Corrigé
Corrected

CR 2019/15

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Tuesday 3 December 2019, at 3 p.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 mardi 3 décembre 2019, à 15 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 afternoon to hear the first round of oral argument of Qatar. I shall now give the floor to Mr. Mohammed Abdulaziz Al-Khulaifi, Agent of Qatar. You have the floor, Sir.

Mr. AL-KHULAIFI:

I. INTRODUCTORY STATEMENT

1. Mr. President, honourable Members of the Court, it is a great privilege to appear before you as the Agent of the State of Qatar in these important proceedings.

2. Qatar comes before the Court to address the appeal of the four Joint Appellants from decisions of the Council of the International Civil Aviation Organization, which I will refer to as the Council, issued on 29 June 2018. In those decisions, the Council upheld its jurisdiction to decide Qatar's claims against the Joint Appellants arising under the Convention on International Civil Aviation and the International Air Services Transit Agreement, to which I will collectively refer as "the ICAO Treaties".

3. I appear before you in circumstances that are, without question, urgent. As it stands, Qatar appears before the Court as a respondent, but it is the Joint Appellants that seek to prevent the Council from considering and resolving a crisis of the Joint Appellants' own making. Qatar's claims before the Council originate in events that date back almost two and a half years, to 5 June 2017, when the Joint Appellants imposed a series of aviation prohibitions so unprecedented in the scope and so brazen in their illegality that they shocked the global community and caused widespread disruption to the international civil aviation system.

4. Specifically, starting on 5 June 2017, and without any warning whatsoever, the Joint Appellants banned all Qatari-registered aircraft from flying to or from the Joint Appellants' airports and from overflying their national airspaces and flight information regions (FIR)[1]. These aviation prohibitions were shocking in the suddenness of their imposition, causing a serious disruption not just to Qatari-registered aircraft, but to all air traffic on those routes. Indeed, several flights were in the air when the Joint Appellants' prohibitions were announced, forcing those flights to make

[1] CMQ — ICAOA, paras. 2.5-2.10; CMQ — ICAOB, paras. 2.6-2.11.

immediate route changes. Other flights were cancelled without warning, with over 70 flights being cancelled on 6 June 2017 alone[2]. Hundreds of passengers, including pilgrims who travelled to Mecca to perform Umrah during the holy month of Ramadan, were stranded, with no direct route back to Qatar[3]. Over the first week, tens of thousands of passengers' reservations were cancelled[4].

5. Because Qatar's airspace is geographically surrounded by the Joint Appellants' airspace and flight information regions, Qatari aircraft were almost entirely disabled from flying into and out of Qatar after 5 June 2017[5].

. . . . . .

The PRESIDENT: Mr. Al-Khulaifi, I am told that your microphone is not working. There must be a technical issue and I would like to invite the technicians to check it. Okay, you may now continue.

Mr. Al-Khulaifi: Thank you, Mr. President.

Where once Qatari aircraft had 13 routes in and out of Doha, including routes over the Joint Appellants' territories, Qatari aircraft were suddenly reduced to flying in and out of Qatar on only two dedicated flight routes[6]. Our national carrier, Qatar Airways, was forced to cancel more than 50 flights a day and discontinue operations to 18 destinations in the Joint Appellants' territories[7].

6. Mr. President, honourable Members of the Court, even as I stand before you today, all Qatari-registered aircrafts are still prohibited from flying over the Joint Appellants' territories, and from taking off and landing at their airports. Never before has any State, let alone four States

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[2] CMQ — ICAOA, para. 2.11 (citing "Gulf blockade disrupts Qatar Airways flights", Al Jazeera (7 June 2017) (CMQ — ICAOA, Vol. IV, Ann. 73); see also CMQ — ICAOB, para. 2.12.

[3] CMQ — ICAOA, para. 2.11 (citing "Qatar row: Air travellers hit by grounded flights", BBC (5 June 2017) (CMQ — ICAOA Vol. IV, Ann. 68); Naveed Siddiqui, "550 Pakistani pilgrims stranded in Qatar flown to Muscat", Dawn (6 June 2017) (CMQ — ICAOA) Vol. IV, Ann. 70); see also CMQ — ICAOB, para. 2.12.

[4] CMQ — ICAOA, para. 2.11 (citing "Slump in travel to and from Qatar as thousands of airline bookings are cancelled", The National (13 June 2017) (CMQ—ICAOA Vol. IV, Ann. 77); see also CMQ—ICAOB, para. 2.12.

[5] CMQ — ICAOA, paras. 2.6-2.10; see also CMQ — ICAOB, paras. 2.7-2.11.

[6] CMQ — ICAOA, paras. 2.14-2.15; tab 1, Thirteen ATS Routes Available Pre-Aviation Prohibitions (Fig. 1); Tab 2, Two ATS Routes Available Post-Aviation Prohibitions (Fig. 2); see also QCMQ — ICAOB, paras. 2.15-2.16 and Figs. 1 and 2 therein.

[7] CMQ — ICAOA, para. 2.21; see also CMQ — ICAOB, para. 2.22.

working together, imposed such a sweeping, draconian aviation prohibition to try to isolate a neighbour as a means of political and economic coercion.

7. As the Court well knows, the ICAO's objective as a specialized agency of the United Nations is to promote "all aspects of international civil aeronautics"[8], including safe and efficient air travel, and to "avoid discrimination between contracting States"[9]. The Joint Appellants' aviation prohibitions are an assault on the entire international civil aviation system created by the ICAO Treaties. The aviation prohibitions disrupted, and continue to disrupt, air navigation, flight safety and efficiency, trade, commerce and communication — the very things that are critical to achieving the objectives of the ICAO.

8. Also critical to realizing these objectives is the smooth and efficient functioning of the dispute resolution mechanisms the ICAO Treaties created. To that end, the Council is vested with the jurisdiction to adjudicate disagreements relating to their interpretation or application.

9. The Council's ability to act with speed and efficiency is necessary to the fulfilment of its mission. After the aviation prohibitions were announced, Qatar notified the Council of the Joint Appellants' actions, and requested its urgent intervention[10]. The Council's intervention — including an extraordinary meeting of the Council held on 31 July 2017 — did not, however, result in lifting the aviation prohibition, but it did help to secure a few additional contingency routes over the high seas for flights in and out of Doha[11]. We are extremely grateful to the ICAO for its assistance. But these are limited and inconvenient air routes. Congestion and reduced efficiency of civil aviation due to increases in flight times and fuel consumption, as well as the economic harm to our national air carrier, persist to this very day.

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[8] Tab 3, Convention on International Civil Aviation (7 Dec. 1944) (entry into force: 4 Apr. 1947), Art. 44 *(i)* (MA — ICAOA and ICAOB, Ann. 1).

[9] Tab 3, Convention on International Civil Aviation (7 Dec. 1944) (entry into force: 4 Apr. 1947), Art. 44 *(g)* (MA — ICAOA and ICAOB, Vol. II, Ann. 1).

[10] CMQ — ICAOA, para. 2.13 (citing tab 5, Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Fang Liu, ICAO Secretary General (5 June 2017) (CMQ — ICAOA,Vol. III, Ann. 21); see also CMQ — ICAOB, para. 2.14.

[11] CMQ — ICAOA, para. 2.19; see also CMQ — ICAOB, para. 2.20.

10. At every turn, Qatar's attempts to negotiate in good faith a lifting of the aviation prohibitions fell on deaf ears. Consequently, on 30 October 2017, Qatar filed two applications requesting the Council to adjudge and declare the aviation prohibitions to be violations of the Joint Appellants' actions under the ICAO Treaties[12], which the Council found to be within its jurisdiction on 29 June 2018. But while these appeals proceed, the Council's hands are tied. It is prevented from playing its important role in resolving the aviation dispute. The Joint Appellants' aviation prohibitions remain in effect, with all that means in terms of compromising the safety, efficiency and security of the civil aviation.

11. The Court exercises a certain measure of supervision over the Council's decision-making in disputes put before it, thus providing — as the Court itself put it in its 1972 Judgment in the case between India and Pakistan — "support . . . for the good functioning" of ICAO"[13]. Qatar's counsel will discuss that case in further detail. For now, it suffices to say that the Court easily rejected the *very same* arguments that the Joint Appellants now raise as their first and second grounds of the appeal. The Joint Appellants' third ground of the appeal is equally unsupported by law or fact.

12. Mr. President, honourable Members of the Court, ultimately, all three grounds of appeal should be seen for what they are: a transparent attempt to evade accountability, or at least delay as long as possible a decision by the Council that the Joint Appellants have violated the ICAO Treaties.

13. I now turn to addressing the Joint Appellants' repeated statements, including just yesterday, seeking to characterize their aviation prohibitions as "lawful" countermeasures, allegedly justified by Qatar's conduct in unrelated spheres. Of course, this is not the stage to assess whether the characterization of the aviation prohibitions is correct, and in fact the Joint Appellants acknowledge this[14]. So instead the Joint Appellants argue that because what they identify as the "real issue" in the disputes before the Council is unrelated to civil aviation, the Council has no jurisdiction to decide Qatar's claims.

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[12] ICAO Application (A) (MA — ICAOA, Vol. III, Ann. 23); ICAO Application (B) (MA — ICAOB, Vol. III, Ann. 23).

[13] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972,* p. 60, para. 26.

[14] RA — ICAOA and ICAOB, para. 2.35.

14. As part of this argument, the Joint Appellants pretend that the Riyadh Agreement imposed obligations only on Qatar. In fact, they are multilateral instruments imposing obligations on all parties, including the Joint Appellants, and in any event, Qatar has implemented them fully. The Joint Appellants also alleged that Qatar has renounced the Riyadh Agreement by way of a letter to the Secretary General of the Gulf Cooperation Council (GCC) dated 19 February 2017[15]. However, Qatar's letter actually states that the parties "have spared absolutely no effort in the implementation of the Riyadh Agreement***s*** and the mechanism of its execution"[16], and calls upon the parties to "agree to terminate" the Riyadh Agreements[17]. In no way, Mr. President, Members of the Court, does this letter amount to Qatar renouncing the Agreements, which Qatar continues to consider binding. Equally, it is telling that the Joint Appellants, instead of raising their grievances (whatever they may really be) within the framework of the regional mechanisms for dialogue and dispute settlement[18], they simply chose instead to impose the aviation prohibitions suddenly and without prior warning. These are not the actions of the States genuinely interested in inducing compliance through lawful countermeasures.

15. But more importantly, the Court's 1972 Judgment is crystal clear: the ICAO 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 those treaties. Rather, the Council's jurisdiction depends, as the Court noted, on the "character of the dispute submitted to it and on the issues thus raised"[19] — in this case, plainly the aviation prohibitions and corresponding issues of safety and efficiency in civil aviation. The Joint Appellants cannot change the character of the case and of the disputes before the Council merely by asserting a countermeasures defence based on alleged circumstances that are extrinsic to the treaties in question. Nor can they deprive the Council

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[15] Letter from Mohamed bin Abdul Rahman bin Jassim Al Thani, Minister for Foreign Affairs of the State of Qatar, to Abdul Latif bin Rashid Al-Zayani, Secretary General of the GCC (19 Feb. 2017) (CMQ — ICAOA, Vol. III, Ann. 40).

[16] *Ibid.*

[17] *Ibid.*

[18] First Riyadh Agreement (23 and 24 Nov. 2013), Art. 10 ("Commission for the Settlement of Disputes") (MA — ICAOA and ICAOB, Vol. II, Ann. 19).

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

of its jurisdiction to assess that defence. What is open to them is to raise that defence before the Council for its consideration.

16. Qatar has already addressed in detail the Joint Appellants' accusations about Qatar's alleged support of terrorism and intervention in their internal affairs in its written submissions. Today I only wish to make two points: one addressed to the substance, and one addressed to the Joint Appellants' misconceived approach.

17. *First*, the Joint Appellants' accusations are entirely false. Qatar is a global leader in the fight against violent extremism and terrorism and is active in promoting several bilateral and multilateral initiatives pursuing that goal. There is a fundamental contradiction that exists between the words and the actions of the Joint Appellants. On the one hand, in the context of these proceedings, the Joint Appellants argue, repeatedly, that Qatar's alleged support of terrorism implicates their national security interests. But on the other hand, Qatar continues to co-operate with the Joint Appellants on issues of security and counter-terrorism as a member of the Global Coalition against Daesh, the GCC, and the Terrorist Financing Targeting Centre. Just two months ago, Qatar participated in a meeting of the GCC Supreme Military Committee in Saudi Arabia, where the assembled chiefs of staff of the armed forces of all of the GCC States committed to greater military co-ordination and collective security in the Gulf region[20]. In fact, in February 2019, a Qatari military contingent joined all GCC military forces in a large joint military exercise in Saudi Arabia[21].

18. Mr. President, honourable Members of the Court, it is unclear how the Joint Appellants' allegations could possibly be credited when our countries are jointly participating in military exercises together.

19. Qatar has also consistently met its international obligations to sanction the United Nations-designated organizations and individuals and has developed robust domestic designation procedures in line with accepted international standards that have leapfrogged those of

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[20] "GCC Chiefs of Staff Emphasize Need for Collective Security", *Asharq Al-Awsat* (4 Oct. 2019), available at https://aawsat.com/english/home/article/1930966/gcc-chiefs-staff-emphasize-need-collective-security.

[21] See, e.g. "The Conclusion of the 10th Joint Peninsula Shield Military Drill", *Gulf Cooperation Council News* (9 Mar. 2019) available at https://www.gcc-sg.org/en-us/MediaCenter/NewsCooperation/News/Pages/news2019-3-9-1.aspx. See also "Qatar joins Saudi Arabia for joint military exercise", *Middle East Monitor* (21 Feb. 2019), available at https://www.middleeastmonitor.com/20190221-qatar-joins-saudi-arabia-for-joint-military-exercise/.

the Joint Appellants. In every respect, the answer is clear: the Joint Appellants' accusations of terrorism amount to nothing more than smoke and mirrors.

20. *Second*, the Joint Appellants' false allegations continue what is now their established pattern of distraction and artifice, in a transparent attempt to evade accountability for their illegal actions. The Joint Appellants jump from one accusation to another accusation, unfounded, unconcerned with the truth. This is simply a "public relations" strategy that withers in the face of the rule of law. When an independent body examines the Joint Appellants' conduct in light of their obligations under the ICAO, it examines the facts, applies the law, and ignores the noise. This is what the Council did when it rejected the Joint Appellants' preliminary objections.

21. The Joint Appellants' accusations are self-serving and desperate, as they attempt to muddy the public discourse, especially within their own countries. For example, the Joint Appellants have repeatedly stated that Qatar uses Al Jazeera "as a platform for . . . extremism and violence"[22] and as a means of "intervention in [their] internal affairs"[23]. The Joint Appellants take this position notwithstanding the fact that Al Jazeera is a public utility private corporation similar to the British Broadcasting Corporation ("BBC") in the United Kingdom, the Public Broadcasting Service ("PBS") in the United States, and Radio France in France, which are all based on government funding to protect from editorial pressures arising from advertisers. Al Jazeera is independent of government editorial control, as guaranteed by Qatari law[24]. The international community — including the United Nations Special Rapporteur on freedom of opinion and expression[25] and the independent non-governmental organizations[26] — have made it clear that Al Jazeera is one of the few independent media outlets in the Gulf region. Al Jazeera therefore is

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[22] MA — ICAOA, para. 2.14; see also MA — ICAOB, para. 2.13.

[23] MA — ICAOA, para. 2.14; MA — ICAOB, para. 2.13.

[24] State of Qatar, Law No. 10 of 2011 on the Conversion of Al Jazeera Satellite Network to a Private Corporation for the Public Benefit (18 May 2011) available at http://www.almeezan.qa/LawView.aspx?opt&LawID=2471&language=en.

