INTERNATIONAL COURT OF JUSTICE

APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL UNDER ARTICLE 84 OF THE CONVENTION ON INTERNATIONAL CIVIL AVIATION

THE KINGDOM OF BAHRAIN, THE ARAB REPUBLIC OF EGYPT,

THE KINGDOM OF SAUDI ARABIA

AND THE UNITED ARAB EMIRATES

v.

THE STATE OF QATAR

COUNTER-MEMORIAL OF THE STATE OF QATAR

VOLUME I

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GLOSSARY OF ACRONYMS, ABBREVIATIONS AND DEFINED TERMS

1972 *ICAO Council Appeal*	*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan),* Judgment, I.C.J. Reports 1972
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ATS	Air Traffic Service
Bahrain	The Kingdom of Bahrain
Chicago Convention	Convention on International Civil Aviation, Chicago, 7 December 1944
Egypt	The Arab Republic of Egypt
EU	European Union
FATF	Financial Action Task Force
FIR	Flight Information Regions
GCC	Gulf Cooperation Council
IASTA	International Air Services Transit Agreement, Chicago, 7 December 1944
ICAO	International Civil Aviation Organization
ICAO Council or Council	Council of the International Civil Aviation Organization
ICAO Application (A)	Application (A) of the State of Qatar; Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago, 1944) and its Annexes, 30 October 2017

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

	done at Chicago on 7 December 1944, 30 April 2018
ICAO Rules	1957 ICAO Rules for the Settlement of Differences
ICJ Application (A)	Joint Application Instituting Proceedings, Appeal Against a Decision of the ICAO Council dated 29 June 2018 on Preliminary Objections (Application (A), Kingdom of Bahrain, Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates v. State of Qatar), 4 July 2018
ILC	International Law Commission
IMF	International Monetary Fund
Joint Appellants	The Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates
NOTAM	Notice to Airmen
Qatar	The State of Qatar
QCM (A)	*Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on Civil Aviation (The Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates v. The State of Qatar*, Counter-Memorial of the State of Qatar (25 February 2019)
QNA	Qatar News Agency
Saudi Arabia	Kingdom of Saudi Arabia
TFTC	Terrorist Financing Targeting Center

United Arab Emirates	UAE
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

CHAPTER 1

INTRODUCTION

1.1 Pursuant to the Order of the Court dated 25 July 2018, the State of Qatar ("Qatar") respectfully submits this Counter-Memorial responding to the Memorial of the Kingdom of Bahrain ("Bahrain"), the Arab Republic of Egypt ("Egypt"), the Kingdom of Saudi Arabia ("Saudi Arabia") and the United Arab Emirates ("UAE", and collectively with Bahrain, Egypt and Saudi Arabia, "Joint Appellants"), submitted on 27 December 2018.[1]

1.2 Although the Court fixed 27 May 2019 as the applicable time-limit, Qatar has elected to submit this Counter-Memorial early. It does so in view of the urgency of the matters in dispute as well as the limited nature of these proceedings, which involve only an appeal from a jurisdictional decision of the Council of the International Civil Aviation Organization ("ICAO Council" or "Council").

I. Procedural History

1.3 As Qatar will explain in greater detail in Chapter 2, this case arises from Joint Appellants' sudden imposition on 5 June 2017 of far-reaching prohibitions on all Qatar-registered aircraft from flying to or from Joint Appellants' airports and from overflying their national airspaces and Flight Information Regions ("FIR") (the "aviation prohibitions"). Acting pursuant to Article 84 of the 1944 Convention on International Civil Aviation ("Chicago Convention" or "Convention"),[2] on 30

[1] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia, and the United Arab Emirates (27 Dec. 2018) (hereinafter "BESUM").

[2] Convention on Civil Aviation, (1994) 15 U.N.T.S. 295 (7 Dec. 1944) (entry into force: 4 Apr. 1947) (hereinafter "Chicago Convention"), Art. 84 (**BESUM Vol. II, Annex 1**).

October 2017 Qatar filed an Application and Memorial with the ICAO Council detailing Joint Appellants' violations of the Convention, and requesting the Council to adjudge and declare the aviation prohibitions unlawful.[3]

1.4 On 19 March 2018, Joint Appellants raised two preliminary objections to the Council's jurisdiction to hear the dispute.[4] In particular, Joint Appellants argued that (1) deciding the dispute would require the Council to consider international legal matters falling outside the Chicago Convention (i.e., whether the aviation prohibitions constitute lawful countermeasures) ("First Preliminary Objection"); and (2) Qatar had failed to comply with the negotiation requirement stated in Article 84 of the Convention ("Second Preliminary Objection"). After a further exchange of briefs and oral hearings,[5] the ICAO Council issued a decision on 29 June 2018 rejecting Joint Appellants' preliminary objections (the "Council

[3] Application (A) of the State of Qatar; Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago, 1944) and its Annexes, 30 October 2017 (hereinafter "ICAO Application (A)") (**BESUM Vol. III, Annex 23**).

[4] Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates in Re Application (A) of the State of Qatar Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on 7 December 1944, 19 March 2018 (hereinafter "ICAO Preliminary Objections (A)") (**BESUM Vol. III, Annex 24**).

[5] Response of the State of Qatar to the Preliminary Objections of the Respondents in re Application (A) of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago, 1944), 30 April 2018 (hereinafter "ICAO Response to Preliminary Objections (A)") (**BESUM Vol. IV, Annex 25**); Rejoinder to the State of Qatar's Response to the Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates in re Application (A) of the State of Qatar Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on 7 December 1944, 12 June 2018 (hereinafter "ICAO Rejoinder (A)") (**BESUM Vol. IV, Annex 26**); ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 6 (**BESUM Vol. V, Annex 53**).

Decision" or "Decision").[6] The Council did so by a vote of 23 to four, with six abstentions.

1.5 Exercising their right under Article 84 of the Convention to appeal from the decisions of the Council to the Court, Joint Appellants instituted these proceedings by means of a Joint Application dated 4 July 2018 ("Joint Application (A)").[7] They raise three grounds of appeal. In particular, Joint Appellants ask that the Court adjudge and declare:

- That the Council Decision is "null and void", and should be "set aside" because "the procedure adopted by the ICAO Council was manifestly flawed and in violation of fundamental principles of due process and the right to be heard" ("First Ground of Appeal");[8]

- That the ICAO Council erred in fact and in law in rejecting their First Preliminary Objection to the effect that the "present dispute would require the Council to determine issues that fall outside its jurisdiction: to rule on the lawfulness of the countermeasures adopted by the [Joint Appellants], including certain airspace restrictions" ("Second Ground of Appeal");[9] and

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

[7] Joint Application Instituting Proceedings, Appeal Against a Decision of the ICAO Council dated 29 June 2018 on Preliminary Objections (Application (A), Kingdom of Bahrain, Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates v. State of Qatar), 4 July 2018 (hereinafter "ICJ Application (A)").

[8] *Ibid.*, para. 29.

[9] *Ibid.*, para. 19.

- That the ICAO Council erred in fact and in law in rejecting their Second Preliminary Objection to the effect that Qatar did not comply with "the necessary precondition to the existence of jurisdiction of the Council, contained in Article 84 of the Chicago Convention, of first attempting to resolve the disagreement regarding the airspace restrictions with the [Joint Appellants] through negotiations prior to submitting its claims to the Council …" ("Third Ground of Appeal").[10]

II. Overview of Qatar's Arguments

1.6 Qatar will show in the subsequent chapters of this Counter-Memorial that all three grounds of appeal are baseless. Indeed, in its 1972 Judgment in *Appeal Relating to the Jurisdiction of the ICAO Council* (*India v. Pakistan*) ("the 1972 *ICAO Council Appeal* case"), the Court rejected arguments that were substantially identical to those that Joint Appellants now present as their first two grounds of appeal.

1.7 Like Joint Appellants, India argued in that case that the ICAO Council's decision was "vitiated" by procedural irregularities.[11] The Court disagreed. It viewed its appellate function in respect of jurisdictional decisions of the ICAO Council in terms of "giv[ing] a ruling as to whether the Council [had] jurisdiction in the case".[12] Making that ruling required the Court to answer only "an objective

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[10] *Ibid*.

[11] *I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Memorial submitted by the Government of India (22 Dec. 1971), para. 93.

[12] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, para. 45. On two past occasions, the Court has defined the appellate function to involve a decision of whether the adjudicator in the first instance was substantively right or wrong. *See Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*

question of law", which "cannot depend on what occurred before the Council".[13] The procedural irregularities India alleged were therefore irrelevant. So too are the alleged procedural irregularities that Joint Appellants identify in their Memorial.

1.8 Qatar considers it telling that Joint Appellants never once mention the aspect of the Court's decision in the 1972 *ICAO Council Appeal* case relating to its appellate function in respect of jurisdictional decisions of the ICAO Council, which is fully dispositive of their First Ground of Appeal.

