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CR 2019/16

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Thursday 5 December 2019, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

in the cases concerning the
Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates *v.* Qatar)
and the
Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates *v.* Qatar)

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le jeudi 5 décembre 2019, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

dans les affaires relatives à
***l'*Appel concernant la compétence du Conseil de l'OACI en vertu de l'article 84 de la convention relative à l'aviation civile internationale (Arabie saoudite, Bahreïn, Egypte et Emirats arabes unis c. Qatar)**
et à
***l'*Appel concernant la compétence du Conseil de l'OACI en vertu de l'article II, section 2, de l'accord de 1944 relatif au transit des services aériens internationaux (Bahreïn, Egypte et Emirats arabes unis c. Qatar)**

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Cançado Trindade
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa
	Judges *ad hoc*	Berman
		Daudet
	Registrar	Gautier

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Cançado Trindade
Mme Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian
Salam
Iwasawa, juges
MM. Berman
Daudet, juges *ad hoc*

M. Gautier, greffier

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The PRESIDENT: Please be seated. The sitting is open. The Court meets this morning to hear the second round of oral argument of the Applicants. I shall now give the floor to Mr. Petrochilos. You have the floor, Sir.

Mr. PETROCHILOS: Mr. President, Members of the Court, good morning.

QATAR'S OVERALL POSITION AND ITS IMPLICATIONS

1. Introduction

1. After Qatar's first-round oral argument on Tuesday, the issues for the Court have come into sharper focus. They have also become fewer in number. This is mostly as a result of Qatar's choice to reformulate — once more — its jurisdictional thesis in a minimalist, but bold, fashion.

2. Qatar says that since it has lodged a claim which cites certain clauses of the ICAO Treaties, that alone suffices for there to be a dispute relating to the interpretation or application of these treaties[1] and to come within the jurisdiction of ICAO. Qatar submits that all the *other* issues which are involved in the Parties' dispute, and which arise under a multitude of *other treaties*, most importantly the Riyadh Agreements, are immaterial to the Court's jurisdictional analysis; in Qatar's words, they are "practically irrelevant"[2].

3. To be sure, Qatar has come to acknowledge that substantive issues under the Riyadh Agreements and other treaties do arise, and that they are heavily disputed between the Parties[3] — although Qatar has avoided so much as even mentioning the relevant international obligations, let alone giving an account of its conduct in light of these obligations. But Qatar does acknowledge that these disputed issues are real and not manufactured by the Appellants[4]. And it does not contest that these issues were, in fact, the ingredients of the Parties' dispute when Qatar chose to resort to ICAO.

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[1] CR 2019/15, p. 17, para. 10 (Al-Khulaifi); CR 2019/15, p. 17, p. 23, para. 3 (Lowe); CR 2019/15, p. 34, para. 9 (Klein).

[2] CR 2019/15, p. 22, para. 2 (Lowe).

[3] CR 2019/15, p. 22, para. 2, p. 25, para. 14 (Lowe).

[4] CR 2019/15, p. 22, para. 2; p. 24, para. 10 (Lowe).

4. So how can it be the case that the non-aviation issues engaged are immaterial? Qatar's whole case on this point rests on one sentence in the Court's 1972 Judgment in the first *ICAO Council Appeal* case between India and Pakistan[5]. The Court will recall that one sentence, which was quoted with great emphasis by counsel opposite on Tuesday[6]. Qatar's case is that no issue that comes in a case by way of defence is relevant in determining jurisdiction. Why? Not because such an issue is not, in fact, part of the dispute, but only because it happens to arise through a defence.

5. That, Members of the Court, is the jurisdictional thesis that Qatar presented to you. That *one* sentence in the 1972 Judgment is your rule of decision in the present case. The import of that sentence, according to Qatar, is that any issue — without limitation — that is involved in a case as a defence has to be regarded as being ancillary to the main claim.

6. Let us take Qatar's thesis to its logical conclusion. If the Appellants had taken the initiative to ask the ICAO Council to declare that their measures, so far as they concern aviation, are permissible under the Riyadh Agreements or as non-reciprocal countermeasures justified by Qatar's anterior breaches of multiple international obligations, then surely ICAO would not have jurisdiction to grant such a declaration. But Qatar's thesis is that ICAO *does* have jurisdiction in the present case, simply because the very same declarations would be the Appellants' defence rather than the offence.

7. Our friends opposite did not concern themselves with this, or indeed other implications of the bold jurisdictional thesis that they presented to the Court. This is my main task this morning, and I should like to take the Court's time with three additional implications.

2. Unlimited scope of issues subsumed within facially narrow claims

8. The first ***such*** implication is that jurisdictional creep — to borrow the term used by Professor Shaw on Monday — is a ready tool to subvert the principles of institutional speciality and consent to jurisdiction.

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[5] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 69, para. 42.

[6] CR 2019/15, p. 29, para. 34 (Lowe); see also CR 2019/15, pp. 35-36, para. 10 (Klein).

9. Let us suppose that a coastal province of a State purports to secede, declaring that it will continue to abide by the international obligations of the State from which it secedes, so far as these concern the claimed territory. That entity then impounds a ship flying the flag of another State, claiming to act as the "port State" under the international maritime convention commonly known as MARPOL[7]. The flag State then protests the impounding. Are we to say that the underlying dispute about statehood, succession to international obligations, and sovereignty over territory, may be brought before a specialized arbitral tribunal, as provided for under MARPOL[8].

10. Members of the Court, one can imagine any number of similar examples, involving compromissory clauses in the foundational texts of various specialized agencies, such as the International Maritime Organization[9]; the International Atomic Energy Agency[10]; the World Health Organization[11]; or even the International Plant Protection Convention[12]. Qatar's thesis entrains that any number of narrowly framed claims could usher in much broader issues before such specialized agencies, if only the claimant party contrives a foothold on which to mount a claim.

3. Qatar's overall position is not coherent

11. The second implication I wish to address requires one to stand back from Qatar's individual arguments on Tuesday and look at Qatar's overall position. Let us recall the four salient propositions that Qatar advanced on Tuesday.

(i) Qatar's *first proposition* is that the ICAO Council may well consider, and adjudicate upon, the substance of the Appellants' charges concerning support for terrorism, extremism and interference in their domestic affairs[13]. Qatar says that the ICAO Council may adjudicate

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[7] International Convention for the Prevention of Pollution from Ships, United Nations, *Treaty Series (UNTS)*, Vol. 1340, p. 184, entered into force on 2 Oct. 1983 (MARPOL), Art. 10.

[8] International Convention for the Prevention of Pollution from Ships, *UNTS*, Vol. 1340, p. 184, entered into force on 2 Oct. 1983 (MARPOL), Ann. 1, Reg. 4, subpara. 3 *(d)*.

[9] Convention on the International Maritime Organization, *UNTS*, Vol. 293, p. 3, entered into force on 17 March 1958, Art. 69.

[10] Statute of the International Atomic Energy Agency, *UNTS*, Vol. 276, p. 3, entered into force on 29 July 1957, Art. 17.

[11] Constitution of the World Health Organization, *UNTS*, Vol. 14, p. 185, entered into force on 7 April 1948, Art. 75.

[12] International Plant Protection Convention, *UNTS*, Vol. 150, p. 67, entered into force on 3 April 1952, Art. 8; see also Convention Placing the International Poplar Commission within the Framework of FAO, *UNTS*, Vol. 410, p. 155, entered into force on 26 Sep. 1961, Art. 15.

[13] CR 2019/15, p. 23, para. 4 (Lowe).

all the legal issues of State responsibility arising, having regard to the applicable treaties, such as the Riyadh Agreements, and also customary international law[14]. It is not a problem, Qatar says, that none of these issues relates to the interpretation or application of the ICAO Treaties.

(ii) Qatar's *second proposition* is that the ICAO Council's main strength is that it produces fast, practical solutions[15].

(iii) Qatar's *third proposition* is that in reaching what Qatar says would be a binding decision on a broad range of issues unrelated to civil aviation, the ICAO Council will proceed ***to*** decide in a manner that is distinctly not judicial[16]. But that is not a problem either, the Court was told.

(iv) The *fourth proposition* is that it was sufficient for Qatar to reference the Parties' broad dispute — not specifically under the ICAO Treaties — in professing an openness to ***a*** dialogue with the Appellants. Such general statements, Qatar says, satisfy the requirement of a genuine attempt of prior negotiation.

12. Now, standing back, and trying to piece together these submissions, one well understands that each one of them, individually, supports Qatar's case on appeal. But do they hold together as a coherent position? One would be hard-pressed to accept that they do, we say with respect:

— Qatar suggests that an eminently practical, specialized body devoted to civil aviation, the overwhelming majority of whom are not lawyers, would be tasked with resolving a series of issues arising under legal instruments that have nothing whatever to do with civil aviation. Further, *this* body would also have to assess how the relevant legal instruments relate (or do not relate) to the ICAO Treaties.

— Qatar suggests that the questions of fact and law that arise — highly complex though they are — need not be debated or considered according to the procedural standards that the Court demands of other tribunals over which it has exercised supervisory jurisdiction. There will be some form of written decision, to be sure, and it must be treated as *res judicata*, we are told;

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[14] CR 2019/15, pp. 68-69, para. 33 (Malintoppi).

[15] CR 2019/15, p. 41, para. 21 (Klein); CR 2019/15, p. 23, para. 4 (Lowe).

[16] CR 2019/15, pp. 68-69, para. 33 (Malintoppi).

but one should not expect it to contain reasons, or indeed to be the product of deliberation following a hearing of any substance.

— Qatar suggests that the assessment of ICAO's jurisdiction must rest on the strictest formalism — that all the Court needs to do, or indeed *can* do, is to look at Qatar's Application before ICAO — but, at the same time, Qatar suggests its supposed invitation to negotiate the subject of that Application may be couched in the most informal, non-specific terms.

13. Members of the Court, we cannot help you further with these contradictions. It falls to us to point them out; but we are unable to give you answers.

4. Judicial propriety

14. The third implication of Qatar's thesis is that the jurisdictional question before you does raise questions of judicial propriety in our submission. Counsel opposite curtly dismiss these concerns as a simple restatement of our jurisdictional objection[17]. But that hardly does justice to the concerns raised by the Appellants, nor does it assist the Court.

15. Members of the Court, Qatar's ICAO claim is the proverbial foot in the door. To crack the door open, Qatar is obliged to pretend that the real issue that divides the Parties can be ignored — while admitting at the same time that the real issue cannot, after all, be ignored; and that it, too, may come through that door.

16. On Monday, I recalled the parallel with the *Monetary Gold* case; there the Court held that Albania's responsibility to Italy was a necessarily implicated issue in the separate dispute between Albania's two creditors, the United Kingdom and Italy; and that Albania was a necessarily implicated party in the case between these two States. As I mentioned, the United Kingdom had an answer for the issue of Albania's responsibility; namely that this responsibility had been established in a treaty, and this was simply a fact of which the Court needed only to take notice[18]. The United Kingdom also had an answer for Albania's absence from the proceedings, namely that Albania would not be bound by any decision between third parties[19].

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[17] CR 2019/15, p. 41, para. 21 (Klein).

[18] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Pleadings, Oral Arguments, Documents,* p. 154 (Oral Argument of Mr. Fawcett).

[19] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Pleadings, Oral Arguments, Documents,* p. 153 (Oral Argument of Mr. Fawcett).

17. But the Court rejected the notion that it was proper to exercise jurisdiction based on an artificially framed, stripped-down version of what we would call today the **"**real issue in dispute**"**, although it was technically feasible for the Court to uphold ***its*** jurisdiction.

18. Artificial framing of the Parties' dispute is indeed what Qatar has done here. It is fair to say that the aviation measures were never the subject of a stand-alone dispute. Rather, they were always part and parcel of *the entire set* of the Appellants' measures. In June 2017, as the Court has heard, the Appellants sought to exercise their entitlement — repeatedly set out in the Riyadh Agreements — to take any action they deem appropriate for their security and stability, in the face of a breach by another contracting State, namely Qatar[20]. And Qatar, for its part, immediately countered that the Appellants' measures were inconsistent with these agreements — the Riyadh Agreements[21]. The dispute between the Parties crystallized there and then.

19. What is more, the dispute is still extant. The Court does not have to take my word for it. I will quote from Qatar's Counter-Memorial, which has this to say:

> "In fact, it is [the] Appellants who, through the imposition of the *aviation prohibitions* and other coercive measures, have purposefully and systematically sought to intervene in Qatar's internal affairs *in breach of the Riyadh Agreements* and international law."[22]

20. If, therefore, there is any *lex specialis* that pertains to this dispute, it is not to be found in the ICAO Treaties but rather in the Riyadh Agreements. We respectfully invite the Court to read these texts closely, together with the contemporaneous official statements that describe the exceptional circumstances that led to their conclusion[23]. It is highly unusual to have three successive international agreements on the same subject-matter, each one of them signed by Heads of State, and each memorializing that it is being concluded in order to address persistent problems of non-compliance. It is also highly unusual to grant a unilateral right of responsive measures in case of breach, evidently going beyond the existing ordinary entitlements under customary international law.