[25] Tab 6, "Demand for Qatar to close Al-Jazeera 'a major blow to media pluralism'—United Nations expert", *OHCHR* (28 June 2017), available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21808&LangID=E.

[26] Tab 7, "Qatar: Demands to close Al Jazeera endanger press freedom and access to information", *Article 19* (30 June 2017), available at https://www.article19.org/resources/qatar-demands-to-close-al-jazeera-endanger-press-freedom-and-access-to-information/; tab 8, "Unacceptable Call for Al Jazeera's closure in Gulf crisis", *Reporters without Borders* (28 June 2017), available at https://rsf.org/en/news/unacceptable-call-al-jazeeras-closure-gulf-crisis.

very much *unlike* the media outlets that are dominated by the Governments of the Joint Appellants themselves, who censor the information disseminated in their countries and in the region.

22. It is apparent that what the Joint Appellants call terrorism and intervention in internal affairs by Al Jazeera is actually free expression. The key allegation of the Joint Appellants — the fact that controversial figures have appeared on Al Jazeera — just reflects Al Jazeera's broad representation of diverse political views. Indeed, other international news agencies also report on controversial people and events that the Joint Appellants accuse Al Jazeera of sponsoring, including CNN, BBC, and France 24, but none of these news agencies has been accused of supporting terrorism or extremism. Equally, the fact that the Joint Appellants do not appear to like the content broadcast by Al Jazeera is all the more reason to protect the media's freedom of expression. And it certainly cannot form a basis for the Joint Appellants to issue the prohibitions or the violations of the ICAO Treaties.

23. Mr. President, honourable Members of the Court, the questions before the Court have nothing to do with the baseless and irrelevant allegations of "terrorism" or interference in the Joint Appellants' internal affairs that they have devoted as much of the Court's time to unnecessarily. The questions have everything to do with the violations of the Joint Appellants' international legal obligations under the ICAO Treaties. The prompt treatment of their appeal by the Court is not just appropriate, it is necessary. And for all these reasons, the State of Qatar respectfully requests that the Court deny the Joint Appellants' appeal in short order and allow the Council to resume its critical work to address the merits of these time-sensitive disputes.

24. Mr. President, Qatar's counsel will now explain why all three grounds of the appeal must be dismissed.

25. *First*, Professor Vaughan Lowe will discuss the key questions before the Court, especially in light of the Court's 1972 Judgment.

26. *Second*, Professor Pierre Klein will address the Joint Appellants' second ground of appeal and explain that the broader dispute between the Parties does not change the "real issue in dispute" in this case, that is, the violations of the ICAO Treaties.

27. *Third*, Mr. Lawrence Martin will address the Joint Appellants' third ground of the appeal and demonstrate that despite Joint Appellants' refusal to negotiate over the aviation prohibitions, Qatar satisfied any negotiation requirements applicable under the ICAO Treaties.

28. *Finally*, Ms Loretta Malintoppi will address the Joint Appellants' first ground of the appeal and show that the Council discharged its dispute settlement functions fully consistent with its procedural rules and previous practice.

29. Mr. President, honourable Members of the Court, I thank you for the privilege of appearing before you. I now kindly ask you to invite Professor Vaughan Lowe to address the Court.

The PRESIDENT: I thank the Agent of Qatar for his statement and I now invite Mr. Vaughan Lowe to take the floor. You have the floor.

Mr. LOWE: Thank you, Mr. President.

II. THERE IS NO NEED FOR THE COURT TO DEPART FROM ITS HOLDINGS IN THE 1972 *ICAO COUNCIL APPEAL CASE*

A. Introduction

1. Mr. President, Members of the Court, it is a privilege to appear before you, and an honour to have been entrusted with this part of Qatar's submissions.

2. There is much common ground in this case, and our friends on the other side have helpfully pulled into a sharper focus the questions that separate us. We are agreed that there is a wider dispute between Qatar and the Joint Appellants. They say that the resolution of that dispute can only be addressed through the Riyadh Agreements[27]. We say that the Riyadh Agreements — which, as the Agent said, Qatar has not repudiated, but considers still to be binding[28] — are practically irrelevant in this case except as part of the factual background. The Agreements do not purport to override the ICAO Treaties and, because of the non-derogation clause in Article 82 of the Chicago Convention, they could not do so[29]. The Joint Appellants refer to them to invoke what

[27] CR 2019/13, p. 28, para. 13 (Al-Otaiba).

[28] See CMQ — ICAOA and ICAOB, para. 2.19.

[29] Tab 3, Chicago Convention, Arts. 4, 82 (MA — ICAOA, Vol. II, Ann. 1).

they say is a provision on a subspecies of countermeasures: but that adds nothing to the customary law on countermeasures, on which they also rely.

3. They say Qatar may not separate the aviation aspects of the dispute. But why not? Qatar's complaint is about the aviation prohibitions; it alleges breaches of specific provisions of the Chicago Convention and the IASTA[30], which regulate civil aviation; the ICAO oversees the implementation of those treaties. Who else should Qatar ask to determine whether the Joint Appellants' actions are compatible with the Chicago Convention? Who else, to take one specific example from Qatar's ICAO submission, should decide whether the aviation prohibitions on Qatar amount to a use of "civil aviation for purposes inconsistent with the aims of the [Chicago] Convention" and therefore in breach of its Article 4?[31]

4. The Joint Appellants say that the ICAO Council is a technical body that lacks the breadth of jurisdiction and of expertise to handle all aspects of the dispute. But that is how the ICAO was designed, over 70 years ago, to discharge its various functions, and to find practical solutions to the problems. Indeed, its success in finding practical solutions — including in situations of armed conflict, as was the background to the 1972 dispute between India and Pakistan — that is the explanation for the absence of formal legal rulings from the Council. It is the structure to which the Joint Appellants signed up when they ratified the Convention. And if the ICAO Council needs additional expertise, Article 8 of its Rules for the Settlement of Differences empower it to obtain expert opinions. And ultimately, a Council decision can, of course, be appealed to this Court.

5. The Joint Appellants point to no rule of law that says that different aspects of a wide-ranging dispute cannot be referred to different specialist bodies; to nothing that bars Qatar from taking aviation aspects of the dispute to the ICAO, or barred the UAE when it took Qatar to the World Trade Organization (WTO) over aspects of Qatar's response to the 5 June 2017 measures, in a dispute that was subsequently withdrawn.

6. That is the short answer to the "real dispute" point. Yes, there are many aspects of the wide tension between Qatar and the Joint Appellants; but the dispute put before ICAO is solely,

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[30] See Request for the Intervention of the ICAO Council (8 June 2017) (MA — ICAOA, Vol. III, Ann. 22); ICAO Application (A) and ICAO Memorial (A) (MA — ICAOA, Vol. II, Ann. 23).

[31] ICAO Memorial (A), p. 599 (MA — ICAOA, Vol. III, Ann. 23).

and really, about the Chicago Convention, IASTA, and civil aviation. ***And that*** is undeniable, when one reads the Applications.

7. The Joint Appellants say that this dispute cannot be separated from the wider dispute because the Council will inevitably be required to rule on breaches of the Riyadh Agreement[32]. It is a kind of "indispensable arguments" argument. But they cite no authority for this principle of inseparability: their analysis focuses on explaining why decisions such as *Lockerbie* and *Certain Iranian Assets*, which appear to go against them, can be distinguished.

8. Moreover, it is not Qatar that is raising the Riyadh Agreement. The Joint Appellants say that it is an essential aspect of their defence. But as they themselves say, "it is axiomatic that jurisdiction and admissibility are to be assessed by reference to the case as in fact it was lodged, this date being the 'critical date'"[33]. We agree; and that is the position that this Court has taken, for example in *Lockerbie*[34]. But when a case is lodged, no one knows what the defences are that will be raised. Jurisdiction and admissibility are to be judged on the basis of the *application*, not the defences to it. This, too, the Court has decided, clearly and explicitly[35].

9. If an assertion that a respondent wishes to raise a defence of countermeasures — not actually raising it, but saying that they wish to do so — is enough to defeat the jurisdiction of any tribunal or body of limited competence, it is hard to see how invoking "countermeasures" does not become a trump card for avoiding all dispute settlement procedures, except perhaps those before a court of plenary jurisdiction — this Court. (And we note that none of the Joint Appellants has made a declaration that accepts the plenary jurisdiction of this Court.)

10. In any event, all of these points are matters for the merits. They can be put to the ICAO Council. The Joint Appellants can raise whatever legal justifications for their conduct, or arguments on non-justiciability or whatever they might choose.

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[32] See CR 2019/13, p. 27, paras. 10-11 (Al-Otaiba).

[33] CR 2019/14, p. 18, para. 43 (Petrochilos).

[34] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 129-131, paras. 38 and 44.

[35] *Ibid*.

11. Yet the Joint Appellants seem to want to have it both ways. They want to appear to be keen to present their countermeasures defence to the ICAO Council; but they are asking the Court to order that the Council should not hear the case. Qatar, in contrast, is trying to activate an established, specialized international dispute settlement procedure, and simply wishes to have its case heard, along with the Joint Appellants' response.

12. Dr. Petrochilos expressed concern that the Joint Appellants might end up with a decision from the Council concerning terrorism and interference in the affairs of other States which either side might claim — in any and all fora — is final and binding[36]: *res judicata*. But the ruling Qatar seeks is only on compliance with the Chicago Convention and IASTA; and if the Joint Appellants do not like the decision, they can appeal it, to this Court. And the point is, in any event, a merits matter: it is about how the Council should exercise its jurisdiction, not about whether or not it has jurisdiction.

B. The questions before the Court

13. Despite all these big issues in the background, the only questions actually put to the Court in these cases are narrow and straightforward. The Joint Appellants in these cases base their applications for the nullification of the decisions of the ICAO Council dated 29 June 2018 on three grounds.

14. The first is that the decisions should be set aside on the grounds that the procedure adopted by the Council was manifestly flawed. The second is that the ICAO Council erred in fact and in law in rejecting the Joint Appellants' objection that the disputes are outside the Council's competence because the Council would have to determine issues that fall outside its jurisdiction. ***And the*** third ground is that the ICAO Council erred in rejecting the Joint Appellants' objection that Qatar had not attempted to resolve the disagreements regarding the airspace prohibitions through negotiations with the Joint Appellants before filing its ICAO application.

15. Before my colleagues set out Qatar's case in detail, I have two further general points to make on these questions.

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[36] CR 2019/13, p. 75, para. 22 (Petrochilos).

C. Misstatements of fact

16. The first is that the three grounds of appeal all rely heavily upon erroneous statements of the facts, as is clear from the evidence filed in these cases. For example, we will take you to the evidence in the record that Qatar did try, repeatedly, to negotiate with the Joint Appellants, but that they refused even to consider negotiating with Qatar, unless Qatar first abandoned its own position and accepted a position dictated by them across a range of issues. This fact is of particular importance, and distinguishes these cases from previous cases before the Court involving the precondition of negotiations.

17. The second general point concerns the fact that these cases arise in the context of the Court's jurisdiction to resolve disputes concerning decisions taken within international organizations that have their own prescribed decision-making procedures. The question is, what precisely is the role of the Court, and what is the scope of its powers, within this framework.

18. Though Article 84 of the Chicago Convention and Article II, Section 2, of the Transit Agreement refer to a right of *appeal*, the Joint Appellants have not simply requested the Court to decide again the question before the Council, which was (in the words of the decision itself) "whether to accept the preliminary objection of the Respondents"[37]. They have presented their case, in part as a claim for annulment.

19. Two questions arise here. First, there is the question whether the Court can exercise a power of review at all in this context.

20. The Court indicated in the *Namibia* case in 1971, that it does not assert a general competence to review decisions of United Nations organs[38]; and the same is no doubt true in relation to decisions taken by United Nations Specialized Agencies such as ICAO. One year later, in the 1972 *ICAO Council Appeal* case, the Court specifically declined to review on procedural grounds a decision of the ICAO Council concerning its jurisdiction.

21. In its 1972 Judgment, the Court said that the question of the ICAO Council's jurisdiction "is an objective question of law, the answer to which cannot depend on what occurred before the

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[37] ICAO Council Decision (MA — ICAOA and ICAOB, Vol. 5, Ann. 52).

[38] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 45, para. 89.

Council"[39]. The Court explained that if as a matter of law the Council has jurisdiction, a procedurally flawed decision that it has jurisdiction is nonetheless correct and is to be sustained by the Court. If**,** as a matter of law**,** the Council has no jurisdiction, even a procedurally flawless decision that it has jurisdiction will not be valid, and will be reversed by the Court on an appeal.

22. The Court did *not* decide in that case that it was because the procedural defects were not fundamental that it disregarded them. It disregarded them because the question of jurisdiction did not depend on them, as paragraph 45 of the 1972 Judgment makes very clear.

23. ***So in*** Qatar's submission the Court reached a clear decision, almost 50 years ago, that it will not quash ICAO Council decisions on jurisdiction on procedural grounds but will, in the event of an appeal, decide in accordance with international law whether or not the Council has jurisdiction. There is no reason to question the correctness of that decision or to distinguish the question in the 1972 case from that in the present cases. And if the Joint Appellants wish the Court to abandon its 1972 decision, then they should expressly argue for that result.

24. The Joint Appellants say that Qatar is unconcerned by procedural defects. But it is not. It is simply applying the Court's clear ruling on how questions of *jurisdiction* — not merits questions — are to be determined.

25. That is Qatar's submission. If, however, the Court should consider that it does have the power to quash Council decisions on procedural grounds, that would lead to the second question: what is the standard of review?

26. Here, Qatar submits that it cannot possibly be the case that each and every technical infraction of procedural rules, no matter how trivial or inconsequential, can warrant the Court in annulling a decision made by another international body.

27. Members of international organizations such as the ICAO cannot be supposed to have created a right to halt procedures within the organization on a point of order and take the matter off to the Court, asking it to rule, a year or two later, that a decision on a step in the procedure is to be quashed, leaving the process open to be started all over again. Slowing down dispute settlement in this way for minor technical infringements has more of the air of a children's game than of a

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[39] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 70, para. 45.

serious system of judicial supervision in relation to a body that is meant to handle disputes concerning international aviation disputes swiftly and efficiently.

28. The Joint Appellants will, no doubt, explain in due course precisely what they understand the legal test for nullification to be, and how they propose to meet it. ***And if***, contrary to Qatar's submission, the Court now holds that Council decisions can be annulled for procedural defects, we submit that the standard that should be applied is the one referred to by the Court's 1972 Judgment, namely, whether the alleged procedural irregularities "prejudice in any fundamental way the requirements of a just procedure"[40]. And as Ms Malintoppi will explain, the Joint Appellants cannot come anywhere close to meeting that standard.

D. Summary

29. To sum up: 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.

30. If Qatar's Applications to the ICAO were, according to their own terms, within the jurisdiction of the Council, then the Council can and should proceed to hear them. The Council cannot subsequently be stripped of its competence to hear the Applications by reason of the terms in which the respondent States choose to frame their response to the merits of Qatar's Applications.

31. In the Joint Appellants' very own words, Qatar's "Application (A) alleged various violations of the Chicago Convention as the result of airspace restrictions adopted by the Applicants on 5 June 2017"[41], and "Application (B) alleged various violations of the IASTA as the result of the airspace restrictions adopted by the Applicants on 5 June 2017"[42]. Qatar's Applications concerned the "interpretation and application" of the Chicago Convention and ***of*** the Transit Agreement, respectively. And as the Court said in its 1972 Judgment, if there is even one provision of the Convention whose interpretation or application is disputed, then the Council is invested with

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[40] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 70, para. 45.

[41] Joint Application — ICAOA, para. 13.