1.9 Like Joint Appellants, India also argued that its dispute with Pakistan was "in the realm of political confrontation between two States … and these matters of political confrontation … are outside the ambit of the Council's competence".[14] The Court easily rejected this argument too, holding:

> "[T]he Council [cannot] be deprived of jurisdiction *merely because considerations that are claimed to lie outside the Treaties may be involved if, irrespective of this, issues concerning the interpretation or application of these instruments are nevertheless in question.* The fact that a defence on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned,—otherwise parties would be in a position themselves to control that competence, which would be inadmissible. As has already been seen in the case of the competence of the Court, so with that of the Council, its competence must depend on the character of the dispute submitted to it and on the issues thus raised—*not on those defences on the*

(Honduras v. Nicaragua), Judgment of 18 November 1960, I.C.J. Reports 1960, p. 214; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, para. 24.

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

[14] *I.C.J. Pleadings*, A*ppeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Memorial submitted by the Government of India (22 Dec. 1971), para. 79.

> *merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled*".[15]

1.10 Joint Appellants argue that the "considerations that are claimed to lie outside" the Chicago Convention in this case are somehow distinguishable from those at play in the 1972 *ICAO Council Appeal* case because they relate to the law of countermeasures (as opposed to the issues relating to the law of treaties that India raised). The reasons this argument is unavailing are explained in detail in Chapter 3. As is obvious from the language quoted above, the Court's reasoning in the 1972 *ICAO Council Appeal* case was stated in general terms and made clear that *any* "defence on the merits … cannot affect the competence of the tribunal or other organ concerned".

1.11 Joint Appellants appear to hope that they can get a different result than that compelled by the Court's jurisprudence by presenting an extended—and irrelevant—polemic about Qatar's alleged support for terrorism and interference in their internal affairs that is said to make the aviation prohibitions lawful countermeasures. Not only are these allegations wholly without merit, as Qatar will amply show in Chapter 2, they are also entirely beside the point. Joint Appellants' assertions still constitute a defence on the merits that "cannot affect the competence" of the ICAO Council.

1.12 Joint Appellants' final argument that Qatar failed to fulfil the negotiation requirement stated in Article 84 of the Convention is as unconvincing as their other two. Having imposed the aviation prohibitions without any prior warning, Joint

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

Appellants immediately stated that there was "nothing to negotiate" with Qatar,[16] and then issued demands with which they said (and still say) Qatar must comply before they will consider even discussing lifting the aviation prohibitions. They have repeatedly and emphatically stated that these demands are "non-negotiable". The Court's jurisprudence is clear that when a State is faced with such a refusal to talk on any issue, the negotiation requirement is discharged. If a State refuses to come to the negotiation table at all, no purpose can be served by insisting on negotiations.

1.13 In any event, Qatar will show in Chapter 4 that it made multiple genuine attempts to negotiate with Joint Appellants in several fora, including directly, within the ICAO institutional framework, as well as with the facilitation of third States. Joint Appellants rebuffed all of these efforts at every turn. For them now to insist that Qatar failed to satisfy Article 84 of the Chicago Convention is as cynical as it is wrong.

III. Structure of Qatar's Counter-Memorial

1.14 The remaining chapters of this Counter-Memorial will explain in detail all the reasons that Joint Appellants' appeal must be rejected. Rather than address Joint Appellants' grounds of appeal in the order they are presented in the Memorial, Qatar will address them starting with the preliminary objections that were presented before the ICAO Council. That is, Qatar will first answer Joint Appellants' Second Ground of Appeal, which reiterates their First Preliminary Objection, and then answer their Third Ground of Appeal, which reiterates their

[16] Jon Gambrell, "Emirati diplomat to AP: 'Nothing to negotiate' with Qatar", *Associated Press* (7 June 2017) (**QCM (A) Vol. IV, Annex 72**).

Second Preliminary Objection. Qatar will deal with Joint Appellants' First Ground of Appeal relating to the alleged procedural irregularities last.

1.15 In addition to being consistent with the order of presentation before the Council, Qatar considers proceeding in this way to be in line with the Court's approach in the 1972 *ICAO Council Appeal* case. Because "giv[ing] a ruling as to whether the Council has jurisdiction in the case" involves only "an objective question of law" that "cannot depend on what occurred before the Council",[17] Joint Appellants' arguments rise or fall on the basis of their Second and Third Grounds of Appeal. Qatar will therefore address those first.

1.16 The main text of this Counter-Memorial consists of five chapters, followed by Qatar's Submissions. After this Introduction, mindful of the Court's admonition in the 1972 *ICAO Appeal* case to put before the Court only what is relevant to these proceedings,[18] **Chapter 2** recounts the factual background to Joint Appellants' imposition of the aviation prohibitions in violation of the Chicago Convention. This Chapter also exposes the disingenuousness of Joint Appellants' baseless and immaterial accusations that Qatar supports terrorism and interferes in Joint Appellants' internal affairs. In Qatar's view, the fact that Joint Appellants are reduced to raising such easily falsifiable claims in an attempt to justify the aviation prohibitions raises serious questions about the motivations underpinning their

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

[18] *Ibid.*, para. 11 ("…with the substance of this dispute as placed before the Council, and the facts and contentions of the Parties relative to it, the Court has nothing whatever to do in the present proceedings, except in so far as these elements may relate to the purely jurisdictional issue which alone has been referred to it, namely the competence of the Council to hear and determine the case".).

entire course of conduct, including their decision to appeal from an evidently sound decision of the ICAO Council.

1.17 **Chapter 3** addresses Joint Appellants' Second Ground of Appeal. Joint Appellants' attempts to impose *a priori* restrictions on the ICAO Council's jurisdiction are inconsistent with its mandate to exercise its dispute settlement functions to their full extent when issues concerning the interpretation or application of the Chicago Convention are in dispute—as is the case here. Joint Appellants' transparent attempt to broaden the dispute by invoking a countermeasures defence cannot control the jurisdiction of the Council. If it were allowed to do so, it would not only increase the potential for abuse inherent in the concept of countermeasures, it would also undermine the entire system of international dispute settlement.

1.18 The simple fact is that Qatar's claims cannot be resolved without any interpretation or application of the Chicago Convention. Indeed, both the availability of a countermeasures defence as a matter of principle and whether the conditions for their exercise have been met indisputably fall within the jurisdiction of the Council. As a result, Joint Appellants' assertion of a countermeasures defence cannot in any way undermine the fact that the dispute before the Council relates to the interpretation and application of the Chicago Convention. This Chapter concludes by showing that the adjudication of Qatar's claims by the ICAO Council was entirely consistent with judicial propriety.

1.19 **Chapter 4** explains why the Court should deny Joint Appellants' Third Ground of Appeal. The record demonstrates that Qatar fulfilled the negotiation requirement in Article 84 of the Chicago Convention by attempting to negotiate with Joint Appellants over the aviation prohibitions on multiple occasions, through multiple avenues and in multiple fora, only to be rebuffed by Joint Appellants at

every turn. Moreover, contrary to what Joint Appellants allege, Qatar duly complied with the requirements of Article 2(g) of the ICAO Rules for the Settlement of Differences.

1.20 **Chapter 5** shows that Joint Appellants' complaints about the putative procedural irregularities before the ICAO Council are baseless. *First*, consistent with the Court's decision in the 1972 *ICAO Council Appeal* case, the Court need not rule on Joint Appellants' procedural complaints because the Council Decision was objectively correct. *Second*, even if the Court were to depart from its ruling in the 1972 *ICAO Council Appeal* case and consider Joint Appellants' procedural complaints, this Chapter makes clear there were no irregularities in the procedure adopted by the Council. The Council conducted the proceedings and adopted its decision in accordance with the provisions of the Chicago Convention, the ICAO Rules for the Settlement of Differences, the Rules of Procedure for the Council, and its own practice. In addition, none of the procedural complaints Joint Appellants identify in their Memorial prejudiced in any fundamental way the requirements of just procedure.

1.21 This Counter-Memorial concludes with Qatar's submissions.

CHAPTER 2

JOINT APPELLANTS' "REAL DISPUTE" ARGUMENT IS AN ARTIFICE FOR ESCAPING SCRUTINY OF THEIR AVIATION PROHIBITIONS

2.1 This Chapter sets forth the factual background to the dispute regarding Joint Appellants' violations of the Chicago Convention and its Annexes that gave rise to Qatar's October 2017 Application before the ICAO Council. It also responds to the false accusations about Qatar's alleged "failure to confront terrorism and extremism", "state-sponsored dissemination of hate speech and incitement" and "violation of the principle of non-intervention" that Joint Appellants make in their Memorial.[19]

2.2 Qatar has chosen to respond to Joint Appellants' accusations with reluctance. It could have rested on the fact that they are—to use the words of the Court in the 1972 *ICAO Council Appeal* case—plainly unrelated to the "purely jurisdictional issue which alone has been referred to it".[20] That is the approach Qatar took when Joint Appellants made similar charges before the ICAO Council in an attempt to justify their first jurisdictional objection (raised in these proceedings as their Second Ground of Appeal). The Council had no difficulty seeing them for what they are. Qatar trusts that the Court would have done the same even without the aid of responsive argument.