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[20] MA — ICAOA and ICAOB, Ann. 20, p. 528, Art. 3; CR 2019/13, p. 71, para. 7 (Petrochilos).

[21] See MA — ICAOA and ICAOB, Ann. 25, Exhibit 43, p. 1185; Exhibit 35, p. 1151; Ann. 25; MA — ICAOB, Exhibit 35, p. 1151; CMQ — ICAOA and ICAOB, Ann. 49, p. 2.

[22] CMQ — ICAOA, para. 2.52; CMQ — ICAOB, para. 2.53; emphasis added.

[23] See MA — ICAOA and ICAOB, Anns. 19, 20 and 21; *ibid*., Vol. V. See also MA — ICAOA and ICAOB, Chap. II.

21. When one reads these documents, Members of the Court, it is plain indeed that the law of this case lies outside the ICAO Treaties, if not exclusively, then at the very least preponderantly, and that Qatar's ICAO complaint is artificial — and therefore improper.

22. It is true, Members of the Court, that Qatar appears to have withdrawn, at least as jurisdictional predicate, the three hypotheses that I described on Monday — admittedly, tongue-in-cheek — as "quick fixes"[24]; these would take out of play the issues in the case that lie outside the ICAO Treaties. Those hypotheses included an inchoate ICAO decision that would effectively reserve the issues under the Riyadh Agreements and customary international law and countermeasures and ***a***nterior breaches — and which decision, by definition, could not result in any finding of State responsibility, as I described on Monday. One supposes that these hypotheses betrayed lack of confidence in Qatar's primary, bold jurisdictional thesis. And so they stand withdrawn, but the change of heart by Qatar should not go unnoticed, we respectfully submit.

23. This, Mr. President, concludes my substantive remarks. It remains for me to say only that in the course of this morning, the Court will also hear from Maître van der Meulen, Professor Shaw and Mr. Olleson on the first, second and third grounds of appeal respectively. Professor Akhavan will then make concluding observations. Following which, the Agents of the Appellants will address the Court, including on the Appellants' final submissions.

24. I am grateful, Mr. President and Members of the Court, for your patience.

The PRESIDENT: I thank Mr. Petrochilos for his statement. I now invite the next speaker, Ms van der Meulen to take the floor. You have the floor, Madam.

Mme van der MEULEN :

PREMIER MOYEN : VIOLATION DES GARANTIES FONDAMENTALES D'UNE BONNE JUSTICE

1. Monsieur le président, Mesdames et Messieurs de la Cour, ma tâche ce matin est de répondre à certains arguments soulevés par nos contradicteurs sur le premier moyen des ***A***ppelants.

[24] CR 2019/14, p. 14, para. 25 (Petrochilos).

2. J'aborderai quatre points.

1. La Cour est compétente pour connaître d'appels interjetés contre les décisions du Conseil

3. Premier point, nos contradicteurs ont, mardi, indiqué que la Cour ne disposait pas d'une compétence générale pour revoir les décisions rendues par les agences spécialisées des Nations Unies[25]. Ils se sont aussi inquiétés de ce que — si la Cour acceptait dans notre affaire de se prononcer sur les vices de procédure — les parties à un différend pourraient tirer prétexte de la moindre décision procédurale («point of order» pour utiliser l'expression de nos contradicteurs) pour amener l'affaire devant la Cour et ainsi ralentir la résolution des différends par le Conseil de l'OACI[26].

4. La crainte d'une extension du pouvoir de révision de la Cour et de l'abus par les Etats d'une telle voie de recours n'est ~~***toutefois***~~ pas justifiée. Ce que les ***A***ppelants demandent à la Cour est expressément prévu par la convention de Chicago qui consacre le droit de faire appel des décisions rendues par le Conseil[27]. Et l'appel concerne aussi bien le bien-fondé d'une décision que les vices de procédure[28].

5. Ce que les ***A***ppelants demandent est aussi confiné : seule une «décision» du Conseil peut faire l'objet d'un appel. Conformément à l'arrêt de la Cour dans l'affaire *Inde c. Pakistan*, ceci inclut seulement les décisions sur la compétence et celles qui tranchent le fond d'une affaire[29]. Il ne fait pas de doute qu'une simple ordonnance sur un point procédural ne pourrait pas faire l'objet d'un appel[30].

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[25] CR 2019/15, p. 26, par. 20 (Lowe).

[26] CR 2019/15, p. 27, par. 27 (Lowe).

[27] MD — ICAOA et ICAOB, annexe 1, art. 84.

[28] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, opinion individuelle de M. le juge Jiménez de Aréchaga, p. 153, par. 37 ; RD — ICAOA et ICAOB, par. 3.14 et suiv.

[29] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, p. 55-57, par. 18.

[30] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, p. 55-57, par. 18.

2. La Cour doit exercer son contrôle sur les décisions rendues par le Conseil

6. J'en viens à mon deuxième point : le rôle de la Cour en tant que juridiction du second degré du Conseil de l'OACI.

7. Le Qatar a répété mardi l'argument selon lequel la Cour ne peut pas se prononcer sur la procédure suivie par le Conseil. Pour lui, tant que la décision du Conseil est correcte — objectivement correcte — il n'y a pas besoin de se préoccuper et encore moins de sanctionner des éventuelles violations procédurales[31].

8. C'est précisément l'argument auquel j'ai répondu lundi, en indiquant que si la Cour acceptait cette position, cela reviendrait à donner carte blanche au Conseil en matière procédurale[32]. Nos contradicteurs ont confirmé mardi que cela reflétait bien la position du Qatar[33] et ils sont allés plus loin, en affirmant que «the fact that the ICAO Council may perform a judicial function does not turn it into a judicial organ *stricto sensu*»[34].

9. En d'autres termes, ce que le Qatar demande à la Cour est de reconnaître l'existence d'un organe qui exerce des fonctions judiciaires, mais qui n'a pas à se comporter comme un organe judiciaire. Et cet organe, nous dit le Qatar, peut tout à fait rendre des décisions contraignantes, sans fournir le moindre raisonnement, sans prendre le temps de délibérer, et sans la moindre transparence. Sa procédure peut même être arbitraire, nous ont dit nos contradicteurs mardi[35].

10. L'existence d'un tel organe — un organe pseudojudiciaire ou presque judicaire — serait justifiée, nous dit le Qatar, par l'arrêt de la Cour dans l'affaire *Inde c. Pakistan*[36]. Sur le fondement de cette affaire, la Cour devrait perpétuer une situation de fait, une exception, et faire du Conseil de l'OACI le seul organe spécialisé des Nations Unies doté de fonctions judiciaires, dont les violations procédurales sont exemptes de toute sanction[37].

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[31] CR 2019/15, p. 27, par. 21 (Lowe).

[32] CR 2019/13, p. 45, par. 18 (van der Meulen).

[33] CR 2019/15, p. 60, par. 4-5 (Malintoppi).

[34] CR 2019/15, p. 68-69, par. 33 (Malintoppi).

[35] CR 2019/15, p. 60, par. 4-5 (Malintoppi).

[36] CR 2019/15, p. 60-62, par. 4-9 (Malintoppi).

[37] CR 2019/15, p. 61, par. 9 (Malintoppi).

11. Et ceci dans des circonstances où des commentateurs et directeurs juridiques de l'OACI recommandent au Conseil de se conformer aux exigences d'une bonne justice[38]. Et dans des circonstances où le comité juridique de l'OACI lui-même reconnaît que le Règlement du Conseil doit être mis à jour et éventuellement harmonisé avec le Règlement de la Cour[39].

12. Les ***A***ppelants rejettent fermement la position du Qatar. Si un organe exerce des fonctions judiciaires, il doit le faire conformément à une procédure régulière. Ou alors il n'exerce pas de fonctions judiciaires et n'a donc pas à respecter les garanties d'une procédure régulière. L'entre deux n'existe pas en droit international.

3. Le seuil de gravité des violations procédurales

13. Troisième point, le Qatar a prétendu mardi que les ***A***ppelants n'avaient pas proposé de seuil s'agissant de la gravité des violations procédurales nécessaire pour enclencher le contrôle de la Cour[40].

14. ***Nos contradicteurs*** ont brandi la menace d'un pouvoir de révision illimité, qui pourrait être invoqué par les parties à la convention de Chicago pour «each and every technical infraction of procedural rules, no matter how trivial or inconsequential»[41].

15. Cette crainte aussi est ***une fois de plus*** infondée. Les Parties s'accordent sur le seuil applicable : les violations doivent porter «une atteinte fondamentale aux exigences d'une bonne procédure»[42]. C'est le test qu'a énoncé la Cour dans l'affaire *Inde c. Pakistan*[43].

4. En l'espèce le Conseil a porté une atteinte fondamentale aux exigences d'une bonne procédure

16. Quatrième point, les violations procédurales alléguées par les ***A***ppelants atteignent ce seuil. Dans leurs plaidoiries, nos contradicteurs ont une fois encore insisté sur la ressemblance entre

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[38] M. Milde, *International Air Law and ICAO*, 3e éd., 2016, MD — ICAOA et ICAOB, annexe 127, p. 203-204 ; J. Huang, *Aviation Safety and ICAO*, 2009, p. 231-238. Voir aussi E. Warner, «Notes from PICAO Experience», 1946, 1 *Air Affairs* 30, MD — ICAOA et ICAOB, annexe 128, p. 37 ; T. Buergenthal, *Law-Making in the International Civil Aviation Organization*, 1969, MD — ICAOA et ICAOB, annexe 125, p. 195-197.

[39] MD — ICAOA et ICAOB, annexe 54.

[40] CR 2019/15, p. 28, par. 28 (Lowe).

[41] CR 2019/15, p. 27, par. 26 (Lowe).

[42] MD — ICAOA et ICAOB, par. 3.67.

[43] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, p. 69-70, par. 45.

les allégations de violations des ***A***ppelants dans la présente affaire et celles de l'Inde en 1972[44]. Pour cette raison, nous disent-ils, la Cour doit rendre la même décision qu'en 1972[45].

17. Monsieur le ***P***résident, Mesdames et Messieurs de la Cour, les violations procédurales dans la présente affaire sont différentes — et l'argument du Qatar nécessite que je m'y attarde.

a) Dans l'affaire *Inde c. Pakistan*, il y a eu *cinq* jours d'audience sur une seule objection préliminaire. Ici, le Conseil a entendu les observations des Parties sur deux objections, voté et rendu sa décision en moins d'un après-midi.

b) Dans l'affaire *Inde c. Pakistan*, l'Inde n'a formulé aucune allégation selon laquelle son droit d'être entendu avait été compromis. Ici, les quatre Etats ont été traités comme un seul Etat et disposé du même temps de parole que le Qatar qui agissait seul.

c) Dans l'affaire *Inde c. Pakistan*, l'audience a été suspendue pour permettre au Conseil de délibérer. Ici, aucune délibération n'a eu lieu.

d) Enfin, dans notre affaire, le ***P***résident a regroupé les deux objections des ***A***ppelants en une seule et même objection et soumis cette objection au vote. Rien de tel ne s'est produit dans l'affaire *Inde c. Pakistan*.

18. Je répondrai brièvement à nos contradicteurs sur chacun de ces points, dont je précise qu'aucun n'a été abandonné par les ***A***ppelants.

La durée de la procédure devant le Conseil

19. S'agissant d'abord de la durée de la procédure devant le Conseil, il nous a été reproché de ne pas avoir pris le temps de décrire ce qui s'est précisément passé devant le Conseil[46]. C'est incorrect puisque les ***A***ppelants ont consacré plusieurs pages de leurs mémoires à une description très détaillée de cette procédure[47].

20. En tout état de cause, ce qui s'est passé devant le Conseil est très simple et très rapide à relater. Les parties ont appris le matin même de l'audience qu'elles disposeraient chacune de 40 minutes pour présenter leurs arguments sur les deux objections préliminaires. L'audience s'est

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[44] CR 2019/15, p. 60, par. 5 (Malintoppi) ; CR 2019/15, p. 69, par. 36 (Malintoppi).

[45] CR 2019/15, p. 69, par. 34 (Malintoppi).

[46] CR 2019/15, p. 62, par. 11 (Malintoppi).

[47] MD — ICAOA et ICAOB, par. 3.13-3.33.

tenue quelques heures plus tard, et a duré en tout et pour tout — présentation des parties et vote compris — 90 minutes.

Les Etats requérants n'ont pas bénéficié d'un temps raisonnable pour présenter leurs objections à l'audience tenue par le Conseil

21. En ce qui concerne la violation du droit des ***A***ppelants d'être entendus, nos contradicteurs insistent sur le fait que les ***A***ppelants ne peuvent pas se plaindre puisqu'ils ont eu «ample opportunity to argue their cases in writing»[48]. Ils auraient en outre bénéficié d'une prolongation du délai pour déposer leur mémoire écrit et obtenu le droit d'en soumettre un second alors que le Qatar n'en a soumis qu'un seul[49]. Mais si le Qatar voulait soumettre un deuxième mémoire, il aurait pu en faire la demande puisqu'il était d'un point de vue procédural, le défendeur s'agissant des objections préliminaires. Il ne l'a pas fait.

