reality of the situation, which is that Qatar at no point attempted to initiate negotiations in relation to the dispute as to obligations under the Chicago Convention which it subsequently submitted to the ICAO Council.

2. Supposed negotiations within ICAO

5.55 Similarly, contrary to Qatar's submissions, the proceedings within ICAO are incapable of constituting genuine attempts to negotiate.

5.56 As set out in the Appellants' Memorial, the letters sent by Qatar to the Secretary-General of ICAO and the President of the Council were not addressed to the Appellants, and in any event did not seek to initiate negotiations in respect of the dispute relating to the Chicago Convention[445].

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442 QCM(A), para. 4.50.

443 *Ibid.*, para. 4.51.

444 *Ibid.*, para. 4.53.

445 BESUM, paras 6.63-6.66.

5.57 Quite apart from this, and insofar as Qatar seeks to rely upon statements made during the Article 54(n) proceedings, the following comment should be made. From the outset, Qatar sought to invoke both the formal dispute resolution proceedings under Article 84, as well as the procedure pursuant to Article 54(n) of the Chicago Convention[446].

5.58 As explained in the Appellants' Memorial, the ICAO Council itself was at all times careful to maintain the distinction between the two procedures, and to ensure that the Article 54(n) proceedings were limited to issues relating to safety of aviation and contingency routes, and did not touch upon the question of the dispute initiated under Article 84[447]. In these circumstances, the Article 54(n) proceedings cannot be regarded as constituting negotiations for the purposes of the precondition of negotiations under Article 84 of the Chicago Convention.

5.59 Nor can Qatar rely on its statement, made at the Extraordinary Session of the ICAO Council on 31 July 2017, at which Qatar's request for

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446 **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 2, Letter from Qatar dated 5 June 2017, ref. QCAA/ANS.02/502/17, to the Secretary General; **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 3, letter of the Qatar Civil Aviation Authority to the President of the Council, dated 8 June 2017, ref. 2017/15984 (see also Vol. III, Annex 22); **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 4, Letter from the Minister of Transport and Communications of Qatar dated 13 June 2017 to the Secretary General, ref. 2017/15993; **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 5, Letter to the Secretary General from the Chairman of the CAA of Qatar dated 13 June 2017, ref. 2017/15994; **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 6, Letter to the Secretary General from the Chairman of the CAA of Qatar dated 15 June 2017, ref. 2017/15995; **BESUM, Vol. V, Annex 31**, Request of the State of Qatar for Consideration by the ICAO Council under Article 54(n) of the Chicago Convention, 15 June 2017; **BESUM, Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 1, Letter to the President of the Council from the Chairman of the CAA of Qatar dated 17 June 2017, ref. 2017/16032.

447 BESUM, paras 6.67-6.69.

consideration under Article 54(n) of the Chicago Convention was dealt with by the Council, that the Appellants' measures constituted a "flagrant violation" of ICAO instruments[448]. Indeed, the Court has drawn a firm distinction between negotiations and "mere protests or disputations"[449], and in particular, has made it clear that negotiations "entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter‑claims"[450].

5.60 Accordingly, the mere fact that Qatar broadcast its accusation before the ICAO Council in the context of the Article 54(n) proceedings cannot be taken as constituting either a "genuine attempt" to negotiate, or as negotiations themselves.

3. Supposed negotiations within the WTO

5.61 Qatar's reliance on the WTO proceedings has also already been noted in the Appellants' Memorial[451]. The fundamental point in this regard remains that a request for consultations, which plays a specific role within the WTO dispute settlement mechanism in relation to alleged violation of WTO obligations, cannot be regarded as constituting an attempt to negotiate in

448 QCM(A), para. 4.62.

449 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 132, para. 157.

450 *Ibid*.

451 See BESUM, paras 6.71-6.73.

relation to alleged breaches of distinct obligations, having a different subject-matter and content, under the Chicago Convention[452].

5.62 Qatar's assertion to the contrary[453] is based on its flawed argument that negotiations need only refer in general terms to the subject-matter of the dispute. As already noted, however, the Court has made clear that negotiations must relate to the specific subject-matter of the dispute, which must concern the substantive obligations in the treaty in question[454].

5.63 In any event, a request for consultations directed at three States cannot constitute negotiations with Egypt. To say, as Qatar does, that "nothing in the response by Bahrain, the UAE and Saudi Arabia to Qatar's request for consultations deviates from similar statements made by Egypt itself"[455], merely serves to underline the absence of any communication addressed to Egypt. The very weakness of Qatar's argument in this regard is telling.