2.3 Qatar has chosen to respond now only to protect the integrity of these proceedings before the principal judicial organ of the United Nations. Far from

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[19] Many of these false and malicious accusations are repeated throughout Joint Appellants' pleadings, but they can be found in most detail in BESUM Chapter II.

[20] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, para. 11.

"confirm[ing] the conclusion that the dispute is indeed unrelated to air navigation and transport",[21] Joint Appellants' cynical (and easily disproved) accusations only underscore how unjustifiable their actions since 5 June 2017 have been.

2.4 The remainder of this Chapter takes up these points in turn. **Section I** details Joint Appellants' unlawful imposition of the aviation prohibitions in violation of the Chicago Convention and its Annexes, as well as Qatar's attempts to mitigate their impact through dialogue under the auspices of ICAO. **Section II** puts Joint Appellants' baseless allegations about Qatar's alleged violations of the Riyadh Agreements and other rules of international law into proper context and shows them for what they are: an artifice to avoid scrutiny of the aviation prohibitions that are the subject of this case.

I. Joint Appellants Imposed the Aviation Prohibitions in Breach of the Chicago Convention and its Annexes

2.5 On 5 June 2017 (10 Ramadan 1438), Joint Appellants imposed a blanket prohibition on all Qatar-registered aircraft from flying to or from their airports and from overflying their national airspaces and Flight Information Regions ("FIR"[22]).[23] This unprecedented closure of airspace was communicated *without*

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[21] BESUM, para. 2.2.

[22] A flight information region (FIR) is a specified sector of airspace in which a certain entity provides flight information and alerting services. A State's management of an FIR is not determinative of sovereignty over airspace within the FIR. *See* ICAO, *Assembly Resolution A 38-12: Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation*, ICAO Doc. 10022 (entered into force as of 4 Oct. 2013), Appendix G, para. 7 ("the approval by the Council of regional air navigation agreements relating to the provision by a State of air traffic services within airspace over the high seas does not imply recognition of sovereignty of that State over the airspace concerned".) (**QCM (A) Vol. II, Annex 14**).

[23] The aviation prohibitions are only part of an array of measures seeking to sever all relations among the Parties. Indeed, on that same day, 5 June 2017, Joint Appellants, *inter alia*, severed diplomatic relations with Qatar and closed their land and sea borders to travel and trade with Qatar

prior warning (itself a violation of Annex 15 of the Chicago Convention[24]) through Notices to Airmen ("NOTAMs") from Joint Appellants' respective Civil Aviation Authorities.[25]

2.6 Saudi Arabia sent its first NOTAM revoking the authorisation of Qatar-registered aircraft from landing at Saudi Arabian airports at 04:42 AM on 5 June.[26] The NOTAM was said to be effective as of 04:35 AM that same day (i.e., seven minutes *before* it was released).[27] Saudi Arabia issued a second NOTAM at 09:37

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with immediate effect. Appellants Bahrain, Saudi Arabia, and the UAE also demanded that all Qatari residents and visitors leave their territories within fourteen days. *See* Kingdom of Bahrain Ministry Foreign Affairs News Details, "Statement of the Kingdom of Bahrain on the severance of diplomatic relations with the State of Qatar", 5 June 2017 (**BESUM Vol. V**, **Annex 73**); ICAO Preliminary Objections (A), Exhibit 6, Declaration of the Arab Republic of Egypt, 4 June 2017 (**BESUM Vol. III, Annex 24**); ICAO Preliminary Objections (A), Exhibit 9, Declaration of the United Arab Emirates, 5 June 2017 (**BESUM Vol. III, Annex 24**); "The Kingdom severs diplomatic and consular relations with Qatar", Saudi Ministry of Foreign Affairs (5 June 2017) (**QCM (A) Vol. III, Annex 48**). In its Order of 23 July 2018, the Court found that some of the measures adopted on 5 June 2017 by the UAE "may constitute acts of racial discrimination" under the International Convention on the Elimination of All Forms of Racial Discrimination. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Request for the Indication of Provisional Measures, Order (23 July 2018), p. 20, para. 54.

[24] The then-applicable 15th edition of Annex 15 of the Chicago Convention required that States give at least seven days' advance notice *before* establishing prohibited areas, other than for emergency operations, which is not the case here. Convention on International Civil Aviation, Annex 15: Aeronautical Information Services (15th ed., July 2016), Standard 5.1.1.4 ("At least seven days' advance notice shall be given of the activation of established danger, restricted or prohibited areas and of activities requiring temporary airspace restrictions other than for emergency operations".) (**QCM (A) Vol. II, Annex 16**).

[25] The NOTAMs were released globally through the international distribution channels for NOTAMs, and the aviation prohibitions were also communicated through public statements in various media.

[26] ICAO Response to Preliminary Objections (A), Exhibit 5, *NOTAMS Issued by the Respondents*, [PDF] p. 985 (**BESUM Vol. IV, Annex 25**).

[27] ICAO Response to Preliminary Objections (A), Exhibit 5, *NOTAMS Issued by the Respondents*, [PDF] p. 985 (**BESUM Vol. IV, Annex 25**). In addition to violating the seven-day advance notice requirement of Annex 15 of the Chicago Convention, Appellant Saudi Arabia's back-timing of this and other NOTAMs violates Annex 17 of the Chicago Convention, which prohibits the "communication of false information such as to jeopardize the safety of an aircraft in flight or on

AM that prohibited Qatar-registered aircraft from overflying "Saudi Arabian airspace", effective as of 12:01 AM on 6 June.[28] Subsequent NOTAMs issued on 5 June at 10:04 AM and 11:41 AM required all non-Saudi-registered aircraft flying to or from Qatari airports through Saudi Arabian airspace to coordinate with Saudi Arabia's General Authority of Civil Aviation, effective as of 12:01AM on 6 June.[29]

2.7 Purportedly acting on behalf of the Republic of Yemen, Saudi Arabia also issued a NOTAM at 3:46 PM on 6 June prohibiting all Qatar-registered aircraft from overflying Yemeni airspace.[30] Like the first Saudi NOTAM, its operative force was back-timed to 3:35 PM, eleven minutes before it was issued.[31]

2.8 For its part, the UAE issued a NOTAM banning all Qatar-registered aircraft from overflying the UAE FIR (which includes UAE territory and large portions of the high seas in the Arabian Gulf) and landing at UAE aerodromes (which include airports, airfields and military landing strips) at 08:37 AM on 5 June.[32] It also required all non-UAE-registered operators intending to use UAE airspace to fly to or from Qatar to seek prior approval from the UAE's General Civil Aviation

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the ground" as an act of unlawful interference. Chicago Convention, *Annex 17: Security* (10th ed., Apr. 2017), Chapter 1, at 1-1 (**QCM (A) Vol. III, Annex 20**).

[28] ICAO Response to Preliminary Objections (A), Exhibit 5, *NOTAMS Issued by the Respondents*, [PDF] p. 985 (**BESUM Vol. IV, Annex 25**).

[29] *Ibid*.

[30] ICAO Response to Preliminary Objections (A), Exhibit 5, *NOTAMS Issued by the Respondents*, [PDF] p. 987 (**BESUM Vol. IV, Annex 25**).

[31] *Ibid*.

[32] ICAO Response to Preliminary Objections (A), Exhibit 5, *NOTAMS Issued by the Respondents*, [PDF] p. 984 (**BESUM Vol. IV, Annex 25**).

Authority by providing them with a copy of the detailed flight manifest at least 24 hours prior to departure.

2.9 Bahrain issued NOTAMs at 11:17 AM and 11:22 AM on 5 June banning all flights between Bahrain and Qatar, and all Qatar-registered aircraft from overflying "Bahrain airspace", respectively.[33] Bahrain issued two additional NOTAMs at 11:29 AM and 11:59 AM that day, specifying that all flights affected by the previous two NOTAMs should use two specific entry and exits routes in the Bahrain FIR. Because the Bahrain FIR fully encompasses Qatar's territory and much of the high seas surrounding it, this had the effect of closing off the rest of the airspace over the Arabian Gulf high seas.[34] Bahrain also informed Qatar of its intent to establish a so-called "buffer zone" adjacent to its territorial waters, threatening to intercept militarily any Qatar-registered aircraft entering it.[35] Two days later, on 7 June, Bahrain issued another NOTAM requiring all non-Bahrain-registered operators intending to use Bahraini airspace to fly to or from Qatar to obtain approval from Bahrain's Civil Aviation Authority.[36]

2.10 Egypt acted at 12:25 PM on 5 June when it issued a NOTAM banning all Qatar-registered aircraft from overflying the Cairo FIR (which includes portions of

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[33] ICAO Response to Preliminary Objections (A), Exhibit 5, *NOTAMS Issued by the Respondents*, [PDF] pp. 981-983 (**BESUM Vol. IV, Annex 25**).