22. Plus fondamentalement, à quoi sert une longue procédure écrite si elle ne débouche pas sur une décision motivée ? A quoi sert-elle si les parties n'ont aucune garantie que la décision prend bien en compte les arguments que les parties ont développés dans leurs mémoires écrits ?

L'absence de délibérations

23. S'agissant de l'absence de délibérations, nos contradicteurs se sont contentés de répéter que la tenue d'une délibération est incompatible avec un vote secret et que cette absence est de toute façon conforme à la pratique du Conseil[50].

24. Permettez-moi de soulever deux points en réponse.

25. D'abord, le fait que le Conseil ait pour habitude de ne pas procéder à des délibérations n'est pas en soi une justification. Cette pratique est plutôt symptomatique d'une incompréhension par le Conseil de ses fonctions judiciaires et révélatrice du besoin d'orientation en matière procédurale.

26. Ensuite, nos contradicteurs ne répondent pas à l'argument que j'ai soulevé lundi, selon lequel la tenue d'un vote secret n'empêche pas une délibération : une formation collégiale peut tout

[48] CR 2019/15, p. 63, par. 15 (Malintoppi). Voir aussi CR 2019/15, p. 63, par. 14 (Malintoppi).

[49] CMQ, par. 5.15 et DQ, par. 5.33.

[50] CR 2019/15, p. 66, par. 26 et suiv. (Malintoppi).

à fait tenir des délibérations, et puis procéder à un vote secret au cours duquel les membres votent de manière libre et indépendante.

Le Conseil a adopté une décision sur la base erronée qu'il y avait une seule objection

27. Sur l'amalgame qui a été fait par le Conseil entre les deux objections bien distinctes des ***A***ppelants, nos contradicteurs affirment qu'il n'y a eu aucune confusion, et que le Conseil a tenu compte du fait que les ***A***ppelants avaient soulevé deux objections[51].

28. Nos contradicteurs semblent penser que le président avait bien saisi la distinction, mais, lorsque le conseil du Bahreïn est intervenu pour s'opposer à l'amalgame entre les deux objections ***préliminaires***[52], le ***P***résident n'a pas modifié la question soumise au vote. Le Bahreïn lui a indiqué qu'il y avait deux objections, le ***P***résident a répondu qu'il n'y en avait qu'une[53]. S'il avait compris cette distinction, la question aurait été reformulée[54]. Et il y aurait eu deux votes : un vote sur chacune des objections. Or, il n'y en a eu qu'*un seul* sur les deux objections, sans distinction quant aux moyens sous-jacents.

La décision du Conseil est dépourvue de motivation

29. J'en arrive enfin à l'absence de motivation.

30. Pour seule réponse, nos contradicteurs ont expliqué mardi que cette absence est parfaitement en ligne avec la pratique du Conseil[55] et que la Cour n'a pas jugé utile, dans l'affaire *Inde c. Pakistan*, d'examiner l'absence de motivation qui avait été soulevée par l'Inde[56].

31. Ils ne disent rien sur ce que signifie l'absence de raisons. Tout au plus disent-ils que des discussions ont eu lieu avant l'audience et que, par conséquent, un processus de décision collégial a bien eu lieu[57]. Cette affirmation souffre de deux failles.

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[51] CR 2019/15, p. 64, par. 18 (Malintoppi).

[52] MD — ICAOA et ICAOB, annexe 53, par. 121.

[53] MD — ICAOA et ICAOB, annexe 53, par. 123.

[54] MD — ICAOA et ICAOB, annexe 53, par. 121.

[55] CR 2019/15, p. 68, par. 32 (Malintoppi).

[56] CR 2019/15, p. 69, par. 34 (Malintoppi).

[57] CR 2019/15, p. 67, par. 27 (Malintoppi).

32. D'abord, la consultation à laquelle se réfère le Qatar a eu lieu *avant* l'audience, donc avant d'entendre les arguments des parties.

33. Ensuite, le fait que le procès-verbal indique que les membres du Conseil ont été consultés et que leurs avis avaient été pris en compte[58] ne nous dit *rien* sur les raisons qui ont poussé le Conseil à rejeter les objections préliminaires. Sans raisons, les Parties n'ont pas de garantie que leurs arguments ont été pris en compte et que le différend a été tranché sur la base du droit et des éléments du dossier plutôt que d'autres considérations. Sans raisons, la Cour ne peut pas, en tant qu'organe d'appel, procéder au «contrôle» des décisions du Conseil, encore moins s'assurer qu'elles sont «correctes»[59].

5. Conclusion

34. En conclusion, les ***A***ppelants soumettent respectueusement que l'appel devant la Cour ne suffit pas à corriger ou effacer une procédure du premier degré qui n'a pas respecté les principes d'une bonne justice. Le Conseil doit lui-même respecter ces garanties procédurales, et la Cour doit, en tant qu'organe d'appel, contrôler la procédure qu'il suit et, lorsque c'est nécessaire, déclarer nulle et de nul effet une décision qui n'est pas le résultat d'une procédure judiciaire.

35. Monsieur le président, Mesdames et Messieurs de la Cour, ceci conclut mes observations sur les réponses du Qatar sur le premier moyen des ***A***ppelants. Je vous remercie pour votre attention et vous demanderais, Monsieur le président, de bien vouloir donner la parole au professeur Shaw.

Le PRESIDENT : Je remercie Mme van der Meulen. Je donne à présent la parole au professeur Malcom Shaw. Vous avez la parole, Monsieur.

Mr. SHAW:

SECOND GROUND OF APPEAL: JURISDICTIONAL ISSUES

1. Mr. President, Members of the Court, I will seek to address some of the comments made by Qatar's counsel on the following matters: the *India* v. *Pakistan* Judgment of 1972 and the test

[58] MD — ICAOA et ICAOB, annexe 53, par. 106 ; CR 2019/15, p. 67, par. 27 (Malintoppi).

[59] CR 2019/15, p. 60, par. 4-5 (Malintoppi).

for jurisdiction; the "real issue"/broader context discussion; the Riyadh Agreements; and the question of jurisdiction and the United Nations specialized agencies.

2. But first permit me to draw attention to some of Qatar's robust language. I note that allegations of bad faith made in the written pleadings[60] have apparently disappeared, so need make no comment. Accordingly, I turn to other examples of what some may see as Qatar's apocalyptic vision. Its Agent referred to the Applicants' aviation measures as "an assault on the entire international civil aviation system"[61]. Professor Lowe referred to the invocation of countermeasures as constituting a "trump card for avoiding all dispute settlement procedures", except perhaps before this Court[62]. This picks up one of the themes introduced in the written pleadings whereby it was proclaimed that the Applicants' arguments constituted "dangers to the international legal order"[63], and that recourse to the countermeasures argument would pose "grave dangers to the international adjudicatory system"[64] and "would seriously undermine the entire system of inter-State adjudication"[65]. But is this really so? We plead the relevance of measures taken pursuant to the Riyadh Agreements and countermeasures under international law cautiously, carefully and specifically. There is a valid and an important legal point here and it cannot be wished away by tendentious language.

1. *India* v. *Pakistan*, 1972 and the test for jurisdiction

3. I turn to the *India* v. *Pakistan* Judgment. For Qatar, this is essentially their case, the whole case and nothing but the case. Its Agent termed the judgment "crystal clear" in stating that the Council cannot be deprived of its jurisdiction merely because a respondent State casts a defence on the merits in a form that touches upon issues falling outside of the relevant treaties[66]. Professor Lowe declared that "Qatar's submissions thus rest squarely on the decision of the Court

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[60] RQ — ICAOA and ICAOB, para. 2.7; see also RQ — ICAOA and ICAOB, paras. 2.13, 2.4 and 3.42.

[61] CR 2019/15, p. 16, para. 7 (Al-Khulaifi).

[62] CR 2019/15, ***p. 24,*** para. 9 (Lowe). See also CMQ — ICAOA and ICAOB, para. 3.4.

[63] CMQ — ICAOA and ICAOB, para. 3.4.

[64] RQ — ICAOA, para. 3.2; CMQ —ICAOB, para. 3.2.

[65] RQ — ICAOA and ICAOB, para. 3.38.

[66] CR 2019/15, p. 18, para. 15 (Al-Khulaifi).

in the 1972 . . . case"[67]. Professor Klein, rather more melodramatically, warned against the dangers of a frontal collision with the jurisprudence of the Court and referred to the Applicants' apparent choice in arguing against the judgment as an infinitely perilous one[68].

4. Rhetoric apart, what does the case actually say? First, the Court states that the question as to whether the Council is competent to hear the case "depends on whether Pakistan's case, considered in the light of India's objections to it, discloses the existence of a dispute of such a character as to amount to a 'disagreement . . . relating to the interpretation or application' of the Chicago Convention"[69]. So, our starting-point is the application and objections to it. Second, the Council's jurisdiction once presumptively established cannot be removed "because considerations that are claimed to lie outside the Treaties may be involved if, irrespective of this, issues concerning the interpretation or application of these instruments are nevertheless in question"[70]. Thirdly, the fact that a defence on the merits is cast in a particular form cannot affect the competence of the Council or other relevant organ[71]. Fourthly, "whether the dispute, in the form in which the Parties placed it before the Council [note Parties not applicant], and have presented it to the Court in their final submissions . . . , is one that can be resolved without any interpretation or application of the relevant Treaties"[72].

5. That a claim can be formulated under the ICAO Treaties is doubtless relevant but it is only the beginning of the inquiry. Indeed, one must determine what is the real issue in dispute, where the relative weight of the dispute lies. It therefore does not assist Qatar that its claim may, as it posits, involve the application of the ICAO Treaties. The question is, does the resolution of the dispute also engage other legal obligations and rights, outside those Treaties; and further, whether these latter legal obligations and rights are the real issue in dispute.

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[67] CR 2019/15, p. 29, para. 34 (Lowe).

[68] CR 2019/15, pp. 41-42, para. 22 (Klein).

[69] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 27.

[70] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 27.

[71] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 27.

[72] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 62, para. 28.

6. Let us pause here. The test is whether the dispute as presented by the Parties can be resolved without recourse to the Chicago Convention and IASTA. That of course, depends upon how the Parties characterize the dispute. Qatar adopts the slice-and-dice approach: carve out an element of the overall dispute which both Parties accept exists[73] and try to take that part to the ICAO Council. For the Applicants, the broader dispute is the dispute and the aviation measures merely a reactive consequence of the cause of that dispute. These aviation measures would never have been taken if Qatar had not violated the Riyadh Agreements and international law with regard to terrorism and non-interference. Can this dispute be resolved without recourse to ICAO? Eminently yes. Whether by negotiation or by turning to the Riyadh Agreements disputes resolution mechanism or by any other method agreed, the overall dispute could be settled. And in so settling the matter, the aviation matters would simply fall away and ICAO be uninvolved.

7. Three points immediately arise. The first is whether the application itself is the exclusive framework for the determination of the existence and nature of a dispute or not. Counsel for Qatar differ. Professor Lowe states that "the question whether Qatar's Applications to the ICAO Council are or are not within the jurisdiction of the Council is a question to be determined by reference to the terms of the Applications as they were made by Qatar"[74]. However, Professor Klein declares that this is simply "le point de départ de l'analyse à cet égard"[75]. They cannot both be right. As we have seen, the Court clearly states that this depends upon the case put by one party and the objections to it put by the other party.

8. The second point that arises here is how does one distinguish between a defence on the merits, on the one hand, and a matter that is encompassed in the application and the objections to it**,** as maintained by the Court, on the other. The Court also put it in ***an***other way: the competence of the Council "must depend on the character of the dispute submitted to it and on the issues thus raised — not on those defences on the merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled"[76]. Professor Klein reads this simply

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[73] ***See e.g. CR 2019/15, p. 22, para. 2 (Lowe), p. 3, para. 4 (Klein).***

[74] CR 2019/15, p. 28, para. 29 (Lowe).

[75] CR 2019/15, p. 34, para. 9 (Klein).

[76] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 27.

and absolutely as if the words "and on the issues thus raised" do not exist[77] and, we say, misconstrues the sentence "those defences on the merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled" in order to mean the objections raised by the current Applicants. There is another reading and this is that the dispute is formulated by a combination of the application and the "issues thus raised" and that this is in contrast to and to be distinguished from those defences or other considerations that become relevant once the jurisdictional question has been resolved.

9. In our reading, the nature of the dispute constitutes an amalgam of Qatar's Application seen in the light of the "issues thus raised" and that is the broader dispute, of which the aviation measures are to be seen as a reactive factor to prior violations of obligations under the Riyadh Agreements and international law which are wholly distinct from and extraneous to the Chicago Convention and IASTA.

10. The third point is this. The Court's comment that: "[t]he fact that a defence on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned, — otherwise parties would be in a position themselves to control that competence"[78] has to be seen in the framework of the content and the character of the particular dispute. What counts is whether or not the dispute actually and really concerns questions as to the interpretation and application of the Chicago Convention and IASTA[79]. As discussed in the first round, the Court clearly took the view that the case centred only upon whether or not the conventions applied.