4. Supposed negotiations through third parties

5.64 Finally, Qatar seeks to rely on supposed attempts to "settle the dispute" through third parties[456]. Although Qatar recounts at length the supposed efforts made through third parties, the evidence relied upon by Qatar in respect of events prior to the filing of its Application with the ICAO Council cannot be regarded as constituting an attempt to initiate negotiations. This is because, as

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452 See BESUM, para. 6.73.

453 QCM(A), para. 4.70.

454 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, para. 161.

455 QCM(A), para. 4.71.

456 *Ibid*., para. 4.72 *et seq*.

already explained in the Memorial *inter alia*: (a) none of the requests or statements was addressed to the Appellants; and (b) all of the requests were in general terms, and failed to refer to the specific substantive obligations under the Chicago Convention[457].

Section 2. The Objection as to Admissibility

5.65 Qatar has largely failed to engage with the Appellants' submission concerning objections to admissibility. The distinction between objections to jurisdiction and objections to admissibility has been well recognized in international procedural law[458]. The former reflects the fundamental principle that jurisdiction is founded upon consent, so that any objection to jurisdiction will focus upon arguments as to whether the consent given in the circumstances encompasses the settlement of the dispute by the court or tribunal in question. As the Court emphasized in *Armed Activities on the Territory of the Congo*:

> "its jurisdiction is based on the consent of the parties *and is confined to the extent accepted by them . . .* When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject *must be regarded as constituting the limits thereon*".[459]

5.66 By contrast, admissibility rests upon the proposition that even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, there are reasons why the Court should not proceed to an

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457 BESUM, paras 6.74-6.86.

458 *Ibid*., para. 4.11 *et seq*.

459 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p. 39, para. 88 (emphasis added).

examination of the merits[460]. In essence, as the Court has noted, an objection to admissibility involves the argument that even when there exists jurisdiction, there is a legal reason why the Court should decline to hear the case[461]. The difference between the two concepts is clear and judicially approved. The Appellants also noted in their Memorial that the same considerations in a case may simultaneously give rise to objections to jurisdiction and objections to admissibility[462]. Qatar did not respond to any of these points.

5.67 As regards the objection to admissibility based on the failure to comply with Article 2(g) of the ICAO Rules, Qatar does not dispute that Article 2 imposes requirements as to the content of a valid Application and Memorial. Nor does it dispute that, as a matter of principle, a failure to comply with the requirements of Article 2 may render an application inadmissible before the Council.

5.68 Instead, it contends that all that is required by Article 2(g) is a "statement" (in French "une déclaration attestant") that negotiations to settle the disagreement have taken place but were not successful, and that the requirement is thus merely one of "form"[463], such that "allegations of fact" in an applicant State's Memorial will suffice in this regard[464].

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460 *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, Judgment, I.C.J. Reports 2003*, p. 177, para. 29. See also BESUM, para. 4.20 *et seq*.

461 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 456-457, para. 120.

462 BESUM, paras 4.30-4.31.

463 QCM(A), para. 4.87.

464 *Ibid*., para. 4.87.

5.69 Such an interpretation of Article 2(g) would, however, render the provision entirely devoid of any *effet utile.* What is required by the precondition of negotiations in Article 89 of the Chicago Convention is a "genuine attempt" to negotiate. It follows that Article 2(g) of the ICAO Rules, which Qatar agrees is intended to reflect that requirement[465], must likewise be understood as requiring a statement, appropriately substantiated, that a genuine attempt to negotiate has in fact been made. Conversely, and as a consequence, assertions as to the supposed futility of even making any such attempt are insufficient to excuse compliance with the requirement. *A fortiori*, a clear assertion that negotiations have not taken place evidently cannot be regarded as constituting compliance.

5.70 But in any event, even if a bare unsupported statement of fact that negotiations had taken place were sufficient, to the extent that Qatar seeks to rely upon the heading of the relevant section of the Memorial submitted to the Council[466] — which on its face merely purports to summarize the requirement contained in Article 2(g) of the ICAO Rules[467]— that is on any view insufficient to satisfy the requirement.

5.71 Further, Qatar's reliance on the fact that the final sentence referred to "further negotiating efforts"[468] is likewise insufficient in circumstances in which the remainder of the paragraph made clear that no efforts to negotiate had in fact been made.