[34] *See* ICAO Council, *First ATM Contingency Coordination Meeting For Qatar, Summary of Discussions*, ICAO Doc. ACCM/1 (6 July 2017), Appendix A at 4-5 (map indicating that prior Westbound routes were prohibited by NOTAM, leaving only two available routes for entry into and exit from Doha for Qatar-registered aircraft) (**QCM (A) Vol. III, Annex 26**). *See also infra* Figure 2: Two ATS Routes Available Post-Aviation Prohibition.

[35] 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) (**BESUM Vol. IV, Annex 25**).

[36] ICAO Response to Preliminary Objections (A), Exhibit 5, *NOTAMS Issued by the Respondents*, [PDF] pp. 981-983 (**BESUM Vol. IV, Annex 25**).

the high seas over the Mediterranean Sea[37]) and departing or landing at Egyptian aerodromes.[38] The same NOTAM also required all non-Egypt-registered operators intending to use the Cairo FIR for travel to or from Qatar to obtain prior approval from the Egypt Civil Aviation Authority.[39]

2.11 Individually and collectively, Joint Appellants' aviation prohibitions caused immediate and widespread disruption and confusion. Over 70 flights, scheduled by multiple carriers, were cancelled on 6 June.[40] Hundreds of passengers, including pilgrims who were seeking to perform the Umrah pilgrimage, were left stranded and forced to rebook and reroute their travel plans.[41] Over the first week of the aviation prohibitions, tens of thousands of seat reservations for flights into and out of Doha across all airlines and for all forward travel dates were cancelled.[42]

2.12 The aviation prohibitions also jeopardised the security and safety of at least five aircraft that were en-route in Yemen airspace on 5 June, since the NOTAM restricting that airspace was back-timed. These en-route flights were required to make urgent, unexpected route changes that resulted in the filing of two Air Safety

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[37] *See* ICAO, Interactive Map, "Cairo FIR" (**QCM (A) Vol. III, Annex 33**).

[38] ICAO Response to Preliminary Objections (A), Exhibit 5, *NOTAMS Issued by the Respondents*, [PDF] p. 986 (**BESUM Vol. IV, Annex 25**).

[39] *Ibid*.

[40] "Gulf blockade disrupts Qatar Airways flights", *Al Jazeera* (7 June 2017) (**QCM (A) Vol. IV, Annex 73**).

[41] "Qatar row: Air travellers hit by grounded flights", *BBC* (5 June 2017) (**QCM (A) Vol. IV, Annex 68**); Naveed Siddiqui, "550 Pakistani pilgrims stranded in Qatar flown to Muscat", *Dawn* (6 June 2017) (**QCM (A) Vol. IV, Annex 70**).

[42] "Slump in travel to and from Qatar as thousands of airline bookings are cancelled", *The National* (13 June 2017) (**QCM (A) Vol. IV, Annex 77**).

Occurrence Reports.[43]

2.13 Qatar immediately notified the ICAO Council of Joint Appellants' actions, and requested its urgent intervention at least to allow overflight of international airspace over the high seas lying within Joint Appellants' FIRs.[44] On 8 June 2017, Qatar formally requested that an extraordinary session of the ICAO Council be convened under Article 54(n) of the Chicago Convention.[45] The ICAO Council scheduled an extraordinary meeting for 31 July 2017 to consider Qatar's request.

2.14 In the Memorial, Joint Appellants allege that they "cooperated extensively and in a timely manner with both ICAO and Qatar to agree to and complement contingency routes and related contingency arrangements and to avoid unnecessary disruption of air traffic".[46] This is not true. Figure 1 (immediately following this page) shows that prior to 5 June 2017, Qatar's national carrier, Qatar Airways, had

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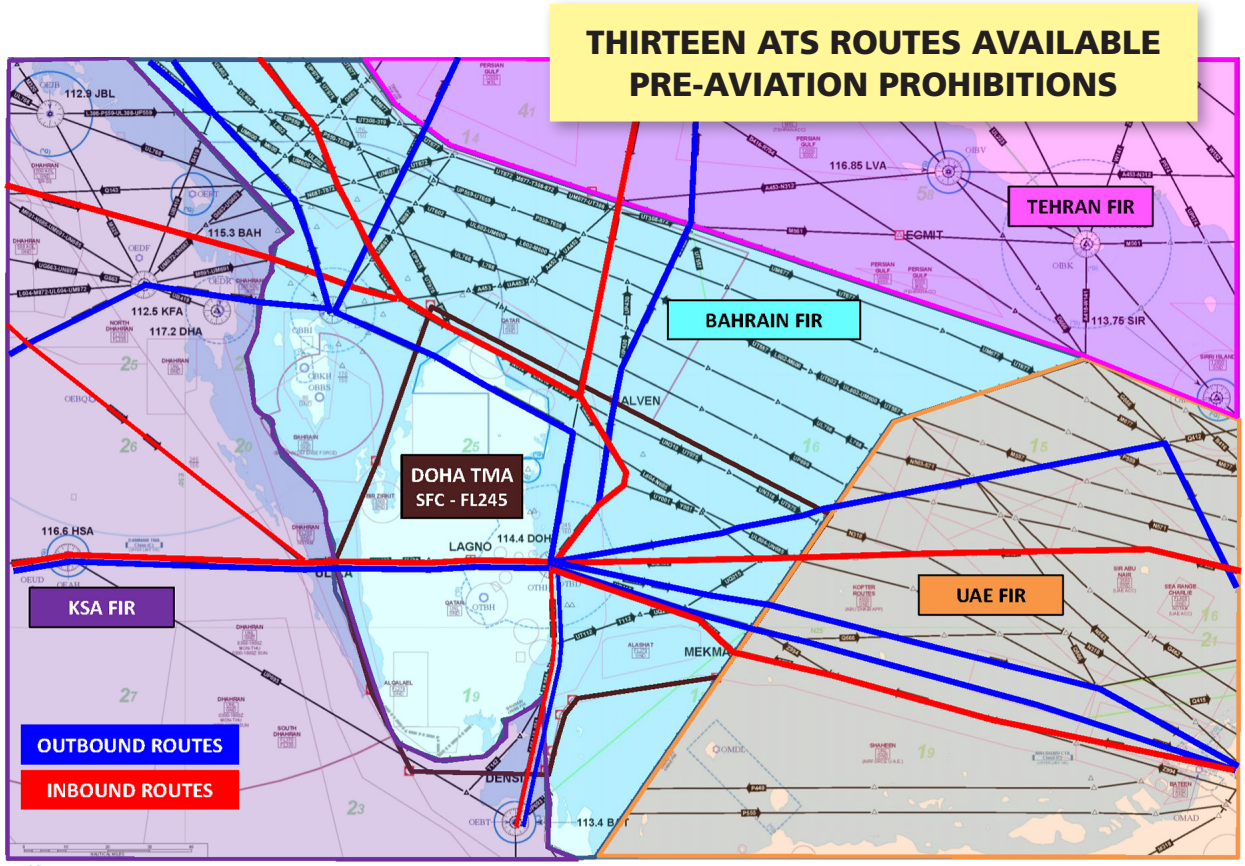
[43] Any event that has or could have significance in the context of aviation safety should be reported in an Air Safety Occurrence Report, consistent with the provisions of ICAO Annex 13 on Aircraft accident and incident investigation.

[44] *Letter* from Adbulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Fang Liu, ICAO Secretary General (5 June 2017) (**QCM (A) Vol. III, Annex 21**). *See also* ICAO Council, 21st Session, *Summary of Decisions*, ICAO Doc. C-DEC 211/10 (27 June 2017), para. 21(a) (describing efforts of ICAO Middle East Regional Office since 5 June) (**QCM (A) Vol. III, Annex 25**).

[45] 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) (**BESUM Vol. IV, Annex 25**). Article 54(n) of the Chicago Convention provides that the Council shall "[c]onsider any matter relating to the Convention which any contracting State refers to it". Chicago Convention, Art. 54(n) (**BESUM Vol. II, Annex 1**).