11. India's defence in that case focused upon whether or not the Chicago Convention and IASTA had been validly terminated or suspended or whether they continued in force as between India and Pakistan. There was no argument as to obligations or legal principles wholly extraneous to the provisions of these treaties. As the Court stated **"**it is now time to turn to the positive aspects, from which it will appear not only that Pakistan's claim discloses the existence of a

[77] CR 2019/15, p. 34, para. 9 (Klein).

[78] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972,* p. 61, para. 27.

[79] CR 2019/13, p. 67, paras. 43-45.

‘disagreement . . . relating to the interpretation or application**’**[80] of the Treaties, but also that India’s defences equally involve questions of their interpretation or application.**”**

12. The question in *India* v. *Pakistan* turned solely upon the applicability of the conventions and not upon the impact upon them of other legal instruments or other rules of international law.

13. This brings us inevitably to the question as to how one identifies the “real issue”.

2. The real issue

14. Qatar’s arguments here have moved about a bit. It originally seemed to argue that one had to look only at the Application or the Applicant’s pleadings in order to ascertain the real “object of the claim”[81]. It then re-formulated this to read that the real issue test calls for an objective identification of the “object of the claim” before the Council, acknowledging that the Court may take into account the pleadings of both sides as well as other documents[82]. This is then interpreted in terms of “the real subject of the dispute” and thence to the statement that: “[t]he relevant ‘claim’ is, of course, applicant’s claim” or again what is required is “an objective assessment of what Qatar is seeking from the ICAO Council”[83]. Somewhat of a circular procession. This evolved into different formulations in the oral hearings by Professors Lowe and Klein respectively as just noted.

15. As Professor Klein stated, both Parties agree that an objective determination is required in order to define the real issue or real object of the dispute[84]. However, Professor Klein accused the Applicants of “un assez remarquable exercice d’illusionnisme” and of a recipe “distraire pour faire oublier l’essentiel”[85]. Indeed, what is essential and what is not***?*** In our view, the Respondent is seeking to define a beach in terms of one grain of sand. We are seeking to determine the sand in the light of the beach.

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[80] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 66, para. 35.

[81] CMQ —ICAOA and ICAOB, para. 3.30.

[82] RQ —ICAOA and ICAOB, Chap. 3, Sect. II (subheading) and paras. 3.18–3.19.

[83] RQ — ICAOA and ICAOB, paras. 3.18–3.19.

[84] CR 2019/15, p. 34, para. 9 (Klein).

[85] CR 2019/15, p. 31, para. 5 (Klein).

16. Mr. President, Members of the Court. Qatar makes much of severability, the capacity to separate parts of a dispute and submit them to different specialized bodies[86]. But at the same time, it posits an extraordinarily wide jurisdiction for such specialized bodies of limited competence. Its own application to ICAO references, in addition to the Chicago Convention and IASTA, the United Nations Charter and the United Nations Convention on the Law of the Sea, accusing the Applicants of violations of these instruments, while the relief sought from the Council requests a determination, *inter alia*, that the Applicants had violated the Chicago Convention, its annexes "and other rules of international law"[87]. Bearing in mind Professor Lowe's acceptance that the ICAO Council was designed as a technical body to find practical solutions to problems, where "its success in finding practical solutions . . . is the explanation for the absence of formal legal rulings from the Council"[88], this is indeed curious. The attempt to argue for a very wide jurisdiction over significant parts of international law beyond the Chicago Conventions with regard to a body which is technical and practical and which does not produce formal legal rulings rather takes the breath away.

17. In my pleading in the first round, I sought to examine the methodology that is adopted by the Court here. I will not repeat this[89], but will merely observe that it is a matter for objective determination by the Court in the light of relevant material, including, of course, the Application and the issues raised by it and the response of the other Party.

18. Qatar has taken a different view of some of the relevant cases here. Professor Klein has noted, while discussing the *Certain Iranian Assets* case, that "le seul test pertinent" is to see whether the relevant acts complained of fall within the relevant treaty[90]. But there is a difficulty here. Is it really being suggested that the mere mention of a relevant convention gives the pertinent body jurisdiction? That cannot be correct, otherwise such passing reference could produce large numbers of complaints for specialized agencies where the real issue is not really that convention.

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[86] CR 2019/15, p. 23, paras. 3 and 5 (Lowe).

[87] MA — ICAOA, Ann. 23, pp. 597-601; MA — ICAOB, Ann. 23, pp. 596-598.

[88] CR 2019/15, p. 23, para. 4 (Lowe).

[89] See e.g. CR 2019/13, pp. 55-61 (Shaw).

[90] CR 2019/15, p. 32, para. 6 (Klein).

19. Indeed, the Court made a general point that where there was a broader dispute, the Court must decide whether the acts complained of fall within the relevant treaty[91]. However, this must be seen in the light of the broader dispute and how exactly the claims relate to it. To put it another way, where is the centre of gravity of the dispute or what in all the circumstances is the real issue. Our case is distinguishable from *Certain Iranian Assets* in that the real issue did not commence on 5 June 2017 with the adoption of the aviation measures, but began with the violations by Qatar of the Riyadh Agreements and international law. The factual matrix is different. We argue that there is an inextricable link between those violations and the measures taken such that the latter cannot be understood or legally examined in the absence of consideration of the former.

20. Professor Klein took us to the *Chagos Arbitration* and argued that the Tribunal held that it could not decide the question of sovereignty as it would have to decide whether it was a "coastal State" which would require a determination of sovereignty[92].

21. But what was the process whereby the Tribunal reached its decision? The Tribunal noted that:

> "For the purpose of characterizing the Parties' dispute, however, the Tribunal must evaluate where the relative weight of the dispute lies. Is the Parties' dispute primarily a matter of the interpretation and application of the term 'coastal State', with the issue of sovereignty forming one aspect of a larger question? Or does the Parties' dispute primarily concern sovereignty, with the United Kingdom's actions as a 'coastal State' merely representing a manifestation of that dispute? In the Tribunal's view, this question all but answers itself. There is an extensive record, extending across a range of fora and instruments, documenting the Parties' dispute over sovereignty."[93]

22. The reasoning is correct and can be transposed to our case. The "relative weight" of our dispute, on the basis of the record, lies clearly on the side of the dispute over the violations of the Riyadh Agreements and of international law concerning terrorism and non-interference. The aviation measures are but the manifestation.

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[91] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America) Preliminary Objections, Judgment of 13 February 2019*, p. 23, para. 36.

[92] CR 2019/15, p. 33, para. 8 (Klein).

[93] *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, para. 211.

23. Where the "real issue in the case" and the "object of the claim"[94] do not centre upon the interpretation or application of the Convention, an incidental or consequential connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of the compromissory clause[95].

3. The Riyadh Agreements

24. I turn to the Riyadh Agreements. We have here a clear difference of opinion between the Parties. For the Applicants, these are crucial, they constitute the heart of the dispute and they determine the real issue before the Court[96]. For the Respondent, they are best forgotten. Of course, as the Agent said, they remain binding and have been implemented by his State[97], while Professor Lowe also accepted that the Riyadh Agreements were binding. However, Professor Lowe also declared that they "are practically irrelevant . . . except as part of the factual background"[98].

25. Mr. President, Members of the Court, this is the nub of the matter. The Riyadh Agreements are not "practically irrelevant"[99], they are critical to this case. They laid down obligations recognized as binding on the parties, particularly so stated by Qatar before you. What obligations? The obligations not to interfere in the internal affairs of the States of the Gulf Council, whether directly or indirectly, and support to the Muslim Brotherhood or any of the organizations, groups or individuals that threaten the security and stability of the Gulf Council States through direct security work or political influence[100].

26. So important were these obligations understood, that the parties established an Implementing Mechanism (17 April 2014). It is provided in the second title, termed "Decision-making body" under the subheading "Leaders of the GCC Countries", that "[t]he leaders shall take the appropriate action towards what the Ministers of Foreign Affairs raise to them

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[94] *Nuclear Tests (New Zealand* v. *France*), *Judgment, I.C.J. Reports 1974*, p. 466, para. 30.

[95] *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, para. 220.

[96] See MA — ICAOA and ICAOB, Chap. II.

[97] CR 2019/15, p. 18, para. 14 (Al-Khulaifi).

[98] CR 2019/15, p. 22, para. 2 (Lowe).

[99] CR 2019/15, p. 22, para. 2 (Lowe).

[100] First Riyadh Agreement, 23 and 24 Nov. 2013; MA — ICAOA and ICAOB, Ann. 19. See also MA — ICAOA, paras. 2.10 *et seq*.; MA — ICAOB, paras. 2.9 *et seq*.

regarding any country that has not complied with the signed agreement by the [GCC] Countries"[101], Article 3 of which proclaimed that: "[i]f 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"[102].

27. A supplementary agreement was signed in November 2014[103], emphasizing that failure to commit to any of the articles of the First Riyadh Agreement and Implementing Mechanism would amount to a violation of the entirety of them. In addition, the leaders of the GCC States called for regular reports to them "in order to take the measures they deem necessary to protect the security and stability of their countries"[104].

28. The Riyadh Agreements process also provided an opportunity to discuss disagreements and disputes. We have already referred to agreed minutes from several meetings held in July and August 2014 in which Qatar's broken promises to implement the agreements were again raised[105].

29. We have here clear and robust provisions accepted by the Applicants and by Qatar as binding[106]. They laid down rules and provided for a way to implement them. The Applicants complained on many occasions of Qatar's violations of them and ultimately felt the need to invoke measures justified under, and authorized by, Article 3 of the Implementing Mechanism. The aviation measures of which Qatar complained to ICAO were adopted only and solely because of the violations of the Riyadh Agreements and international legal rules concerning terrorism and non-interference. How could these agreements be "practically irrelevant"[107]? By what stretch of the imagination could these agreements not be seen as absolutely central to the dispute of which the adoption of aviation measures was one incidental and consequential manifestation.

30. Qatar refuses to engage with what for the Applicants is the key issue, the core of the dispute. Why?

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[101] MA — ICAOA and ICAOB, Ann. 20, p. 526.

[102] MA — ICAOA and ICAOB, Ann. 20, p. 528, Art. 3.

[103] MA — ICAOA and ICAOB, Ann. 21. See also MA — ICAOA, para. 2.66; MA — ICAOB, para. 2.65.

[104] MA — ICAOA and ICAOB, Ann. 21, p. 538, Art. 4.

[105] RA — ICAOA and ICAOB, p. 18 and para. 2.9.

[106] CR 2019/15, p. 18, para. 14 (Al-Khulaifi).

[107] CR 2019/15, p. 22, para. 2 (Lowe).

31. Let me just note in passing that the Agent of Qatar referred in his speech to "regional mechanisms for dialogue and dispute settlement", being Article 10 of the GCC Charter[108]. Has Qatar made use of this mechanism?

32. Interestingly, Professor Lowe made an allusion, an alluring hint**,** to what may be behind Qatar's approach. He referred in passing as it were to Article 82 of the Chicago Convention, which provides that "the contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understanding"[109]. Professor Lowe stated that the Riyadh Agreements do not purport to override the ICAO Treaties and, because of the non-derogation clause in Article 82, they could not do so[110]. Are we to take this as a hint that Qatar feels that the Riyadh Agreements are contrary to this provision? If not, why introduce it?

33. In any event, Article 82 cannot be taken to override subsequent international agreements, accepted by all as binding, which do not refer at all to aviation matters and, indeed, Article 82 appears in the chapter of the Chicago Convention entitled "Other aeronautical agreements and arrangements"[111].

34. Further, I need to deal with Professor Klein's comment as to the scope of Article 3 of the Implementing Mechanism. He notes that this provision gives a right to countermeasures which is "virtually unlimited" and untenable, partly because it is succinct (something which one would have thought a virtue rather than a vice) and because the term "appropriate measures" could be understood to include violations of fundamental human rights and other imperative norms of general international law[112]. This goes to the extreme. The term is not unknown in international law, take for example Article 61 of the Amsterdam Treaty: "In order to establish progressively an area of freedom, security and justice, the Council shall adopt . . . *(d)* appropriate measures to

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[108] CR 2019/15, p. 18, para. 14 and fn. 18 (Al-Khulaifi).

[109] MA — ICAOA and ICAOB, Ann. 1, p. 30.

[110] CR 2019/15, p. 22, para. 2 (Lowe).

[111] MA — ICAOA and ICAOB, Ann. 1, p. 30, Chap. XVII.

[112] CR 2019/15, p. 40, para. 20 (Klein).

encourage and strengthen administrative cooperation"[113]. Are we to understand this to include measures breaching imperative norms?

35. Further, the whole tenor of the principles of *jus cogens* is firmly opposed to interpreting provisions so as to allow breaches of such norms.