[42] Joint Application — ICAOB, para. 14.

jurisdiction. Under the Court's 1972 Judgment, there can be no real question that Qatar's Applications ***are*** plainly within the Council's jurisdiction.

32. The Court went on to say in its 1972 Judgment that, "having . . . decided that the Council is competent, [it] is not called upon to define further the exact extent of that competence"[43]. A defence to the merits of Qatar's Applications that is alleged to implicate certain non-justiciable matters, or matters beyond the jurisdiction of the ICAO Council, is therefore not a reason for the Court to say that the ICAO Council has lost jurisdiction over the Applications to which the defence is made.

33. To put it differently, if there are elements of the defence that the Joint Appellants in this case have outlined that are said to be non-justiciable, or beyond the jurisdiction of the ICAO Council, that is a question that the ICAO Council must address as it exercises its jurisdiction in relation to the Applications. It is a merits question. If the dispute involves matters that could fall outside the jurisdiction of the Council, that is a matter for the Council to determine, and thereafter to act accordingly.

34. Qatar's submissions thus rest squarely on the decision of this Court in the 1972 *ICAO [Council Appeal]* case, which, as Professor Klein will remind you shortly, affirmed 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"[44].

35. These points — the question of the nature and scope of the Court's competence to supervise decisions of the ICAO Council, and the question of the proper focus (which is on Qatar's Applications, ***and*** not on the Joint Appellants' likely defences on the merits of those Applications) for the determination of questions of jurisdiction and admissibility in the ICAO Council — are elementary. And they confirm that the legal basis of the Joint Appellants' case is patently misconceived, as my colleagues will shortly demonstrate.

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[43] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 69, para. 43.

[44] *Ibid.*, para. 27.

36. That, Sir, concludes my submission on behalf of Qatar in this round. Unless I can be of further assistance to the Court, I would ask you, Mr. President, to invite Professor Klein to the lectern.

The PRESIDENT: I thank Mr. Lowe. I now invite Mr. Klein to take the floor. You have the floor.

M. KLEIN : Merci, Monsieur le président.

III. LA COUR DEVRAIT REJETER LE DEUXIÈME MOTIF D'APPEL

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, c'est un honneur pour moi d'intervenir dans la présente procédure au nom de l'Etat du Qatar. Dans la lignée de la présentation générale qui vient de vous être faite par le professeur Lowe, il me revient de vous exposer plus en détail les raisons pour lesquelles le deuxième motif d'appel invoqué par les appelants ne saurait être accueilli.

2. Selon nos contradicteurs — vous l'avez encore entendu hier — le Conseil de l'OACI n'était pas compétent pour rendre les décisions qu'il a adoptées le 29 juin 2018, car le véritable objet du différend entre les Parties n'est pas lié à l'interprétation et à l'application de la convention de Chicago ou de l'accord sur les services aériens[45]. Le différend porté par le Qatar devant le Conseil s'inscrirait dans un contexte bien plus large, caractérisé par des tensions et des désaccords persistants entre les Parties, entre autres en ce qui concerne le soutien prétendument apporté par le Qatar à des groupes ou mouvements terroristes et ses interventions alléguées dans les affaires intérieures des Etats appelants. Et en l'occurrence, toujours selon les appelants, il serait impossible pour le Conseil de se prononcer sur les plaintes du Qatar sans prendre en compte divers éléments relevant de ce contexte plus large, ainsi que les moyens de défense que les appelants invoquent sur cette base, ce que cet organe ne pourrait faire dans le champ d'action restreint que lui reconnaissent les traités de 1944.

[45] MD — ICAOA et ICAOB, par. 4.1.

3. De façon plus précise, les appelants développent trois arguments essentiels à l'appui de leur deuxième moyen d'appel :

— *premièrement*, le véritable objet du différend porté devant le Conseil n'est pas la violation alléguée des traités de 1944, mais bien le désaccord plus large auquel je viens de faire référence ;

— *deuxièmement*, le Qatar propose une interprétation excessivement large des clauses compromissoires des traités de 1944, qui ne peut que conduire le Conseil à excéder son champ de compétence ; et

— *troisièmement*, le Conseil ne peut pas en tout état de cause se prononcer sur la justification des mesures restrictives adoptées par les appelants au titre de contre-mesures.

Je voudrais reprendre avec vous ces trois arguments, pour vous montrer qu'ils sont tous dépourvus de fondement, en commençant par la question de la délimitation du différend que le Qatar a soumis au Conseil.

A. L'existence d'un désaccord plus large entre les Parties est sans influence sur la détermination de l'objet du différend dans la présente affaire

4. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, le Qatar n'a jamais nié l'existence d'un différend plus large entre les Parties à l'instance — même s'il a toujours vigoureusement contesté le bien-fondé des allégations formulées par les appelants à son encontre[46]. Il n'a jamais contesté non plus que le litige relatif à l'aviation civile internationale qu'il a soumis aux instances de l'OACI s'inscrivait dans le cadre de ce différend plus large. En revanche, ce qu'il conteste fermement, c'est l'idée selon laquelle ce facteur priverait *ipso facto* le Conseil de toute compétence pour examiner les plaintes formulées par le Qatar, ainsi que la prétention selon laquelle l'«objet véritable» du différend serait autre que ceux dont le Conseil a été saisi.

5. Pour rendre compte de la manière dont la Cour traite de cette question, nos contradicteurs vous ont proposé hier un assez remarquable exercice d'illusionnisme. La recette est assez simple : distraire pour faire oublier l'essentiel. La distraction consistait à exposer par le menu l'approche suivie par la Cour pour identifier l'«objet véritable du différend», en rappelant entre autres qu'il

[46] Voir, par exemple, CMQ — ICAOA et ICAOB, chap. 2, sect. II.B.1.

revenait à la Cour de procéder à cette détermination et qu'elle le faisait de manière objective en prenant en compte un ensemble d'informations pertinentes[47]. Ce qu'il fallait faire oublier, c'est le critère, le test, développé par la Cour pour déterminer si un différend particulier s'inscrivant dans le cadre d'un désaccord plus large entrait bien dans son champ de compétence lorsque celle-ci est limitée par la portée d'une clause compromissoire. Je voudrais donc rappeler brièvement en quoi consiste ce test, en me référant à l'un des plus récents prononcés de la Cour sur ce point.

6. Dans l'affaire relative à *Certains actifs iraniens*, les Etats-Unis contestaient la compétence de la Cour, fondée par l'Iran sur le traité d'amitié conclu en 1955 entre les deux Etats, pour un motif en tous points identique à celui invoqué par les appelants pour remettre en cause la compétence du Conseil de l'OACI. Les Etats-Unis prétendaient en effet que «l'Iran ne recherche pas le règlement d'un différend juridique relatif aux dispositions de ce traité, mais qu'il tente d'impliquer la Cour dans «un affrontement stratégique de … grande ampleur»»[48]. Que leur avez-vous répondu ? En termes généraux que les requêtes soumises à la Cour «portent souvent sur un différend particulier qui s'est fait jour dans le cadre d'un désaccord plus large entre les parties»[49]. Et de manière plus précise, que la seule question, le seul test pertinent à cet égard est de savoir «si les actes dont l'Iran tire grief entrent dans les prévisions du traité d'amitié et si, par suite, le différend est de ceux dont elle est compétente pour connaître *ratione materiae* par application du paragraphe 2 de son article XXI»[50], c'est-à-dire de la clause compromissoire du traité de 1955. Le raisonnement est en tous points identique à celui que la Cour avait suivi en 2015, dans l'affaire relative à l'*Obligation de négocier un accès à l'océan Pacifique*, pour répondre à une objection du même ordre qui avait alors été formulée par le Chili[51].

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[47] CR 2019/13, p. 56-57, par. 8-11 (Shaw).

[48] *Certains actifs iraniens (République islamique d'Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2019*, p. 22, par. 34.

[49] *Ibid.*, p. 23, par. 36.

[50] *Ibid.*

[51] *Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili), exception préliminaire, arrêt, C.I.J. Recueil 2015 (II)*, p. 604, par. 32. Voir aussi les autres précédents cités 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)*, DQ — ICAOA et ICAOB, par. 3.13.

7. Nos contradicteurs sont restés particulièrement silencieux sur cette jurisprudence constante de la Cour — et on le comprend assez aisément. Ils tentent dès lors de tirer argument de deux autres précédents qui ne leur sont, à vrai dire, d'aucun secours. Le premier est l'affaire du *Plateau continental de la mer Egée*[52]. Si la Cour a décliné sa compétence en l'espèce, ce n'est pourtant aucunement en raison de l'existence d'un différend plus large qui l'aurait empêchée d'exercer sa compétence à l'égard de la requête dont elle était saisie. C'est tout simplement parce que l'objet de la requête, tel que l'avait formulée la Grèce, impliquait nécessairement que la Cour se prononce sur une question qui était couverte par la réserve dont la Grèce avait accompagné sa déclaration d'adhésion à l'instrument sur lequel était fondée la compétence de la Cour. Cette situation ne se rapproche donc en rien de la présente espèce.

8. Le second précédent sur lequel tentent de s'appuyer les appelants — celui de l'arbitrage relatif aux *Chagos*[53] — ne leur est pas plus utile. Ici encore, si le tribunal a refusé d'exercer sa compétence à l'égard de plusieurs volets de la demande présentée par Maurice, c'est en raison du fait que, pour se prononcer sur ces questions — et en particulier sur celle de savoir si le Royaume-Uni pouvait être considéré comme un Etat côtier à l'égard des Chagos —, le tribunal aurait dû trancher préalablement la question de la souveraineté sur ces îles. Il a jugé que cette question sortait clairement du cadre de sa compétence, fondée sur la convention de Montego Bay. En réalité, ce précédent représente un double clou dans le cercueil des appelants. Non seulement parce que ce n'est pas en raison de l'existence d'un différend plus large que les arbitres se sont déclarés incompétents à l'égard de certains chefs de la demande de Maurice, mais aussi parce que les arbitres ont, précisément, accepté d'exercer leur compétence à l'égard d'un des chefs de cette demande. Ils ont ainsi confirmé de manière on ne peut plus claire que l'existence d'un différend plus large ne faisait en rien obstacle à l'exercice par une juridiction de sa compétence à l'égard d'un aspect particulier de ce différend. Décidément, il n'y a pas que la jurisprudence de la Cour qui soit fâcheusement défavorable à nos contradicteurs…

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[52] CR 2019/13, p. 59, par. 16-17 (Shaw).

[53] CR 2019/13, p. 59-60, par. 18 (Shaw).

9. Les Parties s'accordent pour considérer que l'identification correcte de l'objet du différend est une question qui appelle une détermination objective[54]. Et en l'occurrence, la façon de procéder à pareille détermination objective a été très clairement mise en lumière par la Cour. L'unique question qu'il faut se poser ici est celle identifiée dans les arrêts auxquels je me suis référé plus tôt : l'acte dont le Qatar tire grief entre-t-il dans les prévisions de la convention de Chicago et de l'accord sur les services aériens ? C'est du reste exactement la manière dont la Cour avait déjà envisagé les choses dans son arrêt de 1972 sur la compétence du Conseil. Pour savoir si cette compétence était établie, indiquait la Cour, «il faut évidemment savoir si la thèse du Pakistan, envisagée compte tenu des objections formulées par l'Inde à son sujet, fait apparaître l'existence d'un «désaccord … à propos de l'interprétation ou de l'application» de la Convention de Chicago ou de l'Accord de transit»[55]. Ou, ainsi qu'elle l'a encore formulé dans le même arrêt sous un autre angle,

> «[l]a question juridique que la Cour doit trancher est … en fait de savoir si ce différend, sous la forme où les Parties l'ont soumis au Conseil et l'ont présenté à la Cour dans leurs conclusions … peut être résolu sans aucune interprétation ou application des Traités en cause. Si cela n'est pas possible, le Conseil a nécessairement compétence.»[56]

Comme elle l'était en 1972, la réponse à cette dernière question est manifestement négative dans les présentes affaires. Et ainsi que l'approche suivie par la Cour en 1972 le montre clairement, c'est la manière dont l'Etat qui a saisi le Conseil a formulé sa «requête» ou sa «plainte» devant cet organe qui doit constituer le point de départ de l'analyse à cet égard[57]. Or, les plaintes formulées devant le Conseil par le Qatar à l'encontre des appelants dans ses requêtes du 30 octobre 2017 font état, je le rappelle, de violations des articles 4, 5, 6, 9, 12 et 37 de la convention de Chicago[58] et de l'article premier de l'accord sur les services aériens. Ces réclamations ne peuvent, à l'évidence, être tranchées sans interprétation et application des traités de 1944 et le Conseil est de ce fait compétent

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[54] DQ — ICAOA et ICAOB, par. 3.17, renvoyant au MD — ICAOA et ICAOB, par. 4.10 ; voir aussi CR 2019/13, p. 57, par. 9 (Shaw).

[55] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, p. 61, par. 27.

[56] *Ibid.*, p. 62, par. 28.

[57] *Ibid.*, p. 66, par. 36.

[58] MD — ICAOA et ICAOB, vol. III, annexe 23.

pour les examiner. Et l'invocation de contre-mesures par les appelants ne change absolument rien à cet état de choses. C'est ce que je voudrais vous montrer maintenant dans un deuxième temps.

B. L'invocation de contre-mesures par les appelants ne fait pas obstacle à l'exercice de ses compétences par le Conseil

10. Selon les appelants, le Qatar, en arguant que l'invocation de contre-mesures ne fait pas obstacle à l'exercice de ses compétences par le Conseil, propose une interprétation extrêmement large des clauses compromissoires des traités de 1944[59]. Cette interprétation reviendrait à ignorer les limites du consentement que les Etats ont donné au système de règlement des différends institués par ces traités lorsqu'ils y sont devenus parties[60]. L'argument, une fois encore, n'est pas nouveau. En 1972 déjà, dans l'affaire de la *compétence du Conseil de l'OACI*, l'Inde avait tenté de convaincre la Cour que le différend soumis au Conseil portait sur la terminaison ou la suspension de traités, et ne constituait dès lors pas un différend relatif à l'interprétation ou à l'application de la convention de Chicago au sens de son article 84[61]. Cela aurait donc été une question sur laquelle le Conseil n'aurait pas eu compétence pour se prononcer. Et il en aurait été d'autant plus ainsi, selon l'Inde, que la terminaison ou la suspension n'était pas intervenue en l'espèce sur la base d'une clause du traité, mais «in exercise of the right of a sovereign State under a rule of international law *dehors* the treaty»[62]. «*Dehors* the treaty». Si je me permets d'attirer votre attention sur cette formulation — par ailleurs particulièrement stylée —, c'est parce qu'elle contredit on ne peut plus explicitement l'affirmation qui vous a été faite hier selon laquelle, dans l'affaire *Inde c. Pakistan*, «[t]he dispute took place in legal terms within the bounds of the instrument in question»[63]. Cela n'est de toute évidence pas ce que prétendait l'Inde elle-même à l'époque. Et la Cour a repoussé cet argument avec une très grande fermeté :

> «On ne saurait considérer le Conseil comme privé de compétence du seul fait que des données extérieures aux Traités pourraient être invoquées, dès lors que, de toute façon, des questions relatives à l'interprétation ou à l'application de ceux-ci

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[59] CR 2019/13, p. 61-63, par. 23-27 (Shaw).

[60] MD — ICAOA et ICAOB, par. 4.19 et 4.27.

[61] Voir, par exemple, *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan)*, procédures orales (19 juin 1972), p. 506 (Palkhivala).