[46] BESUM, para. 2.55. "Contingency plans are intended to provide alternative facilities and services to those provided for in the regional air navigation plan when those facilities and services are temporarily not available. Contingency arrangements are therefore temporary in nature, remain in effect only until the services and facilities of the regional air navigation plan are reactivated and, accordingly, do not constitute amendments to the regional plan requiring processing in accordance with the 'Procedure for the Amendment of Approved Regional Plans'". Chicago Convention, *Annex 11: Air Traffic Services* (14th ed., July 2016), Attachment C, p. ATT C-1 (**QCM (A) Vol. II, Annex 17**).



Source: Qatar Civil Aviation Authority

Figure 1

access to 13 regular Air Traffic Service ("ATS") routes[47] available for flights into and out of Doha, including operations flying over Joint Appellants' territories.

2.15 After the aviation prohibitions went into effect, Qatari-registered aircraft were prohibited from transiting Joint Appellants' territory and national airspace. They were restricted to using only two routes, both over the high seas in the Bahrain FIR,[48] as reflected in Figure 2 (immediately following this page).

2.16 It was only after ICAO's intervention after Qatar's repeated appeals to it (given that all channels of communication with the relevant authorities of Joint Appellants had been effectively shut off since 5 June 2017, as will be discussed below[49]), and about a week after the imposition of the measures, that Appellants Bahrain, Egypt and the UAE issued NOTAMs revising the scope of their aviation prohibitions to apply only to their respective national airspaces.[50] On 11 June, Bahrain restored two modified ATS routes for traffic flows to and from the West over the high seas off of Bahrain.[51]

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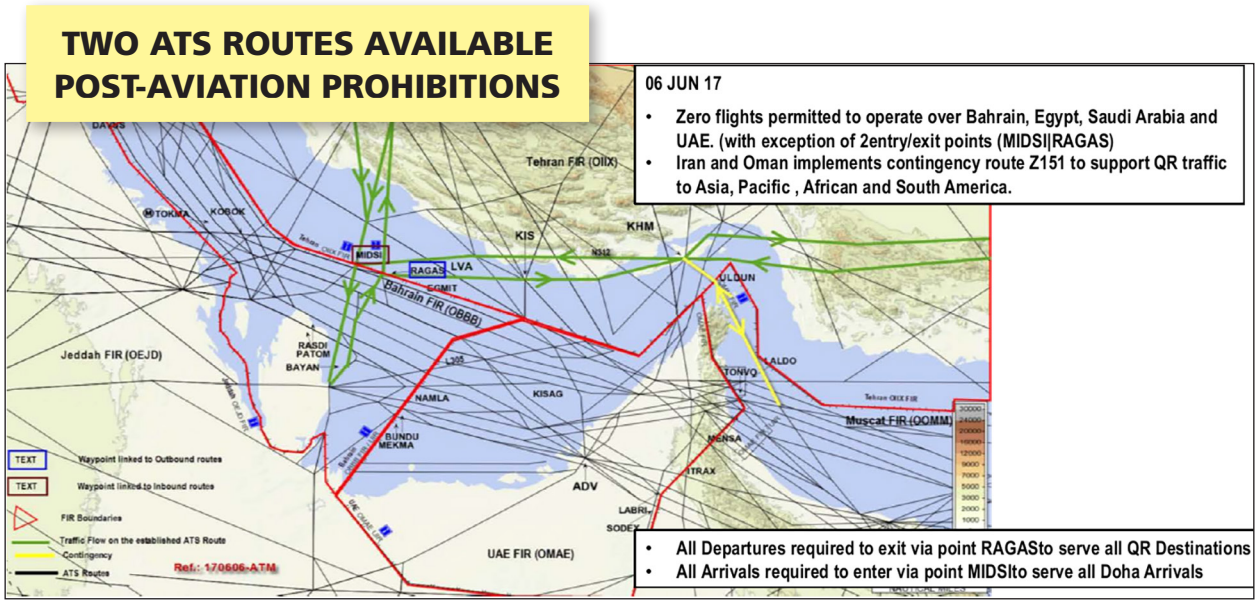
[47] ATS routes are designated routes for channelling the flow of air traffic as necessary for the provision of air traffic service, pursuant to ICAO regulations.

[48] *See* ICAO Council, First ATM Contingency Coordination Meeting For Qatar, *Summary of Discussions*, ICAO Doc. ACCM/1 (6 July 2017), Appendix A at 4-5 (**QCM (A) Vol. III, Annex 26**).

[49] *See infra* Chapter 4, paras. 4.28, 4.29.

[50] Bahrain and Egypt issued their revised NOTAMs on 10 June, while the UAE issued its revised NOTAM on 12 June. ICAO Response to Preliminary Objections (A), Exhibit 5, *NOTAMS Issued by the Respondents*, [PDF] pp. 981-986 (**BESUM Vol. IV, Annex 25**).

[51] ICAO Council, First ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions*, ICAO Doc. ACCM/1 (6 July 2017), Appendix A, pp. 9-10 (**QCM (A) Vol. III, Annex 26**).



Source: Qatar Airways

Figure 2

2.17 On 13 June, Qatar submitted a proposal for a contingency route over UAE territory, which the UAE rejected.[52] A separate proposal for a contingency route via the Bahrain FIR over the high seas was presented on 18 June. It was approved on 20 June and began operation on 22 June.[53] Additional proposals for contingency routes over the high seas areas of the UAE FIR were proposed on 20 June and remained under consideration into August.

2.18 By 22 June 2017, more than two weeks after the introduction of the aviation prohibitions, only two additional modified ATS airways had been re-opened and only *one* contingency route had been established—all by Bahrain in the Bahrain FIR (which, as stated, encompasses Qatar and the high seas surrounding it). The other Joint Appellants continued to reject or delay consideration of all of Qatar's proposals to open additional routes.[54]

2.19 Following the 31 July 2017 extraordinary session of the ICAO Council convened at Qatar's request, the Council issued a decision "urging all ICAO Member States to continue to collaborate, in particular, to promote the safety, security, efficiency and sustainability of international civil aviation".[55] That same day, the UAE approved an additional inbound contingency route over the high seas, but with limited air traffic volume permitted; that contingency route was opened as

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[52] ICAO Council, First ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions*, ICAO Doc. ACCM/1 (6 July 2017), Appendix B, pp. 14-20 (**QCM (A) Vol. III, Annex 26**).

[53] *Ibid.*, para. 6.4.

[54] *See Appendices of Working Paper 14640: Contingency Arrangements and ATM Measures in the MID Region* by Kingdom of Bahrain, Arab Republic of Egypt, Kingdom of Saudi Arabia and United Arab Emirates (2017) (providing maps and timing of the routes that Joint Appellants ultimately agreed to open) (**QCM (A) Vol. IV, Annex 135**).

[55] ICAO Council, *ICAO Annual Report 2017: Settlement of Differences* (**QCM (A) Vol. II, Annex 18**).

of 7 August 2017.[56] The day after the extraordinary session of the Council, Egypt also approved a contingency route over the high seas portion of the Cairo FIR, but the route was of little to no operational value.[57]

2.20 As shown in Figure 3 (immediately following this page), little has changed since 30 October 2017, when Qatar submitted its Application to the ICAO Council under Article 84 of the Chicago Convention.[58] The prohibition of taking off and landing at Joint Appellants' airports and overflying their territories remains in effect to this day.

2.21 As a result of the aviation prohibitions, Qatar Airways has had to cancel more than 50 flights a day and discontinue operations serving 18 destinations in Joint Appellants' territory, accounting for approximately 18% of its overall seating capacity.[59] The aviation prohibitions have also forced Qatar Airways to use limited and less convenient air routes for the destinations that it continues to serve, leading to dangerous congestion and compromising the efficiency of civil aviation in light