36. I turn now to my final section with a few comments on the question of specialized agencies and jurisdiction.

4. Jurisdiction and specialized agencies

37. Surprisingly, Qatar has little to say about the particular status of specialized agencies or the principle of speciality. But perhaps not so surprising. Professor Klein merely states that there is no harm to the principle of speciality where the Council examines the invocation of countermeasures made in order to justify the violations of the Chicago Convention[114]. This is so succinct as to be positively misleading. These are highly important issues. I have taken the Court to its case law which shows clearly that considerations of the legal status and defined purposes of a particular specialized agency are critical to any discussion of jurisdiction. Suffice it to note the statement in the *Legality of the Use by a State of Nuclear Weapons* Advisory Opinion that "[i]nternational organizations are governed by the 'principle of speciality'"[115], whereby these organizations are limited by the powers expressly granted to them by States[116] and the statement by the Court in that case that where broad precatory words are present in the relevant convention, they must be interpreted in the light of the specific functions of the organizations[117] and are not, therefore, to be widely construed.

38. If the jurisdiction of the particular specialized agency is thus restrained, the competence of any dispute settlement mechanism must be similarly constrained.

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[113] Treaty Establishing the European Community, Art. 61, inserted by the Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts, signed on 2 Oct. 1997, *UNTS*, Vol. 2700, p. 164, Art. 2, para. 15

[114] CR 2019/15, p. 39, para. 18 (Klein).

[115] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 78–79, para. 25.

[116] CR 2019/13, p. 63, para. 30 (Shaw).

[117] CR 2019/13, p. 64, para. 31 (Shaw).

39. Mr. President, Members of the Court, this concludes my pleading in the second round. I am grateful for your kind attention and would invite you to call Mr. Olleson to address you now.

The PRESIDENT: I thank Professor Shaw for his statement. I shall now call on Mr. Olleson to address the Court. You have the floor.

Mr. OLLESON:

THIRD GROUND OF APPEAL: THE PRECONDITION OF NEGOTIATION

1. Thank you, Mr. President. Mr. President, Members of the Court, I return to respond to Qatar's submissions in respect of the third ground.

2. As in my first speech, I will focus on the jurisdictional aspect, addressing, first, the differences of law remaining between the Parties as to what is required by a precondition of negotiation, and second, the application of the law to the facts. Third, I will then very briefly address Qatar's position as to the admissibility objection.

3. Before doing so, I make a number of preliminary observations.

4. First, although dealt with last in the Appellants' pleadings, the third ground is free-standing, and could just as equally have been put first; it is based upon non-compliance with a clear, express and objective precondition to the jurisdiction of the Council. As such, as a matter of procedural economy, and in accordance with the Court's established freedom to select the grounds on which it will base its judgment[118], it is open to the Court to allow the appeals on the ground that Qatar did not comply with the precondition of negotiation~~,~~ as being the most "direct and conclusive" ground for its decision[119]. Its analysis could end there; at the beginning, as it were. If the Court were minded to adopt such an approach, however, we nevertheless suggest that it is important that the Court should address the deficiencies in the manner in which the Council dealt with the case so as to provide the Council with guidance for the conduct of future proceedings.

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[118] See e.g. *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I),* p. 298, para. 46; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* p. 180, para. 37*; Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978,* p. 18 para. 40; *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands* v. *Sweden), Judgment, I.C.J. Reports 1958,* p. 62; *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957,* p. 25.

[119] *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands* v. *Sweden), Judgment, I.C.J. Reports 1958,* p. 62.

5. Second, although the third ground is free-standing, there is however an interconnection with the second ground, in the sense that there is an evident inconsistency in the positions Qatar has adopted. On the one hand, Mr. Lowe clearly stated that "the dispute put before ICAO is solely, and really, about the Chicago Convention, IASTA, and civil aviation"[120]. On the other hand, in the context of its supposed compliance with the precondition of negotiation, Qatar continues to rely on supposed attempts to negotiate which, on any view, were self-evidently directed only to the dispute between the Parties relating to the Riyadh Agreements. Qatar cannot, of course, have it both ways; at a minimum, taking its case at face value, it cannot deny that it was incumbent upon it to seek to negotiate in respect of the dispute as to civil aviation which, it asserts, is what was submitted to the Council.

6. Third, it is useful to pause and consider what Qatar is asking the Court to hold. On the one hand, it protests that it has complied with the precondition of negotiation. But, on the other, it seeks at the outset, by reliance on its argument as to futility, to bypass the requirement that it should have made a "genuine attempt".

7. On Monday, I took you to Qatar's original position in its initial, abortive Applications dated 8 June 2017[121], the contemporaneous press reports, showing Qatar's initial opposition to any negotiation on any issue unless the measures were lifted[122], and its position in the Memorials accompanying its Applications dated 30 October 2017[123]. There was a studied silence on all these matters on Tuesday afternoon.

8. It has, however, been clear since at least your 2011 decision in *Georgia* v. *Russia* that, where a jurisdictional provision contains a precondition of negotiation, a "genuine attempt" to negotiate is required; and that has been affirmed in subsequent decisions, including the Court's

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[120] CR 2019/15, pp. 23–24, para. 6 (Lowe).

[121] CR 2019/14, p. 31, para. 41 (Olleson); see MA — ICAOA and ICAOB, Ann. 22, *Application (1) of the State of Qatar and accompanying Memorial, Complaint Arising under the International Air Services Transit Agreement done in Chicago on December 7, 1944,* 8 June 2017 (pp. 560–561); and *Application (2) of the State of Qatar and accompanying Memorial, Disagreement Arising under the Convention on International Civil Aviation done in Chicago on December 7, 1944*, 8 June 2017, (p. 580); judges' folder, tab 41.

[122] CR 2019/14, p. 32, para. 42 (Olleson).

[123] CR 2019/14, p. 32, para. 43 (Olleson); see MA — ICAOA and ICAOB, Ann. 23: *Application (A) and Memorial of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago, 1944)*, 30 Oct. 2017 (p. 601); judges' folder, tab 42; and *Application (B) and Memorial of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the International Air Services Transit Agreement, (Chicago, 1944)*, 30 Oct. 2017 (p. 599); judges' folder, tab 43.

April 2017 Provisional Measures Order in *Ukraine* v. *Russia*, rendered less than two months before the adoption of the airspace measures.

9. Qatar clearly is not a State with "limited resources"[124], and it could not credibly be suggested that it was unaware of what was required to comply with the precondition of negotiation, or, at least, that it could not have obtained appropriate advice. Even if Qatar had adopted a mistaken approach in its initial Applications in early June 2017, no such considerations can possibly apply in relation to the Applications dated 30 October 2017. The issue was clearly given some consideration; yet, just as clearly, Qatar took a conscious decision to argue that it was excused from compliance on the basis that any negotiations would have been "futile".

10. Mr. President, Members of the Court, there is here an important point of principle. As the Court has previously emphasized, preconditions of negotiation play an important function, including by ensuring the delimitation of the scope of a dispute and its subject-matter, and as a limitation on State consent[125]. The requirement of a genuine attempt means that the respondent State is given a choice of acceding to an offer to negotiate regarding that dispute, rather than exposing itself immediately to the jurisdiction of the relevant body[126].

11. A respondent State is thus entitled to insist on compliance with a precondition of negotiation before jurisdiction is invoked against it, and there is nothing improper in taking such a position, nor is it "absurd formalism"[127].

The PRESIDENT: Mr. Olleson, will you please speak more slowly for the interpreters to be able to follow you.

Mr. OLLESON: I shall do so Mr. President.

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[124] *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);* separate opinion of Judge Donoghue, p. 339, para. 25.

[125] *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)*, pp. 124–125, para. 131.

[126] CR 2019/14, p. 25, paras. 17–19 (Olleson); *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)*; separate opinion of Judge Greenwood, p. 328, para. 13.

[127] CR 2009/15, p. 43, para. 4 (Martin).

Conversely, there are good reasons of policy for the Court to be slow to endorse attempts to circumvent the precondition, and in particular a conscious and deliberate failure to comply, based on a unilateral assertion of supposed futility.

12. My fourth preliminary observation is ***that*** compliance with the precondition would not have been difficult. It would have sufficed for Qatar to have sent a letter to each of the Appellants in which it identified the alleged breaches of the Chicago Convention and/or IASTA, and requested negotiations in that regard. Such a letter would not have needed to have been long, nor would it have been particularly complex to draft. Certainly, it would not have needed to have been wrapped up with a bow, or even served on a golden platter[128].

13. This reality of course wholly belies the assertion that Qatar did "everything that can reasonably be expected of a State, and more"[129]. Clearly, it did not. Members of the Court, you are entitled to ask yourselves why it chose not to do so, and to draw the necessary consequences.

1. Legal issues as to the precondition of negotiation

14. I turn to the legal issues.

Areas of no dispute

15. There is much on which there is no dispute. Qatar does not dispute that the relevant jurisdictional provisions do indeed contain preconditions of negotiation[130]. Further, there is no dispute as to the Court's statement in *Georgia* v. *Russia* that the precondition of negotiation requires "at the least — a genuine attempt"[131].

16. Moreover, Qatar did not contest that, in order to qualify as a "genuine attempt" for these purposes, it must be made clear that a party is in fact seeking to negotiate in respect of this particular dispute[132]. Further, while Mr. Martin focused on what he said was the "principal issue" in

[128] CR 2009/15, p. 55, para. 49 (Martin).

[129] CR 2009/15. p. 58, para. 61 (Martin).

[130] CR 2019/15, pp. 43–44, para. 7 (Martin).

[131] CR 2019/15, pp. 43–44, para. 7 (Martin).

[132] CR 2019/14, p. 28, para. 26 (Olleson).

dispute, namely the question of "futility" (to which I shall come in a moment), he did not engage at all with the question of the required clarity in respect of the subject-matter of the dispute[133].

17. Instead, in the context of discussion of the supposed attempts to negotiate in the WTO, you were told that, in *Georgia* v. *Russia*, the Court "stated only that the negotiations must 'relate to the subject-matter of the dispute' — here, the aviation prohibitions"[134], and that "[t]he dispute, in turn, must 'concern the substantive obligations contained in the treaty' — here, obligations related to international civil aviation"[135]. That is essentially a repetition of the erroneous position in Qatar's Rejoinder, which I discussed on Monday[136]. There was no response to my submissions that it is manifestly wrong to focus on the particular measures at issue[137]; and that**,** where the dispute relates to allegations of breach of treaty, the "subject-matter of the dispute" is the question of compliance with the relevant substantive obligations[138].

18. Finally, in addition to the failure to engage with our general position on the level of clarity as to the subject-matter of the dispute required of any attempt to negotiate, there was no come back whatsoever in response to our reliance on the observations of Judge Greenwood as to the particular necessity, in a situation involving a wider dispute, of identifying with sufficient clarity the dispute in respect of which negotiations are in fact being sought[139].

Qatar's case on futility

19. I turn to Qatar's case on futility. Despite its protestations to the contrary[140], Qatar's insistence on its position in this regard is a clear recognition that the facts it relies upon to argue that it in fact complied with the precondition of negotiation are insufficient.

20. I explained on Monday why the Court's case law is clear beyond any peradventure that a "genuine attempt" is required in all circumstances. There was no attempt to counter the various

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[133] CR 2019/14, p. 27–29, paras. 23–34 (Olleson).

[134] CR 2019/15, p. 53, para. 41 (Martin).

[135] *Ibid.*

[136] CR 2019/14, pp. 28-29, paras. 29–31 (Olleson); RQ — ICAOA and ICAOB, para. 4.24.

[137] CR 2019/14, p. 28, para. 30 (Olleson).

[138] CR 2019/14, pp. 28–29, para. 31 (Olleson).

[139] CR 2019/14, p. 30, para. 35 (Olleson).

[140] CR 2019/15, p. 43, paras. 5–6 (Martin).

clear indications that the precondition involves a two-stage test, including the Court's statement at paragraph 159 of *Georgia* v. *Russia* that: "Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met."[141]

21. As in Qatar's Rejoinder, Qatar's position as to futility is unsupported by any authority, and it again sorts to bolster its case by general appeals to "good faith"[142] and "common sense"[143]. Although Qatar attempts to suggest that the approach enunciated in *Georgia* v. *Russia* "can only be understood in context"[144], and cannot be understood to be applicable to a situation in which there is an "absolute refusal", as I said on Monday, the relevant passages of the Court's decision are framed in an entirely general fashion, and without reference to the particular facts of the case[145].

22. In order to attempt to avoid the clear subjective element implicit in its position, Qatar next tried to suggest that, because the Appellants did not deny that they would not have been open to discussions, they must be taken to have admitted that this was the case. In the space of a few sentences, Qatar's position transformed in quick succession from, first, a suggestion that there was no denial[146], before becoming an assertion that the Appellants therefore "effectively admit"[147], and then a definitive statement that the Appellants had made a "concession"[148], and even an "admission that they were unwilling to negotiate with Qatar"[149]. The final stage in this metamorphosis was the categorical assertion that there was an "absolute — and admitted — refusal even to consider engaging in discussions with Qatar"[150]. This was a transparent attempt to shift the burden of proof.