[62] *Ibid.*

[63] ***CR 2019/13, p. 67, par. 43 (Shaw).***

> entrent en jeu. Le fait qu'une défense au fond se présente d'une certaine manière ne peut porter atteinte à la compétence du tribunal ou de tout autre organe en cause ; sinon les parties seraient en mesure de déterminer elles-mêmes cette compétence, ce qui serait inadmissible … la compétence du Conseil dépend nécessairement du caractère du litige soumis au Conseil et des points soulevés, mais non pas des moyens de défense au fond ou d'autres considérations qui ne deviendraient pertinentes qu'une fois tranchés les problèmes juridictionnels.»[64]

11. Il y a, Monsieur le président, Mesdames et Messieurs les Membres de la Cour, un mot qui frappe dans l'extrait dont je viens de donner lecture. «Inadmissible». Il serait *inadmissible* que les Parties soient en mesure de déterminer elles-mêmes la compétence d'une instance juridictionnelle en présentant leurs défenses au fond de telle ou telle manière. Le terme est puissant. Il est péremptoire et c'est d'ailleurs plutôt rare, pour tout dire, qu'on le retrouve dans les prononcés de la Cour. Il montre bien qu'il s'agit là pour la Cour d'une question de principe essentielle car conclure en sens inverse reviendrait à permettre aux Etats de se soustraire au jeu d'une clause compromissoire en optant pour tel ou tel moyen de défense particulier. Ce serait, à l'évidence, une atteinte majeure à l'efficacité des systèmes de règlement de différends mis en place par des dizaines de traités internationaux.

12. Face à la puissance de ce terme — et du propos de la Cour —, qu'ont à dire nos contradicteurs ? Leur réponse, dans leurs écritures, tient en une ligne — une seule ligne : contrairement à celles dont la Cour est saisie aujourd'hui, l'affaire *Inde c. Pakistan* ne concernait pas des contre-mesures[65]. C'est sans doute vrai. Mais c'est bien maigre. La Cour, dans l'extrait que vous venez d'entendre, n'évoque à aucun moment le motif avancé par l'Inde pour contester la compétence du Conseil — en l'occurrence, je l'ai rappelé, la suspension ou l'extinction alléguée des traités pertinents, dans l'exercice d'un droit souverain en dehors, ou au-delà, de ces traités. Peu importe, à ses yeux, le moyen de défense invoqué par l'une des parties pour remettre en cause la compétence d'un organe juridictionnel ou la manière dont ce moyen est présenté. Sa réponse en est une de principe : la compétence de cet organe ne peut dépendre de la façon dont une partie entend répondre aux allégations qui la visent. Et ceci est vrai, évidemment, que cette réfutation soit basée sur la suspension ou l'extinction d'un traité, sur l'invocation de contre-mesures ou sur quelque autre motif que ce soit encore. Les impératifs systémiques qui ont motivé la Cour à se prononcer

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[64] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972,* p. 61, par. 27.

[65] MD — ICAOA et ICAOB, par. 4.27.

avec autant de fermeté sur ce point en 1972 restent manifestement valables quel que soit le moyen de défense invoqué. S'il fallait donner gain de cause aux appelants à cet égard, n'importe quel Etat défendeur pourrait se soustraire à la juridiction de la Cour dans la quasi-totalité des cas où sa compétence *ratione materiae* est limitée par la portée d'une clause compromissoire, et ce, simplement en invoquant la théorie des contre-mesures[66]. Sur ce point non plus, les appelants n'ont aucune réponse à apporter.

13. Permettez-moi encore d'insister sur un point en ce qui concerne la pertinence du précédent de 1972. Nos contradicteurs ont affirmé avec force hier que cette affaire-là ne présentait décidément aucun lien avec celle qui nous occupe aujourd'hui car il s'agirait ici de contre-mesures non réciproques, fondées sur la violation d'obligations internationales complètement extérieures aux traités de 1944. Pourtant cette affirmation s'avère elle aussi inexacte. En date du 23 juin 2017, lorsque la situation à laquelle ont donné lieu les mesures restrictives adoptées par les appelants sont discutées au sein du Conseil de l'OACI, comment l'un d'entre eux, l'Egypte, s'en justifie-t-il ? Il invoque tout simplement une réplique à une violation initiale par le Qatar non pas du droit international général, non pas des accords de R***i***yad, mais de la convention de Chicago elle-même. Selon le compte rendu de cette séance, le représentant de l'Egypte au Conseil «emphasized the view that the actions taken were exclusively related to Egyptian airspace against a country which his State considered to have misused civil aviation for purposes inconsistent with the aims of the Chicago Convention»[67]. Et il se réfère expressément, plus tôt dans son intervention, au fait que les agissements que son Etat reproche au Qatar vont à l'encontre de l'article 4 de la convention. Nos contradicteurs estiment-ils que la question de savoir si le Qatar avait méconnu ses obligations au titre de cette disposition échapperait elle aussi à la compétence du Conseil ?

14. J'en viens maintenant, si vous le permettez, au troisième argument des appelants, selon lequel le Conseil n'aurait en tout état de cause pas compétence pour se prononcer sur l'invocation des contre-mesures.

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[66] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, p. 53-54, par. 16 *b)*.

[67] Voir l'onglet n° 10 du dossier des juges, Item under Article 54 (n) of the Convention on International Civil Aviation — Request of the State of Qatar, ICAO Council — 211th Session, Summary Minutes of the Tenth Meeting of 23 June 2017, ICAO doc. C-MIN 211/10, 11 July 2017, par. 20 (MD — ICAOA, vol. V, annexe 34).

C. Le Conseil de l'OACI est pleinement compétent pour se prononcer sur l'invocation de contre-mesures par une partie à un différend qui lui est soumis

15. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, lorsqu'ils évoquent le rôle du Conseil de l'OACI en matière de règlement des différends, nos contradicteurs ont une fâcheuse tendance à souffler simultanément le chaud et le froid. D'un côté, ils l'identifient comme un organe judiciaire au plein sens du terme, devant lequel toutes les garanties d'une bonne procédure doivent trouver à s'appliquer[68]. D'un autre côté, ils ont visiblement le plus grand mal à accepter qu'il s'agisse d'un organe de règlement des différends investi de tous les pouvoirs nécessaires pour trancher les litiges qui lui sont soumis, en tentant de le corseter par l'invocation du principe de spécialité[69].

16. Pourtant, ce que cette fonction du Conseil en tant qu'organe de règlement des différends implique avant tout, c'est la possibilité de mobiliser l'ensemble des règles de droit international pertinentes pour trancher les différends relatifs à l'interprétation et à l'application des traités de 1944 qui lui sont soumis. Pas plus qu'aucun autre organe spécialisé de règlement des différends, le Conseil n'est appelé à fonctionner à ce titre dans un *vacuum*, en maintenant les normes de l'aviation civile internationale dans une situation d'«isola[tion] clinique[]» — pour reprendre une expression consacrée — à l'égard du reste du *corpus* juridique international[70]. Il est donc parfaitement légitime, pour le Conseil, de faire usage dans ce cadre de règles de droit international dites «secondaires», telles que celles relatives à l'interprétation des traités ou à la responsabilité internationale des Etats[71]. Et, parmi ces dernières, des normes qui régissent le recours aux contre-mesures, dans leurs dimensions tant procédurales que substantielles, telles qu'elles ont en particulier été dégagées par la Commission du droit international dans les articles de 2001. Les Etats membres de l'OACI ne s'y trompent d'ailleurs pas : quand ils défendent leur cause devant le Conseil dans pareil cadre, ils le font exactement de la même manière qu'ils le feraient devant un

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[68] CR 2019/13, p. 43 et suiv., par. 3 et suiv. (van der Meulen).

[69] CR 2019/13, p. 63-64, par. 29-33 (Shaw).

[70] Voir, par identité de motifs, OMC, rapport de l'organe d'appel, *Etats-Unis — Normes concernant l'essence nouvelle et ancienne formules*, doc. WT/DS2/AB/R, 29 avril 1996, p. 19.

[71] Voir sur ce point la sentence arbitrale dans l'affaire n° 2014-02 de l'*Arctic Sunrise (Pays-Bas c. Fédération de Russie)*, sentence arbitrale du 14 août 2015, CPA, par. 190.

organe juridictionnel classique, en développant des argumentations juridiques complexes dans des exposés écrits et oraux très substantiels.

17. La Cour ne dit en fait pas autre chose dans son arrêt de 1972, lorsqu'elle se réfère aux «moyens de défense au fond ou d'autres considérations *qui ne deviendraient pertinentes qu'une fois tranchés les problèmes juridictionnels*»[72]. Si les moyens de défense dont il était question — à l'époque ceux fondés sur la terminaison ou la suspension des traités — sont pertinents une fois les problèmes juridictionnels tranchés, c'est évidemment parce qu'aux yeux de la Cour, le Conseil dispose bien du pouvoir de les examiner dès le moment où il est en situation de se pencher sur le fond des allégations de violation des instruments concernés. S'il ne pouvait le faire, il ne serait tout simplement pas en mesure d'exercer les fonctions que les traités de 1944 lui assignent en matière de règlement des différends. Il n'en va pas autrement pour les contre-mesures dont l'examen sera lui aussi pertinent — et nécessaire — lorsque le Conseil examinera les plaintes du Qatar sur le fond.

18. On voit donc très mal, dans un tel contexte, sur quoi se fonde l'argument des appelants selon lequel le Conseil ne pourrait examiner le bien-fondé de l'invocation de contre-mesures en vue de justifier les violations des traités de 1944 qui leur sont reprochées par le Qatar. Contrairement à ce qu'ils affirment, il n'y a là aucune atteinte au principe de spécialité, dès lors que ce n'est que pour trancher des questions entrant indubitablement dans son champ de compétence, et dans la seule mesure où c'est nécessaire, que le Conseil serait amené à se prononcer sur des points de droit plus larges.

19. A propos de nécessité, d'ailleurs, il me faut revenir sur un point que nos contradicteurs ont martelé sans relâche hier. Ils vous ont exposé, à pas moins de dix reprises, qu'il serait nécessaire, indispensable, inévitable, pour que le Conseil puisse trancher les allégations de violations des traités de 1944 qui lui ont été soumises par le Qatar, que le Conseil se prononce préalablement sur la question de savoir si le Qatar a violé, ou non, ses engagements au regard de l'accord de Ryad et du droit international coutumier[73]. Mais cette affirmation peut être répétée dix

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[72] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, p. 61, par. 27 (les italiques sont de nous).

[73] CR 2019/13, p. 55, par. 3 ; p. 56, par. 7 ; p. 58, par. 12 et 14 ; p. 59, par. 15 ; p. 60, par. 18 et 20 ; p. 66, par. 39 (Shaw) ; p. 73, par. 15 ; p. 74, par. 21 (Petrochilos).

fois, cent fois, cent mille fois, elle n'en deviendra pas exacte pour autant. Ainsi que le Qatar l'a exposé dans ses écritures, le Conseil pourrait en l'espèce parfaitement se limiter à conclure que la défense fondée sur les contre-mesures ne peut être acceptée à défaut de satisfaire aux conditions procédurales requises[74]. Je me limiterai à rappeler, à cet égard, qu'en vertu de l'article 52 des articles sur la responsabilité de l'Etat pour fait internationalement illicite, l'Etat qui se prétend lésé doit, avant de prendre des contre-mesures, notifier à l'Etat responsable sa décision de prendre de telles mesures et lui offrir de négocier. Comme l'agent du Qatar l'a rappelé tout à l'heure, tel n'a absolument pas été le cas en l'espèce et ce seul constat suffirait au Conseil pour écarter l'excuse des contre-mesures. Il n'y aurait là, contrairement à ce que prétendent les appelants, aucune «incohérence», aucune «décision partielle» résultant du fait que le Conseil ne se prononcerait pas en même temps sur l'invocation des contre-mesures dans leur dimension substantielle[75]. Les articles sur la responsabilité internationale de l'Etat mettent en effet conditions procédurales et substantielles sur le même pied lorsqu'il s'agit d'apprécier la validité de contre-mesures. Le non-respect d'une seule de ces conditions, qu'elle relève de la procédure ou du fond, suffit pleinement à invalider une contre-mesure.

20. Je voudrais, si vous le permettez, terminer ces considérations sur les contre-mesures par une observation qui pourrait sembler relever de l'évidence, mais qui paraît néanmoins s'imposer ici. Cette observation est la suivante : ce sont les règles générales du droit de la responsabilité de l'Etat qui encadrent l'institution des contre-mesures et qui permettent de déterminer la validité de celles-ci. Si ce rappel apparaît nécessaire, c'est parce que les appelants semblent déduire d'un texte particulier, les accords de Riyad, un droit de recourir à des contre-mesures qui paraît virtuellement illimité. Cet instrument leur permettrait, selon eux, de recourir à des «actions appropriées», «sans restrictions ou qualification» et sans aucune précondition[76]. L'argument est, évidemment, intenable. D'une part, parce qu'il fait dire au texte des accords de Riyad, extrêmement succincts sur ce point, quelque chose qui n'en ressort nullement. D'autre part et surtout, parce que s'il fallait suivre nos contradicteurs sur ce point, cela signifierait aussi que les parties à cet instrument pourraient

[74] DQ — ICAOA et ICAOB, par. 3.46-3.48.

[75] MD — ICAOA et ICAOB, par. 4.54.

[76] MD — ICAOA et ICAOB, par. 4.35-4.36.

recourir, au titre de «mesures appropriées» adoptées en réaction à une violation alléguée, à des mesures portant par exemple atteinte aux droits fondamentaux de la personne ou à d'autres normes impératives du droit international général, puisque ce type de mesures n'est pas non plus exclu par ce texte. Une telle conséquence serait manifestement inacceptable. Force est donc de conclure, sur ce point, que les accords de Riyad ne donnent aux Etats qui y sont parties aucun droit, en matière de contre-mesures, qui irait au-delà du cadre défini par la Commission du droit international dans les articles de 2001.

21. Il me reste enfin, avant de conclure, à évoquer très brièvement le dernier volet du deuxième moyen d'appel formulé par les appelants. Selon eux, en effet, même si la Cour en venait à conclure que le Conseil est compétent en l'espèce, ce dernier ne pourrait en tout état de cause exercer cette compétence car il porterait autrement atteinte à l'intégrité de la fonction judiciaire[77]. Il en irait ainsi parce que, selon nos contradicteurs, le Conseil ne pourrait se prononcer sur la plainte du Qatar dès lors qu'il n'est pas en mesure d'examiner la justification de leurs actes par les appelants sur la base des contre-mesures. La démarche des appelants à cet égard est assez simple : elle consiste à vous resservir dans un autre emballage — étiqueté cette fois «recevabilité» — les mêmes arguments que ceux avancés à l'appui de leur prétention fondée sur l'incompétence du Conseil. Et, très logiquement, si cet argument ne mérite guère de retenir l'attention, c'est parce qu'il est fondé sur les mêmes prémisses erronées que les objections avancées par les appelants à l'encontre de la compétence du Conseil. Celui-ci, je viens de le rappeler, est pleinement fondé à se prononcer sur le différend qui lui a été soumis, dans toutes ses dimensions et en examinant tous les arguments de fond avancés par les Parties à l'appui de leur position. Il n'y a donc tout simplement ici aucune atteinte que ce soit à l'intégrité de la fonction judiciaire.

22. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, l'approche des appelants par rapport aux questions que je viens d'évoquer dans la présente plaidoirie se caractérise en fin de compte par une très grande cohérence. Le seul problème est que cette cohérence, c'est celle de la collision frontale. Collision frontale avec la jurisprudence de la Cour en matière de définition de l'«objet véritable» d'un différend, une jurisprudence qui montre de façon éclatante

[77] MD — ICAOA et ICAOB, par. 4.28 et suiv. ; voir aussi CR 2019/13, p. 71 et suiv., par. 8 et suiv. (Petrochilos).

que l'existence d'un différend plus large entre les parties ne constitue pas un obstacle à sa compétence tant que l'acte dont il est fait grief entre dans les prévisions du traité concerné. Collision tout aussi frontale avec la jurisprudence de la Cour en matière de détermination de la compétence du Conseil dans les situations où une des parties invoque un moyen de défense particulier au fond, une jurisprudence selon laquelle il serait inadmissible qu'une partie puisse par ce biais déterminer la compétence de l'organe concerné. Le choix opéré par les appelants est clair. Mais c'est évidemment un choix infiniment périlleux et je ne puis que vous inviter, Monsieur le président, Mesdames et Messieurs les Membres de la Cour, à en tirer toutes les conséquences en rejetant le deuxième motif d'appel invoqué par les appelants.