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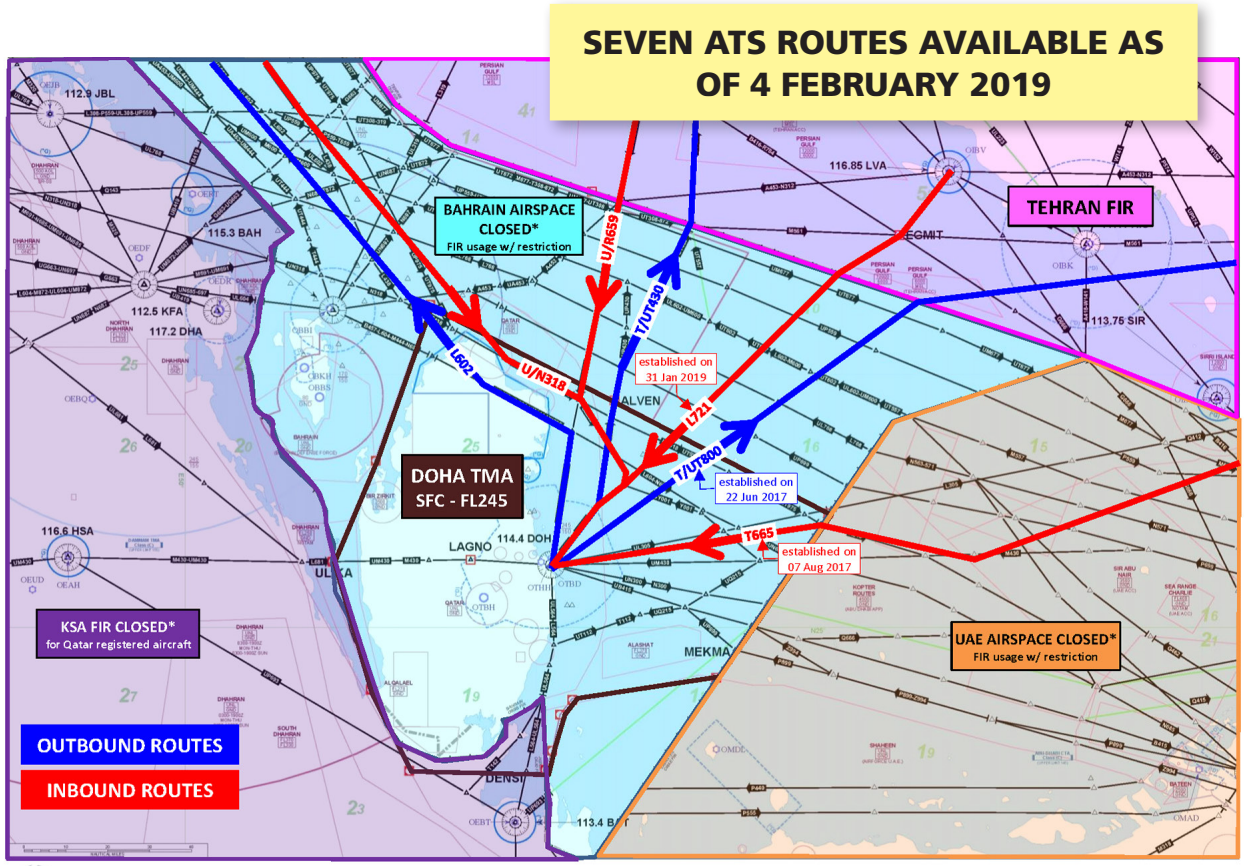
[56] *Appendices of Working Paper 14640: Contingency Arrangements and ATM Measures in the MID Region* by Kingdom of Bahrain, Arab Republic of Egypt, Kingdom of Saudi Arabia and United Arab Emirates (2017), p. 16 (indicating the UAE's acceptance on 7 August 2017 of the T665 westbound proposal for Qatar Airways arrivals) (**QCM (A) Vol. IV, Annex 135**).

[57] ICAO Response to the Preliminary Objections (A), Exhibit 10, *Council – Extraordinary Session,* Summary Minutes, ICAO Doc. C-MIN Extraordinary Session (Closed) (31 July 2017), para. 41 (indicating that contingency route in Cairo FIR would open the following day, 1 August 2017) (**BESUM Vol. IV, Annex 25**); ICAO Council, Third ATM Contingency Coordination Meeting for Qatar, Summary of Discussions, ICAO Doc. ACCM/3 (5-6 Sept. 2017), para. 6.5 (noting the lack of use of the Cairo FIR contingency route T565) (**QCM (A) Vol. III, Annex 27**).

[58] The only changes have been (1) to increase air traffic into T665 (*see* ICAO Council, Third ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions,* ICAO Doc. ACCM/3 (5-6 Sept. 2017), para. 6.12.1 (**QCM (A) Vol. III, Annex 27**)) and (2) to open a new inbound route to Doha in the Bahrain FIR, which became operative only on 31 January 2019 (*see* ICAO Council, Fourth ATM Contingency Coordination Meeting for Qatar, *Summary of Discussions,* ICAO Doc. ACCM/4 (28 April 2018) (**QCM (A) Vol. III, Annex 34**)).

[59] Zahraa Alkhalisi, "Arab blockade is nightmare for Qatar Airways", *CNN* (6 June 2017) (**QCM (A) Vol. IV, Annex 71**).



Civil Aviation Authority

Source: Qatar Civil Aviation Authority

Figure 3

of increases in flight times and fuel consumption occasioned by the required rerouting.[60]

2.22 As set forth in its 30 October 2017 Application before the ICAO Council, Qatar challenges the aviation prohibitions as violations of multiple provisions of the Chicago Convention and its Annexes, including Article 4 by "misusing civil aviation for purposes inconsistent with the aims of the Chicago Convention"; Article 5 by "den[ying] the right of non-scheduled flight over their territories by Qatar-registered aircraft in clear violation of the Convention"; Article 6 by "grossly violat[ing] the[ir] air services Agreements without any warning"; Article 9 by the "discriminatory application of the closure of the airspaces of the [Joint Appellants] solely for Qatar-registered aircraft"; Article 12 by discriminatory treatment over the high seas within Joint Appellants' FIRs; and Article 37 by failing to "collaborate in the implementation of the ICAO Standards".[61] The Council upheld its jurisdiction over these claims in the Council Decision that is the subject of the appeal now before the Court.[62]

2.23 It is this simple reality that Joint Appellants seek to confuse with their false accusations about Qatar's supposed support of terrorism and extremism and interference with their domestic affairs. Qatar will show the baselessness of Joint Appellants' charges below.

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[60] Max Bearak, "Three maps explain how geopolitics has Qatar Airways in big trouble", *Washington Post* (7 June 2017) (demonstrating the added flight time and fuel consumption caused by the aviation prohibitions) (**QCM (A) Vol. IV, Annex 74**).

[61] ICAO Application (A), para. 4 (**BESUM Vol. III, Annex 23**).

[62] ICAO Council Decision (A) (**BESUM, Vol. V, Annex 52**).

II. Joint Appellants' Accusations Are False

2.24 In their Memorial, Joint Appellants claim that the aviation prohibitions reflect their "considered assessments of Qatar's numerous and ongoing violations of international legal obligations".[63] They assert that these ostensible violations consist of the "fail[ure] to suppress the activities of terrorists and extremists living within its borders and … to prosecute such terrorists and extremists"; "systematic[] interfere[nce] in the internal affairs of the Appellants and other States"; and "use[] [of] … State-owned and controlled media – in particular the *Al Jazeera* network – to incite hatred and violence".[64] Joint Appellants' "evidence" for these very serious charges consists almost entirely of media reports and their own official statements.

2.25 Qatar will explain in Chapter 3 why Joint Appellants' attempt to obfuscate the real issues in dispute fails as a matter of law. Here, Qatar shows that it also has no foundation in fact and, indeed, has been rejected by the international community at large. The fact that Joint Appellants are reduced to hiding behind such baseless allegations raises questions about the true motivations for their entire course of conduct, including their decision to appeal the Council Decision to the Court. Joint Appellants are not genuinely concerned about Qatar's (non-existent) support for terrorism or interference in their internal affairs. What they really want is to force Qatar to abandon its commitment to freedom of expression and political tolerance—a commitment that, regrettably, Joint Appellants view as a threat.

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[63] BESUM, para. 2.8.

[64] *Ibid*.

A. JOINT APPELLANTS' ALLEGATIONS OF SUPPORT OF TERRORISM AND EXTREMISM ARE FALSE

2.26 Joint Appellants contend that Qatar "has a long history of supporting extremist and terrorist groups in the Middle East and North Africa".[65] However, the "evidence" they provide in support of this grave charge, much of which is quite dated, collapses under scrutiny. Their claim is also flatly contradicted by the larger international community, including specialised organisations mandated to combat the financing of terrorism, the Gulf Cooperation Council ("GCC"), the European Union ("EU") and the United States of America, which have consistently recognised Qatar's leadership role in countering terrorism and extremism—and increasingly expressed concerns about Joint Appellants' *own* record in this area.

2.27 Joint Appellants cite, for example, a 16-year-old New York Times article for the proposition that a Qatari official "helped" the architect of the 9/11 World Trade Center terrorist attack, Khalid Shaikh Mohammad, "evade a January 1996 arrest warrant issued by the United States for his terrorist activities …".[66] But the very same article proves the accusation baseless when it quotes the then-U.S. Ambassador to Qatar as saying, "I have no information that would lead me to conclude that the Qatar government tipped off Khalid Shaikh Mohammed", as well as other U.S. officials who conceded that there is no "hard evidence" to substantiate the allegation.[67]

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[65] BESUM, para. 2.10.

[66] "Threats and Responses: Counterterrorism; Qaeda Aide Slipped Away Long Before Sept. 11 Attack", The New York Times, 8 March 2003 (**BESUM Vol. VI**, **Annex 100**); *See also* BESUM, para. 2.11.