23. Whilst we maintain our position that there is no exception in the case of evident futility, the Court is not, in fact, required to take a position in the present case on the question of principle;

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[141] *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. 133, para. 159; judges' folder, tab 39.

[142] CR 2019/15, p. 44, para. 9 (Martin).

[143] CR 2019/15, p. 44, para. 9 and p. 46, para. 17 (Martin).

[144] CR 2019/15, p. 44, para. 9 (Martin).

[145] CR 2019/14, p. 27, para. 22 (Olleson).

[146] CR 2019/15, p. 44, para. 10 (Martin).

[147] *Ibid.*

[148] CR 2019/15, p. 44, para. 11 (Martin).

[149] CR 2019/15, p. 45, para. 12 (Martin).

[150] CR 2019/15, p. 45, para. 13 (Martin).

whether or not there is an exception, the burden in this regard is self-evidently on Qatar, and it has failed to discharge it.

24. I therefore do not need to address Qatar's subsidiary arguments based on the supposed significance of the word "if" at the outset of the clauses, although I note that it is self-evidently inconsistent with Qatar's acceptance that the clauses constitute preconditions of negotiation[151].

25. Nor do I need to address the parallel drawn with the futility exception to the requirement of exhaustion of domestic remedies, which serves very different purposes[152], and in any event requires clear proof of futility based on actual prior attempts.

Negotiation through parliamentary diplomacy

26. The Parties agree that the precondition of negotiation may be satisfied through diplomacy by conference or parliamentary diplomacy. I said as much on Monday[153].

27. But, Qatar seeks to expand the holding of the Court in the *South West Africa* cases, and suggests that it is sufficient to comply with the precondition that a party merely seek to refer a matter to a forum where it might be considered through parliamentary diplomacy[154].

28. In *South West Africa* itself, the question was whether the precondition of negotiation was fulfilled, in circumstances in which the essential dispute had previously been extensively debated in the General Assembly; the Court stated that where the issue is

> "one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State after they have *already fully participated in the collective negotiations with the same State in opposition*"[155].

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[151] *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)*; dissenting opinion of Judge Cançado Trindade, p. 288, para. 109.

[152] *Interhandel (Switzerland* v. *United States of America), Preliminary Objections, I.C.J. Reports 1959*, p. 27; *Ambatielos (Greece/United Kingdom)* (1956), United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XII, p. 120.

[153] CR 2019/14, p. 35, para. 59 (Olleson).

[154] CR 2019/15, p. 51, para. 36 (Martin).

[155] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346; emphasis added.

29. Fulfilment of the precondition of negotiation through parliamentary diplomacy is therefore dependent upon the relevant subject-matter of the dispute in fact having been ventilated through "collective negotiations"[156] within the relevant forum.

The PRESIDENT: Could you please speak more slowly for the interpreters, please.

Mr. OLLESON: I do apologize, Mr. President.

2. The facts: Qatar has not complied with the precondition of negotiation

30. Mr. President, Members of the Court, I now turn to the facts.

31. Despite what I said on Monday as to the impermissibility of Qatar's tactic of asking the Court to "connect the dots"[157], this has become its principal argument. Significantly, Mr. Martin inverted the order in which he addressed the various categories; the transparent reason was so as to be able to rely upon the letters from June 2017 addressed to ICAO containing Qatar's allegations of breach, as forming the backdrop against which later general calls for "dialogue" should supposedly be understood.

32. However, if individual communications do not on their own constitute a "genuine attempt", the defect cannot be solved by seeking to consider them together in the round, in particular in circumstances in which the relevant statements are spread out over an extended period of time.

Supposed attempts to negotiate in the context of the ICAO proceedings

33. As regards Qatar's reliance on matters before ICAO, I dealt on Monday with the letters of 5 and 17 June 2017 and explained why they cannot be regarded as constituting a "genuine attempt"[158]. Undeterred by this, Mr. Martin essentially repeated what had been said in the written

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[156] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346; emphasis added.

[157] CR 2019/14, pp. 30–31, para. 38 (Olleson).

[158] CR 2019/14, p. 35, paras. 55–56 (Olleson).

pleadings in that regard, and, for good measure, made reference to Qatar's letter of 8 June 2017[159]. But, as with the other letters, this again contains no more than "claims" and "accusations"[160].

34. In a concession to our position in this regard, Qatar, somewhat grudgingly, accepted that these letters "did not seek to initiate bilateral negotiations, as such"[161]. It was suggested, however that this was "beside the point", since they were an attempt to "initiate a parliamentary diplomatic process"[162]. A short while ago I have explained why that position is flawed.

35. As to the Article 54 *(n)* proceedings themselves, it was suggested that Qatar initiated the Article 54 *(n)* proceedings "for the purpose of resolving the same dispute over the aviation prohibitions that it later brought before the ICAO Council for settlement"[163]. As I noted on Monday, Qatar undoubtedly tried to conflate the matters contained in its initial, abortive Applications with its request under Article 54 *(n)*[164]. But Qatar continues to fail to engage with the fact that it had made clear from the outset its intention to file Applications under the Article 84 procedure, and indeed to that end, had filed the abortive Applications dated 8 June 2017.

36. Mr. Martin took you on a whistle-stop tour of, in quick procession, the minutes of the Council meeting on 23 June 2017[165], the Appellants' joint working paper dated 14 July 2017[166], and the minutes of the Extraordinary Session on 31 July 2017, i.e., the Article 54 *(n)* proceedings[167]. Noticeably, however, he did not advert to the decision of the Council at the meeting on 23 June 2017 as to the approach to be adopted; in this context, the only point he highlighted was that the Council decided to convene an Extraordinary Session[168].

37. Mr. Martin only obliquely touched on the Council's decision, although without making any mention of the relevance of the abortive Applications. Whilst candidly acknowledging and

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[159] CR 2019/15, p. 48, para. 26 (Martin).

[160] CR 2019/15, p. 48, para. 26 (Martin).

[161] CR 2019/15, p. 49, para. 28 (Martin).

[162] CR 2019/15, p. 49, para. 28 (Martin).

[163] CR 2019/15, p. 51, para. 34 (Martin).

[164] CR 2019/14, p. 36, para. 60 (Olleson).

[165] CR 2019/15, pp. 49–50, para. 29 (Martin).

[166] CR 2019/15, p. 50, para. 30 (Martin).

[167] CR 2019/15, pp. 50–51, paras. 31–32 (Martin).

[168] CR 2019/15, pp. 49-50, para. 29 (Martin).

confirming that the Article 54 *(n)* proceedings had "only dealt with issues relating to contingency routes"[169], he stated that I had "appeared to suggest" that the Council had not considered the substance of the dispute because the Council itself had taken a decision in that regard[170]. That, however, was unequivocally my point — the question was decided by the Council on 23 June 2017[171]. Despite Qatar's attempts to suggest the contrary, self-evidently, only the Council had the power to take that decision; it was not a matter that lay within the power of the Appellants to impose on the Council.

38. Mr. Martin further accused us of "mischaracteriz[ing] . . . the record"[172], and suggested that the evidence I relied upon did not support our position.

39. The minutes of the meetings, however are clear; the suggestion that they show only that "the Council at all times insisted on maintaining the distinction between the Article 54 *(n)* and Article 84 processes"[173] does not reflect the tenor of what was decided on 23 June 2017, nor the views expressed by individual members of the Council[174].

40. In any event, the references put forward as being the evidence I supposedly relied upon, as reproduced by Mr. Martin, notably omitted the key paragraph of the minutes of the 23 June 2017 meeting which I had cited[***175***], where, in summarizing the foregoing discussions, the President of the Council "called on all Council Members to focus on technical matters"[176]. Further, the President's

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[169] CR 2019/15, p. 51, para. 34 (Martin).

[170] CR 2019/15, p. 51, para. 35 (Martin).

[171] MA — ICAOA and ICAOB, Ann. 34: *ICAO Council – 211st Session - Summary Minutes of the Meeting of the Tenth Meeting of 23 June 2017*, 11 July 2017, para. 55 (pp. 1557/1541); and see *ibid*., paras. 25–26 (pp. 1553/1537); and 40–41 (pp. 1555/1539). See also MA — ICAOA and ICAOB, Ann. 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 Aug. 2017, paras. 2 (pp. 1630/1614), and 69 (pp. 1642/1626).

[172] CR 2019/15, p. 51, para. 35 (Martin).

[173] CR 2019/15, p. 51, para. 35 (Martin).

[174] MA — ICAOA and ICAOB, Ann 34: *ICAO Council, 211st Session, Summary Minutes of the Meeting of the Tenth Meeting of 23 June 2017*, 11 July 2017, paras. 14 (Mexico); 17 and 37 (US); 21 (Turkey); 29 (Spain); 30 (Uruguay); 31 (Germany); 32 (Australia); and 34 (Brazil).

[175] CR 2019/14, p. 36, para. 59, fn. 90 (citation); cf. CR 2019/15, p. 51, para. 35, fn. 118 (Martin).

[176] MA — ICAOA and ICAOB, Annex 34: *ICAO Council, 211st Session, Summary Minutes of the Meeting of the Tenth Meeting of 23 June 2017*, 11 July 2017, para. 40; see also para. 55.

summary of the preceding discussion was expressly supported by a number of additional members of the Council[177]; notably, neither Qatar nor any other member raised any objection in that regard.

41. Equally, Mr. Martin omitted to reproduce all of the references I had given to the Minutes of the Extraordinary Session on 31 July 2017[178], including the President's request "that the council, consistent with the decision it had taken to convene this Extraordinary Session (211/10) [i.e. the meeting on 23 June 2017], focus its discussion on finding *technical solutions* to the matter at hand"[179].

WTO

42. As to Qatar's request for consultations in the context of the World Trade Organization (WTO), there is little I need to say in response. You were shown paragraph 8 of the requests, which referred to the "prohibition on Qatari aircraft from accessing [the Appellants'] airspace", and to the prohibitions of overflight and landing[180].

43. What you were not taken to are the later passages of these documents, at paragraphs 11 and 12, which demonstrate that these measures were relied upon as constituting alleged breaches of the GATT and GATS[181]. I explained on Monday why a specific request such as this for consultations in respect of alleged breach of WTO obligations could not reasonably have been

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[177] MA — ICAOA and ICAOB, Ann. 34: *ICAO Council, 211st Session, Summary Minutes of the Meeting of the Tenth Meeting of 23 June 2017*, 11 July 2017, paras. 42–44 (Congo, Ecuador, Kenya, Saudi Arabia, South Africa, Tanzania, Turkey and Spain) and paras. 46–50 (United States, Egypt, UAE, Colombia, and Nigeria).

[178] ***178 CR 2019/15, p. 51, para. 35, fn. 118 (Martin); cf. CR 2019/14, p. 36, para. 59, fn. 90 (Olleson).***

[179] MA — ICAOA and ICAOB, Ann. 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 Aug. 2017, para. 69.

[180] CR 2019/15, p. 52, para. 38 (Martin); MA — ICAOA, Ann. 25, Exhibit 11, WTO, *Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS528/1 (4 Aug. 2017), paras. 8 (i), 8 (iv); MA — ICAOA, Ann. 25, Exhibit 12; MA — ICAOB, Ann. 25, Exhibit 11, WTO, *Bahrain — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS527/1 (4 Aug. 2017), paras. 8 (i), 8 (iii); MA — ICAOA, Ann. 25, Exhibit 13/MA —ICAOB, Ann. 25, Exhibit 12, WTO, *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS526/1 (4 Aug. 2017), paras. 8 (i), 8 (v).

[181] MA — ICAOA and ICAOB, Ann. 25, Exhibit 11, WTO, *Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS528/1 (4 Aug. 2017), paras. 10 *(a), (b), (c), (d),* and *(e)* (GATT) and 12 *(f), (g), (h)* and *(i)* (GATS); MA — ICAOA, Ann. 25, Exhibit 12/MA — ICAOB, Ann. 25, Exhibit 11, WTO, *Bahrain — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS527/1 (4 Aug. 2017), paras. 10 *(a), (b), (c), (d), (e),* 8 (iv) (GATT) and 12 *(f), (g), (h)* and *(i)* (GATS); MA — ICAOA, Ann. 25, Exhibit 13/MA — ICAOB, Ann. 25, Exhibit 12, WTO, *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS526/1 (4 Aug. 2017), paras. 10 *(a), (b), (c), (d)* and *(e)* (GATT) and 12 *(f), (g)* and *(h)* (GATS).

understood by the relevant States as being a request for negotiations under the Chicago Convention and/or IASTA[182]. And I have also explained already why Qatar's continued convolutions as to the required clarity as to the subject-matter of any genuine attempt to initiate negotiations are likewise flawed.

Supposed direct attempts to negotiate

44. Mr. President, Members of the Court, as regards Qatar's supposed direct attempts to negotiate, Qatar has apparently come to accept the weakness of its alleged direct attempts. It apparently hopes that, by inviting the Court to **"**connect the dots**"** between its supposed direct offers to engage in "dialogue" and its letters to the ICAO Council, it can somehow make up for its glaring failure to make any genuine attempt to initiate negotiations. Indeed, no response was offered to the point that Qatar's various supposed direct attempts to negotiate contained in press releases were insufficiently clear, and did not in fact seek to initiate negotiations[183].