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465 *Ibid.*, para. 4.88.

466 *Ibid.*, para. 4.88.

467 **BESUM, Vol. III, Annex 23**, ICAO Memorial, Sec. (g) "(g) A statement of attempted negotiations".

468 QCM(A), para. 4.89.

5.72 In that regard, it is significant that Qatar does not dispute, and effectively acknowledges, that it did not comply with the requirements of Article 2(g) of the ICAO Rules insofar as its Memorial before the Council did not contain a statement that negotiations had taken place but were not successful, but instead expressly stated that negotiations had not taken place[469].

5.73 Qatar's further response that the assertion in the Memorial that the Appellants "did not permit any opportunity to negotiate", should be understood as a reference to the Appellants' supposed "immediate and total refusal" to negotiate, and that this is sufficient to discharge the requirement in Article 2(g) of the ICAO Rules[470], is also flawed for the reasons already set out above. At the very least, a "genuine attempt" to negotiate was required.

5.74 As a further fall-back, Qatar seeks to argue that it was open to it to amend its "pleadings" so as simply to assert that negotiations had taken place[471]. That argument is also flawed.

5.75 First, it ignores the fact that, as argued in the Memorial, matters of jurisdiction fall to be established as at the date of seisin[472].

5.76 Second, even if such a course of action were in theory procedurally permissible, it is difficult to see how the making of a bare statement in circumstances in which that statement was both flatly inconsistent with the position previously taken, and entirely unsupported by any new evidence

469 QCM(A), para. 4.88; cf. BESUM, para. 6.97.

470 QCM(A), para. 4.88.

471 *Ibid*., para. 4.90

472 BESUM, paras 6.32-6.34.

tending to support its veracity, could properly be regarded as compliance with the requirement of Article 2(g).

5.77 Finally, Qatar argues that any deficiency was, at most a "minor procedural defect" which would not constitute a proper basis for an appeal to the Court[473]. This, however, fails to address the point; the failure to comply with the requirements of Article 2(g) of the ICAO Rules is not, in this context, relied upon as a "procedural defect", whether minor, or otherwise, but as a matter affecting the admissibility of Qatar's claims before the Council. To the extent that the Council improperly concluded that Qatar's claims were admissible, its Decision falls to be set aside.

Section 3. Conclusion

5.78 For the foregoing reasons, the Council should have concluded that it was without jurisdiction due to Qatar's failure to comply with the precondition of negotiations contained in Article 84 of the Chicago Convention. In the alternative, and in any event, it should have concluded that Qatar's Application was inadmissible due to the failure of its Memorial to comply with the requirements of Article 2(g) of the ICAO Rules.

5.79 The ICAO Council's Decision to reject the Appellants' Preliminary Objections in this regard was thus in error, and the Decision thus falls to be set aside on this basis.

473 QCM(A), para. 4.90.

CHAPTER VI
CONCLUSION

6.1 In conclusion, the Court is respectfully requested to uphold the Appellants' appeal on the basis of one or more of the following grounds:

A. First ground of appeal

6.2 The first ground of appeal is addressed in **Chapter III** and concerns the manifest violations of due process in the proceedings before the ICAO Council and its Decision. It explains that the Court should exercise its supervisory authority over these procedural deficiencies. It also sets out why the Appellants have not waived their right to complain to the Court about those defects. The Appellants thus respectfully request the Court to set aside the Decision of the Council as a procedural nullity on the basis that the Decision of the ICAO Council on 29 June 2018 manifestly violated fundamental rules of due process and the applicable procedural rules in a manner so extreme as to render the proceedings devoid of any judicial character.

B. Second ground of appeal

6.3 The second ground of appeal is addressed in **Chapter IV**. It concerns the characterisation of the real issue in dispute and the ICAO Council's consequent lack of competence over the dispute between the Parties. Qatar has now accepted that there is a dispute between the Parties concerning the matters reiterated in **Chapter II** of this Reply. The core subject-matter of that acknowledged dispute concerns Qatar's failure to comply with its obligations under the Riyadh Agreements and other international law obligations, in response to which, the Appellants adopted a suite of countermeasures that include the aviation restrictions. Chapter IV explains that, on the proper application of the "real issue" test, Qatar's claim does not concern "the

interpretation or application" of the Chicago Convention and its Annexes, but instead concerns that other dispute. Indeed, Qatar's Application should instead be understood as a pretext to try to get the ICAO Council to adjudicate a much broader dispute over which it has no jurisdiction. As such, the ICAO Council lacks jurisdiction of Qatar's claims, or, in the alternative, Qatar's claims are inadmissible, as the aviation claims cannot be severed from the broader dispute. Moreover, Qatar's suggestions of various ways in which the Council might avoid deciding (at least in full) the question of countermeasures should be rejected by the Court as being unconvincing and unprecedented. That Qatar resorted to making such suggestions merely reinforces the force of the Appellants' preliminary objection. Accordingly, the Court is requested to find either that:

(a) The ICAO Council is without jurisdiction to adjudicate upon the dispute between the Parties, which falls outside the ICAO Council's jurisdiction *ratione materiae* under Article 84 of the Chicago Convention; or, in the alternative,

(a) Qatar's claims are inadmissible because it would be improper for the ICAO Council to exercise jurisdiction in circumstances in which this would be prejudicial to the rights of the Appellants and contrary to judicial propriety.

C. THIRD GROUND OF APPEAL

6.4 Finally, the third ground of appeal is addressed in **Chapter V**, which sets out why, as a matter of law, without a "genuine attempt" to negotiate first being made, it is not possible to satisfy the precondition even where the disputing Party considers that any such attempt would be futile. It further establishes that Qatar has not satisfied the precondition and thus the Council has

no jurisdiction, and why, in the alternative, Qatar's claims are inadmissible as a result of its non-compliance with Article 2(g) of the ICAO Rules. As a result, the Court is requested to determine that:

(a) The ICAO Council is without jurisdiction to adjudicate upon the disagreement because Qatar has failed to satisfy a necessary precondition to the ICAO Council's jurisdiction by not attempting to initiate negotiations in relation to its claims prior to submitting them to the ICAO Council; or, in the alternative,

(b) The ICAO Council is not competent to adjudicate upon Qatar's ICAO Application because Qatar failed to comply with the procedural requirement set out in Article 2(g) of the ICAO Rules of affirming that negotiations had taken place but were not successful.

D. CONCLUSION

6.5 In conclusion, the Court is respectfully requested to uphold the Appellants' appeal against the Decision of the ICAO Council and to determine this Decision to be null and void and without effect.

SUBMISSIONS

1. For these reasons, and reserving the right to supplement, amplify or amend the present submissions, the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates hereby request the Court to uphold their Appeal against the Decision rendered by the Council of the International Civil Aviation Organization dated 29 June 2018, in proceedings commenced by Qatar's Application (A) dated 30 October 2017 against the four States pursuant to Article 84 of the Chicago Convention.

2. In particular, the Court is respectfully requested to adjudge and declare, rejecting all submissions to the contrary, that:

1) the Decision of the ICAO Council dated 29 June 2018 reflects a manifest failure to act judicially on the part of the ICAO Council, and a manifest lack of due process in the procedure adopted by the ICAO Council; and

2) the ICAO Council is not competent to adjudicate upon the disagreement between Qatar and the Appellants submitted by Qatar to the ICAO Council by Qatar's Application (A) dated 30 October 2017; and

3) the Decision of the ICAO Council dated 29 June 2018 in respect of Application (A) is null and void and without effect.

Respectfully submitted on behalf of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates, respectively.

_____

H.E. Shaikh Fawaz bin Mohammed Al Khalifa
Agent of the Kingdom of Bahrain

_____

H.E. Amgad Abdel Ghaffar
Agent of the Arab Republic of Egypt

_____

H.E. Abdulaziz bin Abdullah bin Abdulaziz Abohaimed
Agent of the Kingdom of Saudi Arabia

_____

H.E. Dr Hissa Abdullah Al Otaiba
Agent of the United Arab Emirates

CERTIFICATION

The Agents of each Appellant in respect of that State hereby certify that all annexes are true copies of the documents referred to and that the translations provided are accurate.

_____

H.E. Shaikh Fawaz bin Mohammed Al Khalifa
Agent of the Kingdom of Bahrain

_____

H.E. Amgad Abdel Ghaffar
Agent of the Arab Republic of Egypt

_____

H.E. Abdulaziz bin Abdullah bin Abdulaziz Abohaimed
Agent of the Kingdom of Saudi Arabia

_____

H.E. Dr Hissa Abdullah Al Otaiba
Agent of the United Arab Emirates