[67] *Ibid.*

2.28 Joint Appellants' assertion is not without irony. All 19 of the 9/11 hijackers were citizens of one of the four Appellants in this case: 15 were citizens of Saudi Arabia, two were citizens of the UAE and one was a citizen of Egypt.[68] None were Qatari. Indeed, Saudi Arabia will soon have to face allegations of its involvement in helping to plan the 9/11 terrorist attacks, having recently lost a motion to dismiss a lawsuit to that effect in the United States.[69] The UAE also faces potential exposure in those actions given that many of the hijackers travelled through the UAE and significant financial resources were transmitted through UAE banks to the hijackers and other Al-Qaida operatives.[70]

2.29 Next, Joint Appellants contend that in 2003 (i.e., 16 years ago) Qatar provided "safe haven" for Zelimkhan Yandarbiyev,[71] a former president of Chechnya who they say was placed on the UN Security Council Al-Qaida Committee list for allegedly fundraising for terrorist groups, and was the subject of a Russian extradition request, which Qatar refused to honour.[72] Joint Appellants, however, fail to mention that Mr. Yandarbiyev was added to the UN Security Council list only a few months before he was assassinated in Doha in February 2004.[73] Moreover, the 2008 report from the International Monetary Fund ("IMF")

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[68] "September 11 Hijackers Fast Facts", *CNN* (27 July 2013) (**QCM (A) Vol. IV, Annex 64**).

[69] Jonathan Stempel, "Saudi Arabia must face U.S. lawsuits over Sept. 11 attacks", *Reuters* (28 Mar. 2018) (**QCM (A) Vol. IV, Annex 97**).

[70] Jamie Merrill, "REVEALED: 9/11 families could sue UAE for alleged role in attacks", *Middle East Eye* (14 July 2017) (**QCM (A) Vol. IV, Annex 83**).

[71] BESUM, para. 2.11.

[72] *Ibid*. *See also* International Monetary Fund, Qatar: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism, 19 June 2018, published October 2008, p. 46, para. 184 (**BESUM Vol. VII, Annex 130**).

[73] Mr. Yandarbiyev was placed on the UN Security Council list on 26 June 2003. United Nations Press Release SC/7803, "Security Council Committee Adds Names of 17 Individuals to Al-Qaida Section of Consolidated List", 26 June 2003 (**BESUM Vol. VI, Annex 89**).

on which Joint Appellants rely to support this contention, expressly references Qatari authorities' statements that "the purpose of [their] refusal [to extradite Mr. Yandarbiyev to Russian authorities] was to ensure [his] protection".[74] Qatar's concerns appear to have been well-founded, given that two Russians were subsequently tried and convicted of killing him.[75]

2.30 The same 2008 IMF report notably concluded that "there is currently no evidence of significant [money laundering] in the country", the "level of predicate offenses appears very low in Qatar in comparison to other countries", "Qatar ranks among the less corrupted countries in the region", and "[n]o major terrorist activity has been recorded in the country".[76] The report also made certain recommendations and comments regarding the criminalisation of terrorist financing,[77] which have all since been implemented. Qatar Law No. 4 of 2010 not only criminalised money laundering and terrorism financing, but it also established a National Committee for Anti-Money Laundering and Anti-Terrorist Financing with authority to freeze assets and impose travel bans.[78] In 2017, Qatar also amended its counterterrorism legislation to establish a domestic terrorist listing mechanism based on, but separate from, the UN Security Council Sanctions Committee's designated list.[79]

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[74] International Monetary Fund, Qatar: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism, 19 June 2008, published October 2008, p. 46, para. 184 (**BESUM Vol. VII, Annex 130**).

[75] Steven Lee Myers, "Qatar Court Convicts 2 Russians in Top Chechen's Death", *New York Times* (1 July 2004) (**QCM (A) Vol. IV, Annex 60**).

[76] International Monetary Fund, Qatar: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism, 19 June 2008, published October 2008, pp. 19-20, paras. 59-63 (**BESUM Vol. VII, Annex 130**).

[77] *Ibid.*, p. 147, para. 185.

[78] State of Qatar, Law No. 4 of 2010 on Combating Money Laundering and Terrorism Financing (18 Mar. 2010) (**QCM (A) Vol. III, Annex 44**).

[79] State of Qatar, Decree No. 11 of 2017 to Amend Law No. 3 of 2004 (13 July 2017) (**QCM (A) Vol. III, Annex 45**).

Designations and prosecutions have already been undertaken utilising these frameworks and mechanisms.[80]

2.31 Joint Appellants also mention a 2014 statement made by the U.S. Under Secretary for Terrorism and Financial Intelligence, Mr. David Cohen, who described Qatar as a "permissive jurisdiction" for terrorist financing.[81] That characterisation stands in stark contrast with the IMF report just cited, and the fact that Qatar was the first State to negotiate and sign a detailed counterterrorism agreement with the United States.[82] After the signing of this agreement, the U.S. Secretary of State stated that "on the issue of terrorism financing, Qatar had now leapfrogged its rivals".[83]

2.32 In this respect, Qatar also notes that on 22 May 2017, two weeks before the imposition of the aviation prohibitions, it joined the Terrorist Financing Targeting Center ("TFTC"), a partnership between the United States and the GCC Member States designed to help disrupt terrorist financial networks. Qatar attended TFTC

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[80] *See, e.g.*, Noah Browning, "Qatar puts 28 people and entities on new terrorism list", *Reuters* (22 March 2018) (**QCM (A) Vol. IV, Annex 95**).

[81] ICAO Preliminary Objections (A), Exhibit 19, Remarks of Under Secretary for Terrorism and Financial Intelligence David Cohen before the Center for a New American Security on Confronting New Threats in Terrorist Financing, 3 April 2014 (**BESUM Vol. III, Annex 24**); *see also* BESUM, para. 2.12.

[82] U.S. Department of State, *Press Availability with Qatari Foreign Minister Sheikh Mohammed bin Abdulrahman al-Thani*, (11 July 2017) (**QCM (A) Vol. III, Annex 49**). The Qatar-U.S. Counterterrorism Memorandum of Understanding had been negotiated between the parties for approximately a year before it was signed on 11 July 2017. N. Gaouette & Z. Cohen, "US and Qatar broker counterterrorism agreement", *CNN* (11 July 2017) (**QCM (A) Vol. IV, Annex 82**). *See also* U.S. Department of State, *Joint Statement of the Inaugural United States-Qatar Strategic Dialogue* (30 Jan. 2018) ("United States thanked Qatar for its action to counter terrorism and violent extremism in all forms, including by being one of the few countries to move forward on a bilateral Memorandum of Understanding with the United States".) (**QCM (A) Vol. III, Annex 51**).

[83] ICAO Response to Preliminary Objections (A), Exhibit 47, *Tillerson Tries Shuttle Diplomacy in Qatar Dispute* (11 July 2017) (**BESUM Vol. IV, Annex 25**).

meetings held after the imposition of the aviation prohibitions and the other measures of 5 June 2017, in July 2017, March 2018 and May 2018 and jointly designated with other TFTC members 11 individuals and two entities as terrorist financiers on 25 October 2017,[84] and a further 28 individuals as terrorist financiers on 22 March 2018.[85] Even as they accuse Qatar of supporting "terrorism and extremism" before the Court, Saudi Arabia the UAE and Bahrain continue to work constructively and without complaint with Qatar within the framework of the TFTC.[86]

2.33 Qatar is also a founding member of and among the largest contributors to the Global Counterterrorism Task Force, which coordinates and funds local initiatives to counter terrorism by 30 different countries, including China, Russia, India, France, Germany, Japan, Turkey, the United Kingdom and Appellants Egypt, Saudi Arabia and the UAE.[87]

2.34 Here again, Qatar cannot help but note the irony in Joint Appellants' allegations. Both Saudi Arabia and the UAE are reportedly significant hubs for fundraising activities for South Asia-based terrorist groups, including the Afghan

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[84] "Qatar's sanctions hit 13 facilitators of terrorism", *Qatar Tribune* (26 Oct. 2017) (**QCM (A) Vol. IV, Annex 93**).

[85] Noah Browning, "Qatar puts 28 people and entities on new terrorism list", *Reuters* (22 Mar. 2018) (**QCM (A) Vol. IV, Annex 95**).

[86] U.S. Embassy & Consulate in the UAE, *Meeting of the Terrorist Financing Targeting Center Member States Convenes in Kuwait* (6 Mar. 2018) (**QCM (A) Vol. III, Annex 52**); "Co-Led by US, Saudi Arabia, TFTC Members Meet in Kuwait", *Kuwait News Agency* (11 May 2018) (**QCM (A) Vol. IV, Annex 98**). Qatar's security cooperation with Appellants Bahrain, Saudi Arabia and UAE also continues unabated. At the last GCC Summit in December 2018, Saudi Arabia's Foreign Minister Adel al Jubeir recognized this reality, stating that "the dispute would not affect military cooperation". Stephen Kalin, "Qatar rift overshadows Gulf Arab summit as emir stays away", *Reuters* (8 Dec. 2018) (**QCM (A) Vol. IV, Annex 102**).