45. Qatar's reliance on the Emir's speech on 22 July 2017 is particularly striking. It was suggested that the call for dialogue was "on all contentious issues", which included "the aviation prohibitions which Qatar had already brought to the attention of ICAO", and which were supposedly "specifically mentioned" during the speech[184]. When one examines the text of the speech, however, the only possible reference to the aviation prohibitions is an expression of thanks by the Emir to "those who opened their airspace and territorial waters when our brothers closed theirs"[185].

46. Mr. Martin also proclaimed that "[a] public call for dialogue sounds an awful lot like an invitation to negotiate to me"[186]. Mr. Martin's personal assessment in this regard — together with his professed inability to understand the Appellants' argument[187] — are obviously to be taken with a rather large pinch — ***if*** not a handful — of salt. The Court's case law is clear, and requires not

[182] CR 2019/14, p. 37, para. 66 (Olleson).

[183] CR 2019/14, pp. 32–33, paras. 45–48 (Olleson).

[184] CR 2019/15, p. 54, para. 46 (Martin).

[185] CMQ — ICAOA and ICAOB, Ann. 86, p. 7.

[186] CR 2019/14, p. 55, para. 49 (Martin).

[187] CR 2019/15, p. 55, para. 49 (Martin).

just a general call for dialogue but "a genuine attempt . . . to engage in discussions with the other disputing party, with a view to resolving the dispute"[188].

47. In any event, the further question is "an invitation to negotiate" what? Again, Qatar's continued failure to engage on this point seeks to side-step the Court's settled jurisprudence as to the clarity required of any attempt to negotiate[189].

48. The attempt to resuscitate the relevance of the telephone call of 8 September 2017 between the Emir of Qatar and the Crown Prince of Saudi Arabia suffers from the same flaw[190]. No serious attempt was made to respond to the points I made in this regard; nor can anything of value be derived from the subsequent disagreement between Qatar and Saudi Arabia, whatever its cause.

Supposed attempts through third party facilitation and mediation

49. I turn finally to Qatar's supposed attempts to negotiate through the facilitation of third parties.

50. There was no response to the points I had made on Monday as to why Qatar's reliance on this category of supposed attempts manifestly failed to satisfy the precondition of negotiation[191]. Qatar remained unable to point to any evidence that any of the Kuwait- or US-led efforts ever mentioned the dispute under the ICAO treaties, let alone included an invitation to negotiate that specific dispute. Mr. Martin, for example, quoted the former US Secretary of State as stating that "Qatar has been very clear — they are ready to engage"[192]. But the question, again, is "engage" regarding what?

51. In this context, it was suggested that I had introduced a new argument, that "attempts by third parties to mediate or facilitate resolution of a dispute are incapable of fulfilling the

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[188] *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; judges' folder, tab 39.

[189] 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. 133, para. 161; see also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 120–121, para. 43.

[190] CR 2019/15, p. 55, para. 50 (Martin).

[191] CR 2019/14, pp. 37–38, para. 68 (Olleson).

[192] CR 2019/15, p. 57, para. 57 (Martin).

precondition of negotiations"[193]. But this misrepresents my argument by omitting the continuation of what I said: "at least if they do not in fact result in discussions between the parties involved"[194].

52. Here, again, Qatar reverted to seeking to persuade the Court to **"**connect the dots**"**, it being asserted that third party efforts "related to the disputes in their entirety, *including the subset relating to civil aviation*, which had long since been placed on the ICAO agenda"[195].

53. If there were any doubt about just how weak Qatar's position on this category of negotiation is, it became apparent with Mr. Martin's remark that, "if the issue of the aviation prohibitions never expressly came up, it was only because of the Joint Appellants' absolute refusal to discuss any issue involving Qatar"[196]. That is an express recognition that Qatar never in fact raised the aviation prohibitions, let alone attempted to negotiate the dispute concerning substantive obligations under the ICAO treaties. Qatar's complaint about why it failed to do so is obviously unavailing. Nothing ever prevented Qatar from raising the issue of the aviation prohibitions, and requesting negotiations in respect of the dispute concerning substantive obligations under the ICAO treaties, in a simple communication to the Appellants, whether directly or via third parties.

3. The admissibility issue

54. Finally, I turn to Qatar's response on the admissibility issue; here there was very little to which to respond. Mr. Martin simply repeated Qatar's position from its Rejoinder as to the need for a "statement"[197], without engaging with the point I raised that Qatar's statement itself stated that no negotiations had taken place. And there was no response on the other points made about, for example, Qatar's purported amendment before the Council.

55. Mr. President, Members of the Court, that concludes my remarks. I would ask you to invite my friend and colleague Professor Akhavan to the podium.

The PRESIDENT: I thank Mr. Olleson for his statement and I will now give the floor to Mr. Akhavan. You have the floor.

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[193] CR 2019/15, p. 57, para. 58 (Martin).

[194] CR 2019/14, p. 38, para. 70 (Olleson).

[195] CR 2019/15, p. 58, para. 60 (Martin).

[196] CR 2019/15, p. 58, para. 61 (Martin).

[197] CR 2019/15, pp. 58–59, paras. 62–65 (Martin).

Mr. AKHAVAN:

THE DISPOSITION OF THE CASE

1. Mr. President, distinguished Members of the Court. My colleagues have now addressed the three grounds of appeal. It is my task to address the relationship between them, and the ways in which the Court could dispose of this case.

1. First ground: absence of due process

2. As I explained in the first round of pleadings, if the Appellants succeed on the first ground regarding due process, then the decisions are null and void *ab initio*; it would be unnecessary to consider the second and third grounds[198].

3. On Tuesday, counsel for Qatar argued that voting by secret ballot, based on political instructions, without any deliberations or a reasoned decision, is somehow consistent with due process; she reasoned that it is not excluded by the Council's rules of procedure or its past practice[199]. It is a rather curious logic. It is obvious that the rules applicable to the Council's judicial functions cannot be the same as those regarding its political or technical functions. Dispute settlement in international law cannot be equated with voting on motions and amendments.

4. Maître van der Meulen has explained why the procedure for reaching the decisions was manifestly inconsistent with elementary principles of due process. Consistency with the Council's prior practice is irrelevant. If anything, these systemic defects are a compelling reason for the Court to ensure that they do not continue into the future. The Court's supervisory authority is not a substitute for the Council's obligation to respect due process.

5. By declaring the flawed decisions null and void *ab initio*, the Court would set an important precedent. It would provide guidance and encourage the Council and other United Nations specialized agencies to exercise their judicial functions properly[200].

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[198] CR 2019/13, p. 35, para. 12 (Akhavan).

[199] CR 2019/15, pp. 65–69, paras. 20–36 (Malintoppi).

[200] CR 2019/13, p. 32, para. 2 (Akhavan).

2. Second ground: the Council's lack of competence

6. This brings me to the second and third grounds of appeal. Should the Court not dispose of this case based on the first ground, either the second or third ground would be sufficient to conclude that the Council does not have jurisdiction. It would not be necessary to consider the other ground[201].

7. In respect of the second ground, Professor Shaw and Dr. Petrochilos have addressed Qatar's obligations under the Riyadh Agreements and general international law. These relate to counter-terrorism and non-intervention. Their breaches, and the measures adopted in response, are plainly outside the competence of the Council. At best, the solution proposed by Qatar in its written pleadings[202] for the partial exercise of jurisdiction would mean that the Council could not determine State responsibility, because it could not address the circumstances precluding wrongfulness[203].

8. Beyond these points of law, however, it is important to pause and consider the practical outcome if the Council were to exercise jurisdiction over issues wholly unrelated to civil aviation. Let us consider the example of obligations concerning counter-terrorism.

9. For the purpose of this appeal on jurisdiction, the Appellants have limited their evidence to establishing the real issue in dispute between the Parties. The approach would be different if this were a case on the merits where the Riyadh Agreements were at issue. How do States establish whether another State is supporting terrorist groups, such as Al-Qaida or Da'esh? For example, Egypt's Ministry of Interior knew in December 2016 that the suicide-bomber who massacred Coptic Christian worshippers had been radicalized by Muslim Brotherhood leaders in Qatar[204]. How it acquired that information is a highly sensitive matter of national security, implicating intelligence sources.

10. Let us now imagine that Qatar's violations of the Riyadh Agreements came before the ICAO Council on the merits. Its 36 Members are State representatives that, in Qatar's view, are "not independent individuals"[205]. In fact, they are almost all diplomats, civil aviation officials,

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[201] CR 2019/13, p. 35, para. 12 (Akhavan).

[202] CMQ — ICAOA and ICAOB, para. 3.69; see also RQ ICAOA and ICAOB, para. 3.46.

[203] CR 2019/13, p. 34, paras. 9–10; CR 2019/14, pp. 15–16, paras. 28–33 (Petrochilos).

[204] MA — ICAOA, para. 2.35; MA — ICAOB, para. 2.34; MA — ICAOA and ICAOB, Vol. V, Ann. 71.

[205] CR 2019/15, p. 68, para. 30 (Malintoppi).

air-traffic controllers, and airline pilots. In Qatar's view, in the exercise of their judicial functions, they would be entitled to make a decision on these highly complex questions of counter-terrorism, taking instructions from their capitals, voting by secret ballot, and without providing any reasons whatsoever.

11. Let us consider further the issues that would arise in presenting sensitive evidence in such a proceeding. Even sophisticated international courts and tribunals with experienced judges have had great difficulty addressing evidence with national security implications.

12. The Court has previously faced situations where parties have refused to provide evidence on national security grounds. In the *Corfu Channel* case for instance, the United Kingdom refused to produce military orders, and the officer who had executed the order refused to testify during oral proceedings, on the basis of "naval secrecy"[206]. The Court had to determine whether it would draw an adverse inference for this refusal, and declined to do so in the circumstances of the case[207].

13. In the *Bosnia Genocide* case, Serbia refused to provide unredacted versions of certain documents, invoking national security[208]. In a divided decision, the majority of the judges declined to order Serbia to produce the documents, merely noting Bosnia's "suggestion that the Court may be free to draw its own conclusions"[209].

14. The International Criminal Tribunal for the Former Yugoslavia ("ICTY") has confronted similar refusal by States to divulge sensitive information. This included members of NATO. There were sophisticated procedures in place, such as holding *in camera* or *ex parte* hearings[210], justification of non-disclosure[211], confidentiality and security arrangements[212], but States still refused to furnish evidence on grounds of national security.

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[206] *Corfu Channel (United Kingdom* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 32.

[207] *Corfu Channel (United Kingdom* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 32.

[208] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 96-97, paras. 128–129.

[209] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 128-129, paras. 205–207.

[210] *Prosecutor* v. *Blaškić (Decision on the Objection of the Republic of Croatia to the Issuance of* Subpoenae Duces Tecum*)*, International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Chamber II, IT-95-14-T (18 July 1997), para. 148.

[211] *Prosecutor* v. *Blaškić (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II on 18 July 1997)*, ICTY, Appeals Chamber, IT-95-14-AR108 *bis* (29 Oct. 1997), para. 68.

[212] *Prosecutor* v. *Milutinović, Sainović, Odjanić, Pavković, Lazarević, Dorđević, Lukić (Decision on Request of the United States of America for Review)*, ICTY, Appeals Chamber, IT-05-87-AR108 *bis*.2 (12 May 2006), para. 37.

15. If this is the experience of international courts and tribunals, what would be the situation before the ICAO Council, which is unable to observe even the most elementary norms of due process? In Qatar's view, it is not even required to act like a judicial body[213]. It is one thing for civil aviation experts to address aircraft safety, navigation standards, contingency routes, and the like, and yet another for them to make legal findings on terrorism and espionage.

16. The metaphor of the "square peg in a round hole" describes perfectly Qatar's position. The Council is clearly not fit for this purpose; States parties to the Chicago Convention and IASTA never consented to litigate questions of counter-terrorism and non-intervention before 36 State representatives, without any qualifications on such matters, whose judicial function is narrowly confined to matters of technical expertise.

17. Mr. President, it is not difficult to see that the Council's exercise of jurisdiction over the Riyadh Agreements and countermeasures would have unfortunate consequences. It would not only violate the principle of speciality[214], but also politicize a United Nations specialized agency and invite its dysfunction. As counsel for Qatar noted yesterday, ICAO has functioned well exactly because it is a "technical body" that has enjoyed success in "finding practical solutions to problems" within its competence[215]. If the Riyadh Agreements and countermeasures issues are litigated before the Council, in an adversarial proceedings bereft of due process, without any competence or capacity to handle highly sensitive issues of national security and confidential evidence, it is not difficult to envisage the outcome. The Parties would end up before this honourable Court again, in an even worse situation than today, with an even more intractable dispute to resolve.

3. Third ground: precondition of negotiation

18. This brings me to the third ground of appeal, namely Qatar's manifest failure to satisfy the precondition of negotiation. As I explained in our first round pleadings, disposing of the case on

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[213] CR 2019/15, pp. 68–69, para. 33 (Malintoppi).