23. Je vous remercie pour votre bienveillante attention et je vous prie, Monsieur le président, de bien vouloir passer la parole à mon collègue Lawrence Martin, peut-être après la pause.

The PRESIDENT: I thank Mr. Klein. Before I give the floor to the next speaker, the Court will observe a coffee break of 15 minutes. The sitting is adjourned.

The Court is adjourned from 4.20 to 4.40 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now give the floor to Mr. Martin to continue with the pleadings of Qatar today. You have the floor, Sir.

Mr. MARTIN:

IV. THE COURT SHOULD REJECT THE JOINT APPELLANTS' THIRD GROUND OF APPEAL

1. Mr. President, Madam Vice-President, distinguished Members of the Court, good afternoon. It is an honour to appear before you on behalf of the State of Qatar.

2. My task this afternoon is to explain why the Joint Appellants' third ground of appeal should be rejected. The third ground of appeal relates primarily to what the Joint Appellants say is Qatar's failure to satisfy the negotiation requirement in Article 84 of the Chicago Convention. The Joint Appellants also maintain what Mr. Olleson modestly called a "subsidiary"[78] argument that

[78] CR 2019/14, p. 20, para. 3 (Olleson).

Qatar's pleadings before the ICAO Council failed to fulfil the requirements of Article 2 *(g)* of the ICAO Rules for the Settlement of Differences.

3. I will address three issues. *First*, I will discuss the principal disagreement of law that divides the Parties on the content of the Article 84 negotiation requirement. *Second*, I will show on the facts that Qatar plainly satisfied that requirement. *Third*, I will very briefly dispense with the Joint Appellants' arguments based on Article 2 *(g)* of the ICAO Rules.

A. There is no requirement to attempt to negotiate in the face of a total refusal to negotiate *ab initio*

4. On the law, the principal disagreement between the Parties is whether or not a State is required to make a "genuine attempt" to negotiate when the counter-party — or, as in this case, the counter-parties — entirely refuse to negotiate on any issue, in any forum, at any time. We say, the law does not require such absurd formalism. It would be pointless to require a State to make a purely *pro forma* attempt to negotiate in circumstances where the other side absolutely — and *admittedly* — refuses to talk.

5. Mr. President, let me be clear. Qatar does *not* make this argument because we think we have to win it for the Court to reject the Appellants' third ground of appeal. We do not. As I will explain, Qatar made multiple genuine attempts to negotiate with the Joint Appellants over the aviation prohibitions.

6. We make the argument because we think the principle is important and because it is legally correct. We also make it to highlight the lack of seriousness that characterizes the Appellants' entire case. The fact that they ask you to reverse the ICAO Council's decisions because Qatar allegedly failed to make a genuine attempt to negotiate even as they maintained an unyielding policy of rejecting any and all talks with Qatar is an affront to Qatar and to the Court.

7. Let us get right to the heart of the matter. In its Judgment on Preliminary Objections in *Georgia* v. *Russia*, the Court stated that the "precondition of negotiation" requires "at the very least . . . a genuine attempt . . . to engage in discussions with the other disputing party, with a view

to resolving the dispute"[79]. The Court repeated the same statement in *Belgium* v. *Senegal*[80] and most recently in *Ukraine* v. *Russia*[81].

8. The Joint Appellants read these statements to suggest that the requirement to make a "genuine attempt" to negotiate exists in every case, even when one side has made it absolutely clear that it will not negotiate on any issue, at any time. Mr. Olleson reiterated that position yesterday[82].

9. We disagree. That question was not before you in those cases. The Court's language can only be understood in context. Requiring a party to attempt to negotiate even in the face of the other disputing party's absolute refusal would be inconsistent with good faith, not to mention common sense. If no talks are possible on any subject, no purpose could be served by insisting that States nevertheless make an entirely formalistic attempt to negotiate merely for purposes of "checking the box".

10. Qatar expressed this view in its February 2019 Counter-Memorials[83]. The Joint Appellants could have responded on the facts. They could have argued that Qatar misunderstood, and that they were in fact open to discussions. They did not. In their Replies, the Joint Appellants did not dispute Qatar's characterization of their position. They never once denied that they entirely refused to negotiate *ab initio*. Nor did we hear any such denial from Mr. Olleson yesterday. The Joint Appellants thus effectively admit that as from 5 June 2017, they were unwilling to negotiate with Qatar with a view to resolving the aviation dispute or any other issue.

11. The Joint Appellants' concession is consistent with all of the evidence before you. Qatar showed in its written pleadings that after severing diplomatic relations the Joint Appellants at all

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[79] *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.

[80] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 445-446, para. 57.

[81] *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), Preliminary Objections, Judgment of 8 November 2019*, para. 116.

[82] CR 2019/14, pp. 23-27, paras. 12-22 (Olleson).

[83] CMQ — ICAOA and ICAOB, paras. 4.8-4.11.

times took the view that there was "nothing to negotiate" with Qatar[84] unless it complied with their facially unreasonable 13 demands, which themselves were "non-negotiable"[85].

12. Despite their admission that they were unwilling to negotiate with Qatar, the Joint Appellants insist that Qatar was still required to make a "genuine attempt" to negotiate with them. Their argument fails. According to Mr. Olleson, "[t]he primary response to Qatar's position . . . is that it is impermissible to assume that a request for negotiations, if such had been made, would necessarily have been rebuffed"[86]. But there is no issue about "assuming" anything in the circumstances of this case. As I just explained, the Joint Appellants do not deny that they were unwilling to engage in discussions with Qatar on any issue. They thus effectively admit that they would have rebuffed any outreach from Qatar, as, in fact, they did.

13. Mr. Olleson argued also that our approach "aims to introduce a significant element of subjectivity into a precondition which calls for objective verification"[87]. That is not true. The issue is not about Qatar's "subjective" views. The Joint Appellants' absolute — and admitted — refusal even to consider engaging in discussions with Qatar plainly constitutes precisely the "objective verification" that negotiations would be futile that Mr. Olleson says is required.

14. The approach we propose is entirely consistent with the interpretation of procedural requirements in several areas of international law. In the law of diplomatic protection and human rights law, for example, local remedies generally need to be exhausted. The requirement is dispensed with if such remedies are obviously futile. Qatar sees no basis in law, or common sense, to take a different approach here.

15. In addition to making good practical sense, this result is also consistent with what is expected of States when they negotiate. In the *North Sea Continental Shelf* cases, the Court explained that negotiating parties "are under an obligation so to conduct themselves that the

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[84] CMQ — ICAOA and ICAOB, paras. 1.12, 4.30, 4.41.

[85] CMQ — ICAOA and ICAOB, paras. 4.32, 4.74, 4.77.

[86] CR 2019/14, p. 25, para. 17 (Olleson).

[87] CR 2019/14, p. 24, para. 13 (Olleson).

negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it . . .”[88].

16. The Joint Appellants dismiss the Court’s holding in the *North Sea* cases. They claim that it is irrelevant because the Court’s statement “does not concern what is required in order to satisfy a jurisdictional precondition of negotiation, but rather relates to the different issue of how States are required to conduct themselves in the course of negotiations”[89]. That may be so, but the point remains. If a State refuses even to come to the negotiation table, still less with a willingness to compromise, there is obviously no chance that the dispute can be resolved by negotiation. No interest can be served by requiring a State nevertheless to make a wholly pointless attempt to negotiate in such circumstances.

17. Finally, Qatar observes that this result is not only consistent with justice and common sense, it is also consistent with the text of Article 84. That text is different from Article 22 of CERD, the title of jurisdiction in the *Georgia* v. *Ukraine* cases, as well as Article 30 (1) of the Convention against Torture, the title of jurisdiction in the *Belgium* case. Article 84 provides:

> “*If* any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes *cannot* be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council.”[90]

18. The conditional conjunction “if”, which does *not* exist in either Article 22 of CERD or Article 30 (1) of the Convention against Torture, is significant. “If” means: “in the event that” or “on the assumption that”[91]. It expresses a condition necessary for something to happen. Particularly when paired, as here, with the term “cannot”, which denotes impossibility, the use of “if” in Article 84 plainly calls for an objective assessment of fact; namely, whether settlement by negotiation is possible or not.

19. In making that objective assessment, Qatar considers it entirely appropriate for the Court to be guided by a disputing party’s total, unyielding refusal to enter into negotiations. Such a

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[88] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85 *(a)*.

[89] RA — ICAOA and ICAOB, para. 5.24.

[90] Convention on International Civil Aviation (7 Dec. 1944) (entry into force: 4 Apr. 1947), Art. 84 (MA — ICAOA, Vol. II, Ann. 1; emphasis added.

[91] *Merriam-Webster’s Collegiate Dictionary* (11th ed., 2009), p. 617 (RQ — ICAOA, Vol. II, Ann. 14).

refusal plainly constitutes sufficient, indeed overwhelming, evidence to conclude that the disagreement "cannot be settled by negotiation".

B. Qatar made multiple genuine attempts to negotiate in many fora

20. Mr. President, distinguished Members of the Court, as I said at the outset, Qatar firmly considers the view of the law just presented the right one. But as right as it is, and as fascinating as the issue may be, the Court does not need to agree with us to reject the Joint Appellants' third ground of appeal. In fact, Qatar not only made a "genuine attempt" to negotiate with the Joint Appellants with a view to resolving the aviation dispute, it made many such attempts in multiple fora. But, as Qatar's Agent explained, all those attempts fell on deaf ears.

1. Qatar attempted to negotiate under the auspices of ICAO

21. Qatar's attempts to negotiate with the Joint Appellants over the aviation prohibitions are especially obvious from its efforts under the auspices of ICAO.

22. I begin with what is, thankfully, a point of agreement between the Parties on an issue of law. In our Counter-Memorials, we explained that no specific format is required for exchanges to constitute "negotiations"[92]. In the *South West Africa* cases, the Court ruled that there was no reason to distinguish "collective negotiations" in the context of an international organization from "direct negotiations" between the disputing parties[93]. In his 1969 book on ICAO, Judge Buergenthal echoed the point, writing that "within the ICAO framework, parliamentary diplomacy can take the place of direct negotiations"[94].

23. The Joint Appellants agree. In their Replies, they expressly state that they "do not dispute that, as a matter of principle, an attempt to negotiate may be held to have been made through the medium of diplomacy by conference or parliamentary diplomacy"[95].

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[92] CMQ — ICAOA and ICAOB, para. 4.17.

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

[94] Thomas Buergenthal, *Law-making in the International Civil Aviation Organization* (1969), p. 131 (MA —ICAOA, Vol. VI, Ann. 125).

[95] RA — ICAOA and ICAOB, para. 5.39.

24. The Parties' agreement on this point is critical because the facts of this case show that attempts at negotiations among them took place via parliamentary diplomacy under the auspices of ICAO. Yesterday, Mr. Olleson told you that "there is nothing in the proceedings before ICAO which even comes close to satisfying the precondition"[96]. With respect, he could not be more wrong.

25. Immediately after the Joint Appellants imposed the aviation prohibitions, Qatar dispatched a letter to the ICAO Secretary General dated 5 June 2017, complaining that the aviation prohibitions were "not in accordance with the Spirit of the Chicago Convention" and invited the Secretary General to "consider bringing this issue to the attention of the ICAO Council"[97]. Upon receiving Qatar's letter, the ICAO Secretary General immediately "brought the matter to the attention of the relevant Representatives on the Council of ICAO"[98], which then included representatives of Appellants Egypt, Saudi Arabia and the UAE.

26. Shortly thereafter, on 8 June 2017, Qatar also wrote to the President of the ICAO Council to suggest that the Council convene an extraordinary session under Article 54 *(n)* of the Chicago Convention. In its letter, Qatar explained that "[i]n an unprecedented act, the above-mentioned States announced that, effective immediately, all Qatar-registered aircraft, including the aircraft of the national carrier, Qatar Airways, will be prevented from accessing the airspace over their national territories"[99]. The letter outlined what Qatar considered to be the Joint Appellants' violations of the ICAO Treaties and called on the Council to, among other things:

— "Reaffirm that all Member States are obliged to respect the principles of the Chicago Convention and must refrain from interfering with international civil aviation"; and

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[96] CR 2019/14, p. 34, para. 51 (Olleson).

[97] Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Fang Liu, ICAO Secretary General (5 June 2017) (CMQ — ICAOA, Vol. III, Ann. 21).

[98] Letter from Fang Liu, ICAO Secretary General, to Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, Reference No. AN 13/4/3/Open-AMO66892 (7 June 2017) (CMQ — ICAOA, Vol. III, Ann. 22).

[99] ICAO Response to Preliminary Objections (A), Exhibit 3, Letter from Adbulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Dr. Olumuyiwa Benard Aliu, President of ICAO, 2017/15984 (8 June 2017) (MA — ICAOA, Vol. IV, Ann. 25).

— "Urge the concerned countries to cease using these unjustified measures against the State of Qatar, in order to ensure the rights of the State of Qatar under the Chicago Convention are fully respected."[100]

27. Qatar wrote again to the President of the Council on 17 June 2017 and requested that the Council

> "include this top-urgent item to the Work Programme of the ongoing ICAO Council 211th Session and [undertake] urgent actions to restore the safe, secured and efficient flow of air traffic and immediate removal of the current blockade exercised unlawfully against Qatar-registered aircraft"[101].

On 19 June 2017, the President of the Council transmitted all of Qatar's letters to all Council delegations, again including Appellants Egypt, Saudi Arabia and the UAE[102]. None of the Joint Appellants provided any response of any kind.

28. Yesterday, Mr. Olleson tried to dismiss these letters as irrelevant "both because they were not addressed to the [Appellants], and in any event because there was no attempt to initiate negotiations"[103]. That is beside the point. To be sure, the letters did not seek to initiate bilateral negotiations, as such, but they did seek to, and did in fact, initiate a parliamentary diplomatic process in which the Parties, to use the words of Judge Buergenthal again "participated . . . on opposite sides"[104]. That is all that is required.

29. At its 211th Session, during a meeting held on 23 June 2017, the Council discussed how it planned to address Qatar's request under Article 54 *(n)*[105]. The three Appellants on the Council (Egypt, Saudi Arabia and the UAE) adamantly refused to discuss the aviation prohibitions. Saudi Arabia insisted that "the focus of the discussion should rest on safety, security and air navigation"[106]. The UAE agreed[107]. And Egypt warned ICAO to "not delve into political

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[100] ICAO Response to Preliminary Objections (A), Exhibit 3, Letter from Adbulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Dr. Olumuyiwa Benard Aliu, President of ICAO, 2017/15984 (8 June 2017) (MA — ICAOA, Vol. IV, Ann. 25).

[101] ICAO Response to the Preliminary Objections (A), Exhibit 1, Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Olumuyiwa Benard Aliu, President of the ICAO Council (17 June 2017) (MA — ICAOA, Vol. IV, Ann. 25; emphasis omitted).

[102] Email from Olumuyiwa Benard Aliu, President of the ICAO Council, to All Council Delegations (19 June 2017) (RQ — ICAOA, Vol. II, Ann. 4).

[103] CR 2019/14, p. 34, para. 52 (Olleson).