[214] CR 2019/13, pp. 32, 42, paras. 2, 36 (Akhavan), pp. 62, 63–64, 68, paras. 24, 29–341, 48 (ii) (Shaw).

[215] CR 2019/15, p. 23, para. 4 (Lowe).

this third ground would mean that the Court would not need to make a ruling on the second ground[216].

19. My colleague Mr. Olleson has explained in detail why Qatar did not make a genuine attempt to negotiate on matters of civil aviation.

20. It was telling that counsel for Qatar dismissed this fundamental requirement as an "absurd formalism"[217]. But this view does not comport with your jurisprudence. The Court has repeatedly affirmed that negotiation is a fundamental means of dispute settlement, and, in appropriate circumstances, a precondition to jurisdiction, even or especially where there is a serious controversy among States.

21. Consider *Georgia* v. *Russia*. That case came before the Court in the context of an armed conflict and allegations of "ethnic cleansing". Even in those extreme circumstances, the Court did not dispense with an exacting requirement of prior negotiations on the subject-matter in dispute. It would be plainly inconsistent for the Court to disregard the same requirement in this case.

22. Mr. President, it is with good reason that the Court's jurisprudence has treated the requirements of prior negotiations seriously. Recourse to international courts and tribunals is meant to be the last resort, not the first. This is especially so when there are complex, multilayered disputes that cannot be disentangled from one another.

23. Qatar wants to hold others accountable on civil aviation matters, while avoiding its own accountability for terrorism and interference in the affairs of other States.

24. Mr. President, Qatar had every opportunity to resolve the dispute between the Parties under the Implementing Mechanism of the Riyadh Agreements; even in 2017, it had every opportunity to attempt to negotiate on civil aviation issues. It manifestly failed to do so before the filing of its Applications with the Council; and the Council erred in disregarding Qatar's manifest failure. The Appellants respectfully invite the Court to uphold the third ground of appeal, and find that the Council is without jurisdiction.

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[216] CR 2019/13, p. 35, para. 12 (Akhavan).

[217] CR 2019/15, p. 43, para. 4 (Martin).

4. Concluding remarks

25. Mr. President, distinguished Members of the Court. This concludes the oral pleadings of the Appellants. It has been an honour to appear before you in this proceeding and I thank you for your kind attention.

26. The four Agents will now end the second round hearing on behalf of the Appellants. First, the Agent of Bahrain will address you, followed by the Agent of Egypt. The Agent of the United Arab Emirates will then read the submissions in respect of Application B, following which the Agent of Saudi Arabia will read the submissions in respect of Application A. I now ask that you call the honourable Agent of Bahrain to the podium.

The PRESIDENT: I thank Mr. Akhavan for his statement and I will now invite the Agent of the Kingdom of Bahrain, H.E. Sheikh Fawaz bin Mohammed Al Khalifa to take the floor. You have the floor, Sir.

Sheikh AL KHALIFA:

STATEMENT BY THE AGENT OF THE KINGDOM OF BAHRAIN

1. Mr. President, Madam Vice-President, esteemed Members of the Court, it is an honour to address you again and to make brief concluding remarks on behalf of the Kingdom of Bahrain.

2. For over 20 years, the leaders of the GCC States made serious efforts to restrain Qatar's support for terrorism and other forms of extremism. Such efforts were made in the GCC framework and under the Riyadh Agreements.

3. In the Riyadh Agreements, the leaders committed to take specific actions in relation to specific international and regional threats[218]. They also set up an implementation mechanism[219].

4. Throughout this process, the State of Qatar constantly failed to honour its leader's words. It did not respond to other States' calls for compliance with its international law obligations.

5. The Riyadh Agreements are not mere factual background, as Qatar says[220]. They are the heart of the dispute.

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[218] MA — ICAOA and ICAOB, Anns. 19, 20 and 21.

[219] MA — ICAOA and ICAOB, Ann. 20, preamble, second paragraph.

[220] CR 2019/15, p. 22, para. 2 (Lowe).

6. The measures which the four States took in June 2017 are the consequence of Qatar's non-compliance with its international law obligations, in particular under the Riyadh Agreements. This is the real dispute before the ICAO Council, and this Court. Those measures are not the cause of a manufactured court case.

7. Let me say a few words about Qatar's criticism on Tuesday that the four States failed to raise concerns within regional mechanisms, specifically Article 10 of the GCC Charter[221].

8. Qatar seems to suggest that it is an appropriate forum for the resolution of the dispute before the Court, but it has not come to that forum itself. Nor has Qatar sought to use the executive procedures set out in the implementing mechanism.

9. Qatar also argued on Tuesday that the four States refused to participate in the mediation by Kuwait[222]. This is wrong. We are indeed participating, even today. For its part, Qatar never made any attempt to discuss civil aviation issues in regional forums.

10. For our part, Bahrain is always open to discuss the real dispute between the Parties in such forums.

11. It is now for Qatar to show goodwill.

12. Thank you, Mr. President, Madam Vice-President, honourable judges, for hearing the Kingdom of Bahrain. Let me also thank the Registrar and his staff, the interpreters and the court reporters for their services during these proceedings.

13. I request that you call the Agent for Egypt to the podium.

The PRESIDENT: I thank the Agent of the Kingdom of Bahrain and I will now give the floor to the Agent of the Republic of Egypt, H.E. Mr. Amgad Abdel Ghaffar. You have the floor, Sir.

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[221] CR 2019/15, p. 18, para. 14, fn. 18 (Al-Khulaifi). See also CMQ — ICAOA, para. 2.52; fn. 145.

[222] CR 2019/15, p. 56, paras. 52-54 (Martin).

Mr. GHAFFAR:

STATEMENT BY THE AGENT OF THE ARAB REPUBLIC OF EGYPT

1. Bismillah al-Rahman al-Rahim. Mr. President, Members of the Court, it is an honour to address you again as the Agent of the Arab Republic of Egypt at the conclusion of our oral pleadings.

2. Qatar has confirmed, in this proceeding, that its case before the ICAO Council is not a simple dispute about civil aviation. The Parties would not be before you in this unfortunate situation if Qatar had complied with its obligations under the Riyadh Agreements and under general international law. There would not be any airspace restrictions if Qatar respected the principles of counter-terrorism and non-interference in the internal affairs of other States.

3. On Tuesday, the distinguished Agent for Qatar described the inconvenience to passengers who had their flights cancelled when the airspace restrictions were imposed in June 2017; but he said nothing about the grave humanitarian consequences for Egypt and its people of Qatar's direct support for extremists. He complained that Qatar Airways flights are disrupted, but said nothing about the many innocent civilians who have been murdered at the hands of terrorists supported by Qatar.

4. The Agent of Qatar described Al Jazeera as a media outlet, just like the BBC or Radio France. This comparison is simply not credible. Whatever image is presented to the wider world through the Al Jazeera English language service, its Arabic language services are notorious. They provide a platform for extremists and serve Qatar's foreign policy by fomenting violence and instability among its neighbours. The Agent for Qatar considers Al Jazeera featuring what he described merely as "controversial figures" a cause for celebration. The true analogy would be if the BBC or PBS regularly invited far-right extremists to advocate violence against religious minorities.

5. Mr. President, international law prohibits such hate speech and incitements to violence. Qatar has completely ignored that the Riyadh Agreements expressly singled out its use of Al Jazeera as a harmful practice that it must stop. Qatar would not have signed these agreements unless it recognized that solving the problem was within its control.

6. Mr. President, Egypt's purpose in imposing the airspace restrictions was to induce Qatar to end its harmful conduct. All it takes to resolve the situation is for Qatar to respect the sovereignty of other States and the fundamental principles of international law. Egypt has always pursued friendly relations and multilateralism, especially with its fellow Arab League members.

7. I would like to take this opportunity to thank you, Mr. President, Members of the Court, the Registry, the Court staff and the court reporters, for your consideration and assistance in these proceedings. This concludes the statement of Egypt. I invite you to call to the podium the Agent of the United Arab Emirates. Thank you.

The PRESIDENT: I thank the Agent of the Arab Republic of Egypt and I will now give the floor to the Agent of the United Arab Emirates H.E. Hissa Abdullah Al-Otaiba

Ms AL-OTAIBA:

STATEMENT BY THE AGENT OF THE UNITED ARAB EMIRATES

1. Bismillah al-Rahman al-Rahim. Mr. President, distinguished Members of the Court, I will conclude the submissions of the United Arab Emirates.

2. The Agent for Qatar characterized this appeal as a "transparent attempt to evade accountability"[223].

3. This statement is ironic in the extreme and encapsulates what is wrong about Qatar's claims before the ICAO Council. In truth, in submitting its claims to the ICAO Council, it is Qatar which is seeking to evade accountability.

4. We need look no further than the Riyadh Agreements to understand why this is the case. By signing the Riyadh Agreements, Qatar consented to all of their terms and conditions. Those agreements contained a crucial provision, granting each party the right to take whatever measures they deemed appropriate to protect their security and stability, in the event that another party violated its obligations[224].

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[223] CR 2019/15, p. 17, para. 12 (Al-Khulaifi).

[224] MA — ICAOA and ICAOB, Ann. 20, pp. 526, 528; MA — ICAOA and ICAOB, Ann. 21, p. 539.

5. Granting this right to each party reflected the gravity of the extremist and terrorist threats that the Riyadh Agreements were intended to address.

6. To emphasize the importance of this right and the seriousness of this obligation, it was set out not once but in three separate provisions in two of the three Riyadh Agreements[225].

7. All parties understood the self-judging nature of this right, which imposed no specific limitations on the type of measures which could be taken to protect the parties' security and stability.

8. It is obvious that this right did not allow resort to force, violations of human rights or other such obligations that no State should ever violate. It is equally obvious that this right was intended to apply to a very broad range of measures. Otherwise, there would have been no reason for each party to specifically consent to granting this right through the Riyadh Agreements.

9. The measures taken by the UAE and the other Appellants on 5 June 2017, including the aviation restrictions, were validly taken on the basis of this right following their determination that Qatar continued to be in persistent violation of the Riyadh Agreements. That is clear from the public statements announcing these measures.

10. Qatar seeks to escape the consequences of its broken commitments by asking the ICAO Council to declare those same measures unlawful.

11. Qatar's failure to comply with its binding commitments under the Riyadh Agreements is the real dispute between the Parties. This is a crisis of Qatar's "own making"[226]. To say otherwise is disingenuous.

12. Mr. President, I shall now read the Appellants' Final Submissions regarding Application B on behalf of the Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates. They are as follows:

> "1. In accordance with Article 60, paragraph 2, of the Rules of the Court, and for the reasons set out during the written and oral phase of the pleadings, the Kingdom of Bahrain, the Arab Republic of Egypt 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 (B) dated 30 October 2017 against the three States pursuant to Article II, Section 2 of the IASTA.

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[225] MA — ICAOA and ICAOB, Ann. 20, pp. 526, 528; MA — ICAOA and ICAOB, Ann. 21, p. 539.

[226] CR 2019/15, p. 14, para. 3 (Al-Khulaifi).

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 the State of Qatar and the Appellants submitted by Qatar to the ICAO Council by Qatar's Application (B) dated 30 October 2017; and

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

13. Thank you, Mr. President, Madam Vice-President, and honourable Judges, for hearing the United Arab Emirates. I request that you call the Agent for Saudi Arabia to the podium.

The PRESIDENT: I thank the Agent of the United Arab Emirates. The Court takes note of the Final Submissions which you have just read on behalf of the Applicants, with respect to the case concerning the *Appeal relating to the jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates* v. *Qatar).* I will now call upon the Agent of the Kingdom of Saudi Arabia, H.E. Abdulaziz bin Abdullah bin Abdulaziz Abohaimed, to take the floor. You have the floor, Sir.

Mr. ABOHAIMED:

STATEMENT BY THE AGENT OF THE KINGDOM OF SAUDI ARABIA

1. Bismillah al-Rahman al-Rahim. Mr. President, Members of the Court, in closing let me thank the Registrar and his staff for their services during these proceedings; I would like also to give particular thanks to the interpreters for their excellent translation, and the court reporters for their assistance.

2. We also thank you, Mr. President, and Members of the Court, for your kind attention.

3. Mr. President, in accordance with Article 60, paragraph 2, of the Rules of Court, I shall now read the Appellants' Final Submissions regarding Application A on behalf of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates. They are as follows:

"1. In accordance with Article 60, paragraph 2, of the Rules of the Court, and for the reasons set out during the written and oral phase of the pleadings, 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 the State of 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."

4. With great respect, thank you, Mr. President, Madam Vice-President, and honourable Members of the Court.

The PRESIDENT: I thank the Agent of the Kingdom of Saudi Arabia. The Court takes note of the final submissions which you have just read on behalf of the Applicants with respect to the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates* v. *Qatar).* The Court will meet again tomorrow, Friday 6 December 2019, at 3 p.m. The sitting is adjourned.

The Court rose at 12.05 p.m.

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