[104] Thomas Buergenthal, *Law-making in the International Civil Aviation Organization* (1969), p. 131 (MA — ICAOA, Vol. VI, Ann. 125).

[105] ICAO Council, 211th Session, *Summary Minutes of the Tenth Meeting*, ICAO doc. C-MIN 211/10 (23 June 2017), paras. 7-55 (CMQ — ICAOA, Vol. III, Ann. 24).

[106] *Ibid.*, para. 15.

considerations"[108]. The Council nonetheless agreed to schedule an extraordinary session, later set for 31 July 2017, to discuss Qatar's request[109].

30. The Joint Appellants' unbending refusal to discuss the aviation prohibitions is also evidenced by the joint working paper they submitted to the Council's extraordinary session[110]. All of the Joint Appellants urged the Council "to limit its deliberations to the urgent Article 54 *(n)* matters which are related to the safety of international civil aviation, and to defer the other, non-urgent matters"[111].

31. The discussions at the 31 July extraordinary session of the Council, at which all five Parties were present[112], are equally revealing. For its part, Qatar complained of "the successive [Notices to Airmen] and arbitrary action taken by the four blockading Member States starting on 5 June 2017, in flagrant violation of all relevant ICAO international Standards, as well as of relevant ICAO instruments to which they were parties"[113]. It also requested that the Joint Appellants "lift the unjust air blockade that had been imposed upon it by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates"[114], observing that the Joint Appellants' violations were "unprecedented in the entire history of international civil aviation"[115].

32. The UAE argued on behalf of all four Appellants that "their airspace closures were legitimate, justified, and a proportionate response to Qatar's actions and were permitted under international law"[116]. It also reiterated their insistence that "the Council should *limit* its

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[107] ICAO Council, 211th Session, *Summary Minutes of the Tenth Meeting*, ICAO doc. C-MIN 211/10 (23 June 2017), para. 18 (CMQ — ICAOA, Vol. III, Ann. 24).

[108] *Ibid.*, para. 20.

[109] *Ibid.*, para. 53.

[110] ICAO Response to the Preliminary Objections (A), Exhibit 8, *Response to Qatar's Submission Under Article 54 (n) Presented by Bahrain, Egypt, Saudi Arabia, and the United Arab Emirates*, ICAO doc. C-WP/14640 (19 July 2017) (MA — ICAOA, Vol. IV, Ann. 25).

[111] *Ibid.*, para. 5.1 *(b)*.

[112] ICAO Response to the Preliminary Objections (A), Exhibit 10, *ICAO Council, Extraordinary Session, Summary Minutes*, ICAO doc. C-MIN Extraordinary Session (31 July 2017), para. 5 (MA — ICAOA, Vol. IV, Ann. 25).

[113] *Ibid.*, para. 11.

[114] *Ibid.*, para. 14.

[115] *Ibid.*, para. 25.

[116] *Ibid.*, para. 32.

deliberations to the urgent Article 54 *(n)* matter which was related to the safety of international civil aviation, and . . . *defer* the other non-urgent matters"[117].

33. Although the Parties subsequently continued to have some additional exchanges on the issue of contingency routes, the question of the aviation prohibitions remained off the table. This situation persisted until Qatar filed its Applications with the Council (and, indeed, it persists to this day).

34.The Joint Appellants also argue that the proceedings before ICAO do not count because "the Article 54 *(n)* proceedings were limited to issues relating to the safety of aviation and contingency routes, and did not touch upon the question of the dispute initiated under Article 84"[118]. As I explained, however, Qatar initiated the Article 54 *(n)* procedure precisely for the purpose of resolving the same dispute over the aviation prohibitions that it later brought before the ICAO Council for settlement. It may be that the Article 54 *(n)* procedure ultimately only dealt with issues relating to contingency routes, but that is only because the Joint Appellants expressly, and repeatedly, refused to allow the Council to consider any other subject.

35. Mr. Olleson appeared to suggest that the Council declined to consider the substance of Qatar's complaints not because of the Joint Appellants' objections but because the Council itself "decided from the outset" not to do so[119]. That is a flat mischaracterization of the record. The evidence Mr. Olleson cites shows only that the Council at all times insisted on maintaining the distinction between the Article 54 *(n)* and Article 84 processes[120], *not* that it decided on its own not to enter the substance of the matter.

36. In any event, even if that were the case — which it is not — the fact would remain that Qatar made a genuine attempt to engage a parliamentary diplomatic process for purposes of

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[117] ICAO Response to the Preliminary Objections (A), Exhibit 10, *ICAO Council, Extraordinary Session, Summary Minutes*, ICAO doc. C-MIN Extraordinary Session (31 July 2017), para. 33; emphasis added (MA — ICAOA, Vol. IV, Ann. 25).

[118] RA — ICAOA and ICAOB, para. 5.58.

[119] CR 2019/14, p. 36, para. 59 (Olleson).

[120] ICAO Council, 211th Session, *Summary Minutes of the Tenth Meeting*, ICAO doc. C-MIN 211/10 (23 June 2017), paras. 25-26, 55 (CMQ — ICAOA, Vol. III, Ann. 24); ICAO Response to the Preliminary Objections (A), Exhibit 10, *ICAO Council, Extraordinary Session, Summary Minutes*, ICAO doc. C-MIN Extraordinary Session (31 July 2017), para. 2 (MA — ICAOA, Vol. IV, Ann. 25).

resolving the dispute it subsequently brought to the Council under Article 84, and that process failed. Article 84 requires nothing more.

2. Qatar also attempted to negotiate through the WTO Framework

37. Qatar's attempts to engage with the Joint Appellants through parliamentary diplomacy under the auspices of ICAO were not the only genuine attempts to negotiate that Qatar made. It also did so within the framework of the World Trade Organization (WTO).

38. Specifically, on 31 July 2017, Qatar sent Appellants Saudi Arabia, Bahrain and the UAE letters inviting them "to enter into consultations concerning measures adopted in the context of coercive attempts at economic isolation imposed . . . against the State of Qatar"[121]. Qatar's requests for consultations expressly stated that the measures included the Joint Appellants' "prohibition on Qatari aircraft from accessing [their] airspace", as well as their "prohibition on flights to and from [their territories] operated by aircraft registered in Qatar, including prohibiting landing of Qatari aircraft at airports [in their territories]"[122]. In other words, the requests for consultations included the subject-matter of the Parties' dispute under the ICAO Treaties.

39. Saudi Arabia, Bahrain and the UAE rejected the offer just ten days later. By joint letter dated 10 August 2017, they took the position that, "the measures referenced in the Request implement diplomatic and national security decisions with respect to which all WTO members maintain full sovereignty", and therefore "decline[d] to engage in consultations on this matter"[123].

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[121] ICAO Response to the Preliminary Objections (A), 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), para. 1 (MA — ICAOA, Vol. IV, Ann. 25); ICAO Response to the Preliminary Objections (A), Exhibit 12, WTO, *Bahrain — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS527/1 (4 Aug. 2017), para. 1 (MA — ICAOA, Vol. IV, Ann. 25); ICAO Response to Preliminary Objections (B), Exhibit 11, para. 1 (MA — ICAOB, Vol. IV, Ann. 25); ICAO Response to the Preliminary Objections (A), Exhibit 13, 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), para. 1 (MA — ICAOA, Vol. IV, Ann. 25).

[122] ICAO Response to the Preliminary Objections (A), 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, Vol. IV, Ann. 25); ICAO Response to the Preliminary Objections (A), Exhibit 12, 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, Vol. IV, Ann. 25); ICAO Response to Preliminary Objections (B), Exhibit 11, paras. 8 (i), 8 (iii) (MA — ICAOB, Vol. IV, Ann. 25); ICAO Response to the Preliminary Objections (A), Exhibit 13, 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) (MA — ICAOA, Vol. IV, Ann. 25).

[123] ICAO Response to the Preliminary Objections (A), Exhibit 14, *Letter from UAE, Bahrain, and Saudi Arabia to Junichi Ihara, Chairman of the WTO Dispute Settlement Body* (10 Aug. 2017), p. 2 (MA — ICAOA, Vol. IV, Ann. 25).

40. In their Replies, the Joint Appellants argue that Qatar's requests for consultations do not constitute a genuine attempt to negotiate over the aviation prohibitions because the requests related to "alleged breaches of distinct obligations, having a different subject-matter and content"[124]. They say it is not enough to "refer in general terms to the subject-matter of the dispute"[125], as the requests for consultations plainly do. Mr. Olleson made similar points yesterday, although he was rather more circumspect on the subject[126].

41. Our friends are mistaken. The Court has never said that an invitation to negotiate must expressly identify the *specific* substantive obligations in the treaty at issue. In *Georgia* v. *Russia*, the Court stated only that the negotiations must "relate to the subject-matter of the dispute"[127] — here, the aviation prohibitions. The dispute, in turn, must "concern the substantive obligations contained in the treaty"[128] — here, obligations related to international civil aviation.

42. The Court distinctly did *not* state that an invitation to negotiate must identify *specific* substantive obligations in the treaty. Indeed the Court held that the negotiation requirement would have been satisfied if there had been negotiations concerning "extermination" and "ethnic cleansing" — the general subject-matter of the CERD, the treaty at issue in that case — without specifying the specific substantive obligations of the CERD involved[129].

43. The Replies also seek to discount Qatar's requests for consultations because they were not addressed to Egypt. This argument, of course, is of no assistance to Appellants Bahrain, Saudi Arabia and the UAE. But it also does not rescue Egypt. As Qatar explained in its Counter-Memorials, the formalistic distinction the Joint Appellants attempt to make ignores the reality of this case. The Joint Appellants have at all times acted in concert, hand-in-hand every step of the

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[124] RA — ICAOA and ICAOB, para. 5.61

[125] RA — ICAOA and ICAOB, para. 5.62.

[126] CR 2019/14, p. 37, paras. 64-66 (Olleson).

[127] *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.

[128] *Ibid.*

[129] *Ibid.*, para. 181.

way, including by bringing the present appeals jointly[130]. They notably offered no serious response on this point in their Replies[131]. Nor did we hear anything yesterday.

44. Qatar's invitation to Appellants Bahrain, Saudi Arabia and the UAE to engage in consultations in the context of the WTO therefore constitutes a "genuine attempt" to negotiate, which Appellants flatly rejected, just like all the others.

3. Qatar repeatedly attempted to engage the Joint Appellants in direct negotiations

45. Qatar also tried repeatedly to engage the Joint Appellants in direct negotiations. The details of those efforts are set out in our written pleadings[132]. I will therefore not burden the Court by rehearsing all the relevant facts here. I will highlight only a few key points.

46. First, from the very outset of the crisis, Qatar repeatedly called on the Joint Appellants to engage in dialogue. On 22 July 2017, for example, His Highness the Amir of Qatar delivered his first public address following the imposition of the aviation prohibitions. He expressly stated that Qatar is "ready for dialogue and for reaching settlements on all contentious issues in this context"[133]. The "contentious issues" included, of course, the aviation prohibitions which Qatar had already brought to the attention of the ICAO Council, and which His Highness the Amir also specifically mentioned during his speech[134].

47. Despite Qatar's calls for dialogue, the Joint Appellants' Foreign Ministers made clear they had no interest in talking. At a 30 July 2017 joint press conference with his counter-parts from the three other Appellants, the Minister of Foreign Affairs of Saudi Arabia reiterated their stance, stating that "there is no negotiation over the 13 demands"[135]. The Minister added that "we made a decision not to allow our airspace" — our airspace — "or borders to be used and this is our

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[130] CMQ — ICAOA and ICAOB, paras. 4.46, 4.71; RQ — ICAOA and ICAOB, para. 4.49.

[131] See RA — ICAOA and ICAOB, para. 5.63.

[132] CMQ — ICAOA and ICAOB, Chap. 4, Sect. I B (1); QR — ICAOA and ICAOB, Chap. 4, Sect. I B (1)

[133] "Emir speech in full text: Qatar ready for dialogue but won't compromise on sovereignty", *The Peninsula* (22 July 2017), p. 7 (CMQ — ICAOA, Vol. IV, Ann. 86).

[134] *Ibid.*; see also ICAO Response to the Preliminary Objections (A), Exhibit 70, *Minister of State for Foreign Affairs Confirms Illegality of the Siege Imposed on Qatar* (26 Sept. 2017) (MA — ICAOA, Vol. IV, Ann. 25).

[135] ICAO Response to the Preliminary Objections (A), Exhibit 58, *Foreign Ministers of Saudi Arabia, Bahrain, UAE and Egypt: Measures taken against Qatar are sovereign, and we all are negatively impacted when terrorism and extremism become stronger* (30 July 2017) (MA — ICAOA, Vol. IV, Ann. 25); ICAO Response to Preliminary Objections (B), Exhibit 57 (MA — ICAOB, Vol. IV, Ann. 25).

sovereign right"[136]. Here, we have explicit evidence that the subject-matter concerning which there could be "no negotiation" included, among other things, the airspace restrictions, which were to be the subject of the Council's Extraordinary Session the very next day.

48. On 19 September 2017, His Highness the Amir of Qatar repeated the call for unconditional dialogue in his speech before the United Nations General Assembly, saying: "From here, I renew the call for an unconditional dialogue based on mutual respect for sovereignty"[137].

49. The Joint Appellants complain that these and other calls for dialogue did not constitute a "genuine attempt" to negotiate because Qatar allegedly never took any "concrete steps" to attempt to negotiate[138]. I confess I do not understand this argument. A public call for dialogue sounds an awful lot like an invitation to negotiate to me. The law does not require an engraved note, wrapped in a bow and delivered on a golden platter.

50. In any event, the only time that one of the Joint Appellants' leaders engaged with Qatar directly (albeit very briefly), His Highness the Amir did take "concrete steps" to attempt negotiations. With the facilitation of the President of the United States of America, His Highness the Amir called the Crown Prince of Saudi Arabia by telephone on 8 September 2017. As reported by the official news agency of Saudi Arabia, "the Emir of Qatar expressed his desire to sit at the dialogue table and discuss the demands of the four countries"[139]. According to Qatar News Agency ("QNA"), His Highness also welcomed a proposal the Crown Prince made "to assign two envoys to settle [the] issues in dispute"[140], which of course included the aviation prohibitions.

51. Immediately after the call, however, press reports confirm that Saudi Arabia reversed course and announced the "suspension of any dialogue or communication with the authority in

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[136] ICAO Response to the Preliminary Objections (A), Exhibit 58, *Foreign Ministers of Saudi Arabia, Bahrain, UAE and Egypt: Measures taken against Qatar are sovereign, and we all are negatively impacted when terrorism and extremism become stronger* (30 July 2017) (MA — ICAOA, Vol. IV, Ann. 25); ICAO Response to Preliminary Objections (B), Exhibit 57 (MA — ICAOB, Vol. IV, Ann. 25).

[137] United Nations General Assembly, 72nd Session, General Debate, *Address by His Highness Sheikh Tamim bin Hamad Al-Thani, Amir of the State of Qatar* (19 Sept. 2017), p. 4 (CMQ — ICAOA, Vol. III, Ann. 55).

[138] MA — ICAOA and ICAOB, para. 6.61.

[139] "Saudi Arabia suspends dialogue, saying Qatar 'distorting facts'", *The Guardian* (8 Sept. 2017) (CMQ — ICAOA, Vol. IV, Ann. 89).

[140] "Hopes for Qatar crisis breakthrough raised, shattered within minutes", *Gulf News* (9 Sept. 2017) (CMQ — ICAOA, Vol. IV, Ann. 90).

Qatar"[141]. It apparently did this only because QNA failed to report that it was Qatar that had initiated the call[142]. The prospects of negotiation returned to zero, despite His Highness the Amir of Qatar's genuine attempts to negotiate.

4. Qatar attempted to settle the dispute through third parties

52. Qatar also participated in attempts to resolve the disputes with Joint Appellants mediated by Kuwait and the United States. In both cases, however, those efforts, like all the others, were frustrated by the Joint Appellants' refusal to participate.

53. As early as June 2017, His Highness the Emir of Kuwait was working to try to defuse the crisis. On 12 June, His Excellency the Foreign Minister of Qatar stated that "Qatar is in contact with HH the Emir of Kuwait . . . on his mediation efforts", and affirmed Qatar's openness to dialogue, adding that "Qatar is ready to discuss any requests, provided that they are clear"[143].

54. The issuance of the Joint Appellants' 13 demands on 22 June 2017 did not stop the efforts of His Highness the Emir of Kuwait, who reiterated the call for unconditional dialogue. Qatar responded favourably[144] — the Joint Appellants did not[145]. While acknowledging that "the Emir of Kuwait . . . has acted as a go-between during this time of indirect communication", the UAE press reported on 11 September 2017 that "[e]ach of the quartet's 13 demands are non-negotiable and non-divisible and are the bare minimum required to return once more to normalcy between neighbors"[146].

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[141] "Saudi Arabia suspends dialogue, saying Qatar 'distorting facts'", *The Guardian* (8 Sept. 2017) (CMQ — ICAOA, Vol. V, Ann. 89).

[142] "Qatar crisis: Saudi Arabia angered after emir's phone call", *BBC News* (9 Sept. 2017) (CMQ — ICAOA, Vol. IV, Ann. 91).

[143] ICAO Response to the Preliminary Objections (A), Exhibit 23, *Foreign Minister: Qatar Focuses on Solving Humanitarian Problems of Illegal Siege* (12 June 2017) (MA — ICAOA, Vol. IV, Ann. 25).

[144] ICAO Response to the Preliminary Objections (A), Exhibits 19, 33-36, 38-39, 42, 44-46, 48-49, 59-62, 65-68, 72-74 (MA — ICAOA, Vol. IV, Ann. 25); ICAO Response to Preliminary Objections (B), Exhibits 18, 32-35, 37-38, 41, 43-45, 47-48, 58-61, 64-67, 71-73 (MA — ICAOB, Vol. IV, Ann. 25).

[145] ICAO Response to the Preliminary Objections (A), Exhibit 61, *Foreign Minister Reiterates: Qatar Welcomes Any Effort Supports Kuwaiti Mediation to Resolve Gulf Crisis* (30 Aug. 2017) (MA — ICAOA, Vol. IV, Ann. 25); ICAO Response to the Preliminary Objections (B), Exhibit 60 (MA — ICAOB, Vol. IV, Ann. 25).

[146] ICAO Response to the Preliminary Objections (A), Exhibit 65, *UAE Press: Qatar has distorted details of phone call* (11 Sept. 2017) (MA — ICAOA, Vol. IV, Ann. 25); ICAO Response to the Preliminary Objections (B), Exhibit 64 (MA — ICAOB, Vol. IV, Ann. 25).

55. Subsequently, at a 30 August 2017 press conference, His Excellency the Foreign Minister of Qatar referred to

> "letters sent by HH the Emir of Kuwait to all the parties, which called for dialogue directly and unconditionally. He noted that the State of Qatar was the only country to respond to the Kuwaiti letter after a few days, [on] the contrary, non[e] of the siege countries responded, in continuation of their approach of not responding and ignoring any mediation efforts, whether from Kuwait or any other friendly country."[147]

56. The "other friendly country" His Excellency referred to was the United States. The details of the American efforts are also set out in our written pleadings[148]. The essential point now is that the United States-led process followed the same all-too-familiar pattern: the United States tried to engage the Parties in dialogue, Qatar agreed but the Joint Appellants refused.

57. Summing up the situation, the United States Secretary of State stated: "It's up to the leadership of the quartet when they want to engage with Qatar because Qatar has been very clear — they are ready to engage"[149].

58. Mr. Olleson somewhat surprisingly made a new argument yesterday according to which "attempts by third parties to mediate or facilitate resolution of a dispute are incapable of fulfilling the precondition of negotiations"[150]. We disagree with this novel, belated contention. It is plainly inconsistent with the Court's jurisprudence, which makes clear that "the Court has come to accept less formalism in what can be considered negotiations"[151].

59. The Joint Appellants did *not* make the argument that Mr. Olleson rehearsed yesterday in their written pleadings. What they did argue in their Replies was that the efforts of Kuwait and the United States did not constitute "genuine attempts" to negotiate because "all of the requests were in general terms, and failed to refer to the specific substantive obligations under the Chicago Convention"[152]. The argument is not well taken.

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[147] ICAO Response to the Preliminary Objections (A), Exhibit 61, *Foreign Minister Reiterates: Qatar Welcomes Any Effort Supports Kuwaiti Mediation to Resolve Gulf Crisis* (30 Aug. 2017), pp. 1-2 (MA — ICAOA, Vol. IV, Ann. 25); ICAO Response to the Preliminary Objections (B), Exhibit 60, pp. 1-2 (MA — ICAOB, Vol. IV, Ann. 25).

[148] CMQ — ICAOA and ICAOB, paras. 4.76-4.83.

[149] ICAO Response to the Preliminary Objections (A), Exhibit 71, *Tillerson Faults Saudi-Led Bloc for Failing to End Qatar Crisis* (19 Oct. 2017) (MA — ICAOA, Vol. IV, Ann. 25); ICAO Response to the Preliminary Objections (B), Exhibit 70 (MA — ICAOB, Vol. IV, Ann. 25).

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

[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)*, p. 133, para. 160.

[152] RA — ICAOA and ICAOB, para. 5.64.

60. The Kuwaiti and American efforts to resolve the Parties' disputes related to their disputes in their entirety, including the subset relating to civil aviation, which had long since been placed on the ICAO agenda. And the Joint Appellants' refusal to participate likewise applied across the board. It is difficult to understand why the Joint Appellants' refusal to talk on *any* issue should not be taken to apply also to the aviation prohibitions.

61. Put another way, 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. They cannot be heard to claim that their own bad behaviour is reason for the Court to find that Qatar did not comply with the Article 84 requirement. In fact, Qatar did everything that can reasonably be expected of a State, and more.

C. Qatar satisfied Article 2 *(g)* of the ICAO Rules

62. Mr. President, distinguished Members of the Court, that brings me to my final point: the Joint Appellants' argument that Qatar's alleged failure to comply with the requirements of Article 2 *(g)* of the ICAO Rules somehow rendered its Applications to the ICAO Council inadmissible. On this subject, I can be brief.

63. Article 2 *(g)* states that the complainant State's Memorial to the Council should contain "[a] *statement*"—a statement—"that negotiations to settle the disagreement had taken place between the parties but were not successful"[153]. The Joint Appellants' arguments as to how Qatar supposedly failed to fulfil this requirement have been something of a moving target.

64. In their Applications and again in the Replies, they argued that the requirement that there be a "statement" that negotiations between the Parties had taken place requires more than just a "statement". They argued that what is really required is not just a statement but an "appropriately substantiated" statement[154]. But that is not at all what the provision says. A "statement" means a statement, nothing more, nothing less. This is obviously a requirement of form, and it has always been treated as such by the Council in the past[155].

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[153] ICAO Council, Rules for the Settlement of Differences, Art. 2 *(g)* (MA — ICAOA and ICAOB, Vol. II, Ann. 6; emphasis added).

[154] RA — ICAOA and ICAOB, para. 5.69.

[155] CMQ — ICAOA and ICAOB, para. 4.87; RQ — ICAOA and ICAOB, para. 4.55.

65. The Joint Appellants also argue that Qatar did not comply with Article 2 *(g)* because the statement included in its Memorials said "[t]he Respondents did not permit any opportunity to negotiate the aviation aspects of their hostile actions"[156]. According to the Joint Appellants, this did not satisfy Article 2 *(g)* because it constitutes a statement that negotiations had not taken place[157]. This argument is unavailing for many reasons, including that the statement in Qatar's Memorials is factually correct. Article 2 *(g)* calls for a statement "that negotiations to settle the disagreement had taken place *between the parties*". Here there were no negotiations directly among the Parties precisely because the Joint Appellants at all times refused. For them to suggest that Qatar's Applications before the Council should be deemed inadmissible as a result of a factual circumstance of their own making is, to say the least, audacious.

66. Mr. President, distinguished Members of the Court, thank you for your patient attention this afternoon. May I ask that you give the floor to Ms Malintoppi?

The PRESIDENT: I thank Mr. Martin for his statement. I now invite Ms Loretta Malintoppi to address the Court. You have the floor, Madam.

Ms MALINTOPPI: Merci, Monsieur le président.

V. THE COURT SHOULD REJECT THE JOINT APPELLANTS' FIRST GROUND OF APPEAL

1. Mr. President, Members of the Court, it is a great honour to appear before you on behalf of the State of Qatar.

2. My task this afternoon is to address the Joint Appellants' first ground of appeal, namely their request that the decisions of the ICAO Council as to its jurisdiction over Qatar's applications be recognized as procedural nullities " — a *non est* — and accordingly set aside" because the "procedure adopted by the ICAO Council was manifestly flawed and in violation of the fundamental principles of due process"[158].

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[156] ICAO Memorial (A), Section *(g)* (MA — ICAOA, Vol. III, Ann. 23); ICAO Memorial (B), Section *(g)* (MA — ICAOB, Vol. III, Ann. 23).

[157] MA — ICAOA and ICAOB, para. 6.97.

[158] RA — ICAOA and ICAOB, para. 3.1.

3. It is no accident that Qatar is dealing with the Joint Appellants' *first* ground of appeal *last*. As stated in Qatar's written submissions, the request that the Court declare the decisions null and void is not only inappropriate, it is also unnecessary for reasons of procedural economy because the Council rightly affirmed its jurisdiction over Qatar's applications as my colleagues showed earlier.

4. Yesterday, counsel for the Joint Appellants said that Qatar alleges that the Court does not have to rule on the procedural irregularities, that these are in any case irrelevant, even if the procedure before the Council was arbitrary and contrary to due process. All that matters for Qatar, according to the Joint Appellants' interpretation of Qatar's case, is that the decisions of the Council are correct[159].

5. But that is not just Qatar's position, Mr. President. That is in fact the conclusion reached by the Court in its Judgment in the 1972 *ICAO Council Appeal* case, which is particularly relevant to the first ground of appeal given the close resemblance between the Joint Appellants' procedural complaints in this case and India's allegations in 1972. Much like the Joint Appellants in these proceedings, India argued that the Council's decision to assume jurisdiction over Pakistan's ICAO complaint was vitiated by procedural irregularities, and thus null and void on that ground alone. Unlike the Joint Appellants, however, who ask that the Court also adjudge and declare that the Council has no jurisdiction over Qatar's ICAO complaints, India argued that, in such event, the case should be sent back to the Council for "re-decision on the basis of a correct procedure"[160].

6. The Court dismissed in one paragraph India's arguments. It is paragraph 45 of the Judgment. The Members of the Court are no doubt familiar with that paragraph but the message could not be clearer and it bears repeating; the Court said the following:

> "The Court however does not deem it necessary or even appropriate to go into this matter [the alleged procedural irregularities], particularly as the alleged irregularities do not prejudice in any fundamental way the requirements of a just procedure. The Court's task in the present proceedings is to give a ruling as to whether the Council has jurisdiction in the case. This is an objective question of law, the answer to which cannot depend on what occurred before the Council. Since the Court holds that the Council did and does have jurisdiction, then, if there were in fact procedural irregularities, the position would be that the Council reached the right conclusion in the wrong way. Nevertheless, it would have reached the right conclusion. If, on the other hand, the Court had held that there was and is no

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[159] CR 2019/13, p. 43, para. 6 and p. 44, para. 8 (van der Meulen).

[160] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 69, para. 44.

> jurisdiction, then, even in the absence of any irregularities, the Council's decision to assume it would have stood reversed."[161]

7. This holding is fully consistent with how the Court had earlier described in the same Judgment its supervisory authority over decisions of the Council under the ICAO Treaties. In particular, the Court held that:

> "In . . . providing for judicial recourse by way of appeal to the Court against decisions of the Council concerning interpretation and application . . . the [ICAO] Treaties gave member States, and through them the Council, the possibility of ensuring *a certain measure* of supervision by the Court over those decisions."[162]

8. Counsel for the Joint Appellants yesterday read the same passage and stressed that the words employed by the Court have importance and meaning[163]. I agree of course. However, I would add that, in order to appreciate fully the importance and the meaning of the Court's words, and particularly the context in which the Court referred to the "measure of supervision", or "un certain contrôle", to use the French expression, that the Court must exercise over the Council, the passage needs to be quoted in its entirety, and not selectively as counsel did in her speech yesterday. The Court held: "To this extent, [the ICAO] Treaties enlist the support of the Court for the good functioning of the Organization, *and therefore the first reassurance for the Council lies in the knowledge that means exist for determining whether a decision as to its own competence is in conformity or not with the provision of the treaties governing its action*"[164].

9. Thus it is clear that, far from — and I quote from the Appellants' submissions — "provid[ing] the Council with necessary direction on how to comply with the duties of due process", as the Joint Appellants assert[165], the Court deemed such direction neither "necessary" nor "appropriate". In other words, it declined to consider it as part of its supervisory authority over the Council. Rather, the Court remained focused on the "objective question of law" before it, namely whether the Council's "decision as to its own competence [was] in conformity or not with the provision of the treaties governing its actions". The Court was also mindful to note that the

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[161] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972,* pp. 69-70, para. 45.

[162] *Ibid.*, p. 60, para. 26; emphasis added.

[163] CR 2019/13, p. 45, para. 20 (van der Meulen).

[164] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972,* pp. 60-61, para. 26.

[165] RA — ICAOA and ICAOB, paras. 3.8-3.11.

procedural irregularities alleged by India did not fundamentally prejudice the requirements of a just procedure.

10. My colleagues before me explained that the Council properly upheld its jurisdiction over Qatar's ICAO complaints. We maintain that nothing in the present case therefore renders it "necessary or even appropriate" to deal with the Joint Appellants' allegations of procedural irregularities in detail. I also note that the Joint Appellants themselves have chosen not to address in their oral arguments yesterday all of the alleged violations raised in their written submissions. They limited their exposition just to two of those: absence of deliberations and lack of reasons. The fact that they were allegedly given insufficient time to present their arguments and that the two preliminary objections were addressed as one were only briefly mentioned in passing[166].

11. Nevertheless, the Joint Appellants insist that the alleged irregularities in this case are different from those invoked by India and represent "without a doubt" fundamental breaches of due process[167]. Curiously, however, counsel for the Joint Appellants said absolutely nothing yesterday about what actually happened at the Eighth Meeting of the ICAO Council on 26 June 2018 or ~~***anything***~~ about the Council's practice. It is therefore necessary to review briefly the facts relating to the Joint Appellants' original complaints (not the abridged version that we heard yesterday). I will however not address the complaint that the ICAO Council acted improperly in deciding on the voting majority because this complaint appears to have been dropped in the Appellants' Reply, and was also not mentioned at all during the Appellants' first round presentation. There is therefore no need to add anything on this subject to what Qatar had already stated in its written submissions.

A. The Joint Appellants had ample opportunity to present their case before the ICAO Council

12. I will begin, *first*, with the Appellants' complaint that the Council did not afford them sufficient time to plead their case.

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[166] CR 2019/13, p. 48, para. 33 (van der Meulen).

[167] CR 2019/13, p. 48, para. 32 (van der Meulen).

13. The Appellants allege that the Council granted them "patently insufficient time" to develop their case, presumably because, even though each one of them appeared as a single party, they were collectively accorded the same time as Qatar[168].

14. In terms of time-limits, however, the Joint Appellants were given more than enough time to respond to Qatar's ***M***emorial: twelve weeks. They also sought and obtained a six-week extension to file their objections to the jurisdiction of the Council, which they eventually filed 20 weeks after the Memorial of Qatar[169]. In addition, they were granted the opportunity to file a Rejoinder following Qatar's response to their Preliminary Objections. I note that this was unprecedented because the Council had never before granted a party the opportunity to submit a further written pleading after the response to a preliminary objection[170]. Nonetheless, the Council allowed this Rejoinder, in spite of Qatar's objection. So, the Joint Appellants had another bite at the apple, while Qatar only had one written pleading.

15. Clearly, the Council afforded to the Joint Appellants ample opportunity to argue their cases in writing and Qatar did not have an improper procedural advantage either in terms of the number of the submissions filed, or with regard to the time-limits granted by the Council for the filing of those submissions.

16. As for the oral proceedings, which appear to be the central element of the Joint Appellants' complaint, Article 12 of the ICAO Rules for the Settlement of Differences expressly states that "oral arguments may be admitted at the discretion of the Council". In other words, this means that, under the applicable rules, oral argument***s*** could have been dispensed with altogether. Nevertheless, they were admitted in these proceedings. And yet, the Joint Appellants complain that justice was not served because they were heard collectively and not individually, with the same time allocated as Qatar for their arguments. But they fail to explain how their case would have been presented differently had they pleaded separately. In fact, we had an inkling of what might have happened when we witnessed yesterday counsel representing different Joint Appellants standing at

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[168] Joint Application — ICAOA, para. 30 *(i)*; Joint Application — ICAOB, para. 30 *(i)*; MA — ICAOA and ICAOB, para. 3.2 *(a)*; RA — ICAOA and ICAOB, paras. 3.20 *(a-b)*.

[169] See tab 25, Letter from Permanent Representative of the Arab Republic of Egypt on the ICAO Council to President of the ICAO Council (16 Jan. 2018) (MA — ICAOA, Vol. V, Ann. 44); tab 26 Letter from the Secretary General of ICAO to Joint Appellants (9 Feb. 2018) (MA — ICAOA, Vol. V, Ann. 45).

[170] See CMQ — ICAOA and ICAOB, paras. 5.17-5.18.

this lectern, each one of them in turn pleading a different ground of appeal on behalf of all Appellants. No separate arguments were made and the structure of the overall presentation followed very much the structure of Qatar's presentation. In other words, the Joint Appellants acted as a single party for all intents and purposes. Presumably, the same approach would have been followed before the ICAO Council: more time would have been spent to make the very same arguments.

B. The ICAO Council properly disposed of the Joint Appellants' preliminary objections

17. *Second*, the Joint Appellants complain that their preliminary objections were disposed of as a single plea, even though they had been advanced as two separate grounds for which the Council should have declined to exercise its jurisdiction. Once again, the minutes of the Council hearing tell a different story.

18. Indeed, the minutes show that there was no confusion whatsoever as to the fact that there were two challenges to the jurisdiction of the Council. For example, the legal adviser of the Bahraini delegation explained that "accepting either one of [the] preliminary objections had the effect of disposing of the case here and now"[171]. He therefore suggested a wording for the question to be put to the Council in the following alternative terms: "Do you accept either one of the two preliminary objections formulated by the Respondents in respect of each of the Applications?"[172] The President of the Council noted that "in essence . . . [the Joint Appellants] had a preliminary objection for which they provided two justifications"[173]. The President further added that he "took the point made by [the legal adviser of Bahrain's delegation] that the voting on each preliminary objection applied to both the justifications provided therefor"[174].

19. Thus, the President of the Council clearly took into account the point made by the delegation of Bahrain and expressly stated that the vote of the Council concerned both the

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[171] Tab 27, ICAO Council — 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO doc. C-MIN 214/8, 23 July 2018 (Final), para. 121 (RA — ICAOA, Ann. 56).

[172] *Ibid.*

[173] Tab 27, ICAO Council — 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO doc. C-MIN 214/8, 23 July 2018 (Final), para. 123 (RA — ICAOA, Ann. 56).

[174] *Ibid.*

justifications asserted by the Joint Appellants as depriving the Council of its jurisdiction. There was clearly nothing improper in the way that the preliminary objections were disposed of and considered.

C. The decision to vote by secret ballot was in conformity with the rules and practice of the Council and the Joint Appellants did not object

20. *Third*, the Joint Appellants argue that the fact that the decisions were adopted by secret vote, in spite of a request by the Joint Appellants for a roll call with open vote, was procedurally improper.

21. It is however undisputed that the applicable procedural rules allow voting by secret ballot. Rule 50 of the Rules of Procedure for the Council expressly states that "[u]nless opposed by a majority of the Members of the Council, the vote shall be taken by secret ballot if a request to that effect is supported, if made by a Member of the Council, by one other Member, and, if made by the President, by two Members"[175].

22. In this case, the request to take the vote by secret ballot was made by a member of the Council who, in fact, was the Dean of the Council, the representative of Mexico. It was supported by another member, the representative of Singapore (who was also first Vice-President of the Council). Thus, the procedure was in conformity with the Rules, and the Council granted the request[176].

23. The President also clearly indicated that the Council Rules of Procedure would apply to the proceedings[177]. No one objected, not even any of the Joint Appellants, even though they could have raised an objection under Article 36 of the ICAO Rules of Procedure[178]. This provision states that rulings of the President of the Council on the interpretation and application of the Rules can be appealed by a member of the Council, and the appeal is immediately put to a vote. The ruling of the President stands unless overruled by a majority of the votes cast.

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[175] ICAO Council, *Rules of Procedure for the* Council, ICAO doc. 7559/10 (2014), Rule 50 (CMQ — ICAOA, Vol. II, Ann. 15).

[176] Tab 27, ICAO Council — 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO doc. C-MIN 214/8, 23 July 2018 (Final), paras. 106-108 (RA — ICAOA, Ann. 56).

[177] Tab 27, ICAO Council — 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO doc. C-MIN 214/8, 23 July 2018 (Final), para. 6 (RA — ICAOA, Ann. 56).

[178] RQ — ICAOA and ICAOB, para. 5.20.

24. The minutes of the hearing also record that this manner of proceeding took into account the Council's most recent dispute settlement practice, the *Brazil* v. *United States* case, where the United States' preliminary objection was also decided by secret ballot voting[179]. Significantly, that precedent was expressly mentioned by the representative of Mexico in his proposal to proceed to vote by secret ballot in this case[180]. In *Brazil* v. *United States*, not a single member of the Council, including three of the four Joint Appellants here — Saudi Arabia, the UAE and Egypt — none of them complained about holding a vote by secret ballot (or, for that matter, the absence of deliberations, or a failure to state reasons)[181]. In fact, in that case, it was one of the Joint Appellants in these proceedings, the UAE, which requested a secret vote, thus openly endorsing this procedure[182].

25. Mr. President, Members of the Court, how can the Joint Appellants stand before you and credibly argue that the Council's decision to vote by secret ballot in this case was a grave violation of due process when the proper procedure was followed and one of them even took the initiative of proposing this very same voting method in another case before the ICAO Council?

D. The absence of open deliberations on the substantive issues is explained by the decision to vote by secret ballot which was taken in conformity with the rules

26. The *fourth* allegation of violation of due process is that the vote of the Council took place immediately after the parties' oral submissions without any discussion or deliberation, in spite of a specific motion for a decision on this point submitted by the Joint Appellants[183]. This would suggest, in the Joint Appellants' view, that the result had been predetermined because the members of the Council were acting as representatives of their countries rather than adjudicators[184].

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[179] Tab 28, ICAO Preliminary Objections (A), Exhibit 2, ICAO Council — 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO doc. C-MIN 211/9, 5 July 2017, para. 97 (MA — ICAOA, Vol. III, Ann. 24); ICAO Preliminary Objections (B), Exhibit 2, para. 97 (MA — ICAOB, Vol. III, Ann. 24).

[180] Tab 27, ICAO Council — 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO doc. C-MIN 214/8, 23 July 2018 (Final), para. 106 (RA — ICAOA, Ann. 56).

[181] RQ — ICAOA and ICAOB, para. 5.19.

[182] Tab 28, ICAO Preliminary Objections (A), Exhibit 2, ICAO Council — 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO doc. C-MIN 211/9, 5 July 2017, para. 97 (MA — ICAOA, Vol. III, Ann. 24).

[183] RA — ICAOA and ICAOB, para. 3.23 *(a)*.

[184] MA — ICAOA and ICAOB, para. 3.2 *(g)*.

27. At the hearing yesterday counsel for Joint Appellants went as far as saying that there was no deliberation because the Council members had already, to quote the original French, "ava[ien]t déjà, avant même d'entendre les parties, pris une décision, ou reçu des instructions de vote"[185]. But this is pure speculation. What counsel failed to recall is that the minutes of the meeting state that account had been taken of "the views of the many Council Representatives who had been consulted prior to the present meeting"[186]. This means that there had been consultations with a number of Council members and thus a collegiate process of decision had been carried out. In any event, as Qatar recalled in its written pleadings[187], the practice of the Council — a practice in which three of the four Joint Appellants have directly participated as Council members — the practice shows that, when the Council opts to adopt a decision by secret ballot, there are no open deliberations on the substantive issues in dispute.

28. This can be easily verified by checking the minutes of the Council hearing in *Brazil* v. *United States*[188]. They show that, save for an intervention by the representative of Cuba, the interventions of the Council members reported under the heading "Deliberations" did not address the substance of the questions before the Council or the merits of the parties' submissions. And Cuba's intervention in any event took place before the UAE's proposal to proceed with a vote by secret ballot[189]. Likewise, the minutes of the ICAO Council in this case make it clear that similar discussions, also reported under the heading "Deliberations", were held, again prior to the decision to vote by secret ballot[190].

29. It follows that there was no violation of due process at all — let alone a grave and manifest violation — concerning the absence of open deliberations.

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[185] CR 2019/13, p. 49, para. 44 (van der Meulen).

[186] Tab 27, ICAO Council — 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO doc. C-MIN 214/8, 23 July 2018 (Final), para. 106 (RA — ICAOA, Ann. 56).

[187] RQ — ICAOA and ICAOB, paras. 5.19-5.27.

[188] Tab 28, ICAO Preliminary Objections (A), Exhibit 2, ICAO Council — 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO doc. C-MIN 211/9, 5 July 2017 (MA — ICAOA, Vol. III, Ann. 24).

[189] *Ibid*., paras. 92-97.

[190] Tab 27, ICAO Council — 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO doc. C-MIN 214/8, 23 July 2018 (Final), paras. 106-118 (RA — ICAOA, Ann. 56).

30. The Joint Appellants' other complaint that the absence of open deliberations somehow demonstrates that the ICAO Council members acted on instructions from their Governments also betrays a fundamental misunderstanding of the Council's functions and structure. In contrast with the Court, the ICAO Council is composed of national representatives of the member States, not independent individuals[191]. Whether a decision is made by the State of the representative, or whether the representative can use her or his own discretion to assess the matter, it does not mean that the decision itself is arbitrary or politically motivated[192].

E. Failure to state reasons in the decisions of the Council was a natural consequence of secret voting

31. The final complaint I wish to address is the allegation that the ICAO decisions did not comply with the requirement to state reasons pursuant to Article 15 (2) *(v)* of the ICAO Rules. The Joint Appellants argue that this was not surprising since there were no deliberations, a fact that in their opinion shows (again) that the Council "improperly abdicated its judicial function"[193]. The absence of deliberations would also allegedly show that the decisions were "pre-determined", or "the fruit of political instructions", as counsel argued yesterday[194].

32. I have already touched on this alleged procedural defect in connection with the Council's decision to proceed by secret ballot. No reasons were provided in the *Brazil* v. *United States* case either — a case in which three of the Joint Appellants participated and where they raised no objections whatsoever. Again the practice of the Council shows that, when a decision is taken by secret vote, no reasons are given[195].

33. I will also add that, in dealing with the absence of reasons, reference was made by counsel yesterday to the case law of this Court and to scholarly publications on the Court's practice and procedure[196]. But the fact that the ICAO Council may perform a judicial function does not turn

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[191] See ICAO Council, *Rules of Procedure for the Council*, ICAO doc. 7559/10 (2014), Definitions ("Member of the Council"), p. 1 (MA — ICAOA, Vol. II, Ann. 15). See also Chicago Convention, Art. 50 *(a)* (MA — ICAOB, Vol. II, Ann. 1).

[192] RQ — ICAOA and ICAOB, para. 5.11.

[193] RA — ICAOA and ICAOB, para. 3.20 *(d)*.

[194] Joint Application — ICAOA, para. 30 (vii); Joint Application — ICAOB, para. 30 (vii); CR 2019/13, p. 50, para. 49 (van der Meulen).

[195] RQ — ICAOA and ICAOB, paras. 5.22, 5.29, 5.41.

[196] CR 2019/13, pp. 50-51, 52, paras. 51-53 and 57 (van der Meulen).

it into a judicial organ *stricto sensu*, much less into the principal judicial organ of the United Nations. The attempted analogy fails to take account for the particular characteristics of the ICAO Council and is therefore wholly inapposite.

34. It is worth recalling that an alleged failure to state reasons had also been raised by India in 1972 in the *ICAO Council Appeal* case. The Court at the time did not even consider that allegation, particularly so because it did "not prejudice in any fundamental way the requirements of a just procedure"[197]. It is difficult to see why things should be any different here.

35. In conclusion, Mr. President, Members of the Court, Qatar submits that, consistent with the Court's precedent in the 1972 *ICAO Council Appeal* case, and given the Council's jurisdiction over Qatar's applications, it is neither necessary nor appropriate to go any further into the Joint Appellants' allegations of procedural irregularities. This conclusion is also in line with considerations of procedural economy, a principle which has been linked with the good administration of justice by this Court[198]. It would make no sense to remit a substantially correct decision on purely procedural grounds.

36. Even if the Court were minded to review the procedural irregularities of which the Joint Appellants complain, the ICAO Council proceedings were fair and consistent with the applicable procedural framework. They did not prejudice in any way the requirements of a just procedure. To echo one final time the Court's ruling in the 1972 *ICAO Council Appeal* case, not only did the Council reach the right conclusion, it did so in the right way[199].

37. This concludes my remarks, Mr. President, Members of the Court, and brings to an end the first round of oral observations by Qatar. I thank you very much for your kind attention this afternoon.

The PRESIDENT: I thank Ms Malintoppi. Your statement indeed brings to an end the first round of oral argument of Qatar. Oral argument in the case will resume on Thursday

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[197] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 69, para. 45.

[198] See Kolb, "General Principles of Procedural Law", in *A Commentary of the Statute of the International Court of Justice*, OUP, 2019, pp. 980-981 (referring to *Territorial and Maritime Dispute (Nicaragua/Colombia) I.C.J. Reports 2007*, para. 50).

[199] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 69, para. 45.

5 December 2019, at 10 a.m. for the Applicants' second round of pleadings. At the end of that sitting, the Applicants will present their final submissions. The Respondent will present its second round of oral argument on Friday 6 December 2019. At the end of that sitting, Qatar will also present its final submissions.

I recall that for the second round, the Applicants will have a maximum of two hours to present their argument and the Respondent a maximum of one and a half hours. I would also like to recall that in accordance with Article 60, paragraph 1, of the Rules of Court, the oral statements of the second round are to be as succinct as possible. The purpose of the second round of oral argument is to enable each of the Parties to reply to the arguments put forward orally by the opposing party. The second round must therefore not be a repetition of the arguments we have already heard yesterday and today, and the parties are not actually obliged to use all the time allotted to them.

The sitting is adjourned.

The Court rose at 5.50 p.m.