[87] U.S. Department of State, *Global Counterterrorism Forum Co-Chairs: About the Global Counterterrorism Forum (GCTF)* (23 Sept. 2014) (**QCM (A) Vol. III, Annex 46**).

Taliban, Lashkar-e-Taiba and the Haqqani Network.[88] These activities include donor fundraising, money laundering and extortion of expatriate populations. UAE banks have also been accused of facilitating the transfer of funds to terrorists and terrorist groups, including those responsible for the 9/11 attacks and the 2008 Mumbai attacks.[89]

2.35 In addition, a September 2018 report of the Financial Action Task Force[90] ("FATF") on Saudi Arabia found that "Saudi Arabia is not effectively investigating and prosecuting individuals involved in larger scale or professional [money laundering] activity", "is not effectively confiscating the proceeds of crime", and "does not effectively seek international co-operation from other countries to pursue money laundering and the proceeds of crime".[91] This means that every year, billions of dollars in criminal proceeds leave Saudi Arabia without a trace.[92]

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[88] Declan Walsh, "WikiLeaks cables portray Saudi Arabia as a cash machine for terrorists", *The Guardian* (5 Dec. 2010) (**QCM (A) Vol. IV, Annex 62**); G. Jaffe & M. Ryan, "A Dubai shopping trip and a missed chance to capture the head of the Taliban", *Washington Post* (24 Mar. 2018) (noting evidence of frequent trips by the Taliban leader to Dubai) (**QCM (A) Vol. IV, Annex 96**). Saudi Arabia and the UAE were also two of the only three States that recognized the Taliban as the legitimate government of Afghanistan in the late 1990s. Adrian Guelke, *Terrorism and Global Disorder* (2006), p. 55 (**QCM (A) Vol. IV, Annex 109**).

[89] "Protests outside UAE Embassy in New Delhi over 26/11 terror funding allegations", *New India Express* (6 Aug. 2017) (**QCM (A) Vol. IV, Annex 87**).

[90] The Financial Task Force is a G7 initiative to combat money laundering and terrorist financing. Its objectives include setting standards and promoting effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system; monitoring the progress of its members in implementing necessary measures; and reviewing money laundering and terrorist financing techniques and counter-measures. Financial Action Task Force (FATF), *Who we are* (**QCM (A) Vol. IV, Annex 130**).

[91] FATF-MENAFATF, *Anti-money laundering and counter-terrorist financing measures – Saudi-Arabia*, Fourth Round Mutual Evaluation Report, FATF, Paris (Sept. 2018), pp. 3-4 (**QCM (A) Vol. IV, Annex 120**).

[92] Dominic Dudley, "Saudi Arabia Accused Of Turning A Blind Eye To International Terrorism Financing By Global Watchdog", *Forbes* (25 Sept. 2018) (**QCM (A) Vol. IV, Annex 101**).

2.36 Saudi Arabia was also recently placed on the EU's "list of countries that pose a threat to the bloc because of lax controls against terrorism financing and money laundering".[93] Countries on the EU list "have strategic deficiencies in their anti-money laundering and countering the financing of terrorism regimes that pose significant threats to the financial system of the Union".[94] The EU list does not include Qatar.

2.37 Joint Appellants also accuse Qatar of "refus[ing] to take action to suppress the terrorism-related activities of, or to prosecute, internationally designated terrorists based in Qatar".[95] Joint Appellants name four individuals who have been placed on the UN Security Council ISIL (Da'esh) & Al-Qaida Sanctions Committee list: Khalifa Muhammad Turki Al-Subaiy (designated in 2008);[96] Abd Al-Rahman bin 'Umayr Al-Nu'aymi (designated in 2014);[97] Sa'd bin Sa'd

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[93] S. Kalin & F. Guarascio, "EU adds Saudi Arabia to draft terrorism financing list: sources", *Reuters* (25 Jan. 2019) (**QCM (A) Vol. IV, Annex 104**). *See also* Francesco Guarascio, "EU adds Saudi Arabia to dirty-money blacklist, upsets UK, U.S.", *Reuters* (13 Feb. 2019) (**QCM (A) Vol. IV, Annex 107**).

[94] S. Kalin & F. Guarascio, "EU adds Saudi Arabia to draft terrorism financing list: sources", *Reuters* (25 Jan. 2019) (**QCM (A) Vol. IV, Annex 104**).

[95] BESUM, paras. 2.15, 2.38.

[96] ICAO Preliminary Objections (A), Exhibit 15, Narrative Summary: QDi.253 Khalifa Muhammad Turki Al-Subaiy, United Nations sanctions list issued by the Security Council Commission pursuant to Security Council Resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh) Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, last updated 3 February 2016 (**BESUM Vol. III, Annex 24**).

[97] ICAO Preliminary Objections (A), Exhibit 16, Narrative Summary: QDi.334 'Abd al-Rahman bin 'Umayr al-Nu'aymi, United Nations sanctions list issued by the Security Council Commission pursuant to Security Council Resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh) Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, last updated 13 May 2016 (**BESUM Vol. III, Annex 24**).

Muhammad Shariyan al-Ka'bi (designated in 2015);[98] and Abd al-Latif bin Abdallah Salih Muhammad al-Kawari (designated also in 2015).[99]

2.38 Qatar, however, has met its obligation to enforce the UN sanctions applicable to these individuals (arms embargo, asset freeze and travel ban), and at no time has any UN body found that Qatar violated any such obligation. Qatar arrested and imprisoned Al-Subaiy for six months in 2008 for a conviction for terrorism financing.[100] And it has also placed all of them on its National Counter Terrorism Committee terrorist designation list,[101] a step that will facilitate their prosecution for any crimes for which sufficient evidence may be gathered.

2.39 Joint Appellants further suggest that Qatar's reservation to an 18 February 2015 League of Arab States resolution supporting Egypt's unilateral use of force in Libya somehow shows that Qatar supports terrorism.[102] They are mistaken.

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[98] Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning ISIL (Da'esh) Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, Narrative Summaries of Reasons for Listing QDi.382 Sa'd bin Sa'd Muhammad Shariyan al-Ka'bi, United Nations Security Council Subsidiary Organs (last updated 21 September 2015) (**BESUM Vol. VI, Annex 96**).

[99] Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning ISIL (Da'esh) Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, Narrative Summaries of Reasons for Listing QDi.380 Abd al-Latif bin Abdallah Salih Muhammad al-Kawari, United Nations Security Council Subsidiary Organs (last updated 21 September 2015) (**BESUM Vol. VI, Annex 95**).

[100] ICAO Preliminary Objections (A), Exhibit 15, Narrative Summary: QDi.253 Khalifa Muhammad Turki Al-Subaiy, United Nations sanctions list issued by the Security Council Commission pursuant to Security Council Resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh) Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, last updated 3 February 2016 (**BESUM Vol. III, Annex 24**).

[101] *See* State of Qatar, Ministry of Interior, National Counter Terrorism Committee, *National Terrorist Designation Lists*, Designation Order No. 2 (21 Mar. 2018) (designating Al-Nu'aymi, al-Ka'bi, and al-Kawari) (**QCM (A) Vol. III, Annex 41**); State of Qatar, Ministry of Interior, National Counter Terrorism Committee, *National Terrorist Designation Lists*, Designation Order No. 4 (28 Aug. 2018) (designating Al-Subaiy) (**QCM (A) Vol. III, Annex 43**).

[102] BESUM, para. 2.36.

Qatar recalled its Ambassador to Cairo over this insulting suggestion when Egypt first made it in 2015.[103] Qatar's reservation stemmed from concerns about the unilateral use of force in a fellow Member State of the Arab League, the possibility of civilian casualties, and the desire not to strengthen any particular party in the Libyan civil war before the conclusion of the then-ongoing UN-sponsored peace talks.[104] Notably, the Secretary General of the GCC Abdul Latif al-Zayani (from Bahrain) said at the time that Egypt's accusations were "unfounded, contradict reality, and ignore the *sincere efforts by Qatar*, as well as the Gulf Co-operation Council and Arab states, *in combating terrorism and extremism at all levels*".[105]

2.40 Finally, Joint Appellants allege, based on media reports from the BBC and the Washington Post, that Qatar paid hundreds of millions of dollars to terrorists, armed militant groups and Iran's Islamic Revolutionary Guard Corps "as a purported ransom payment for the release of the kidnapped members of the Qatari royal family".[106] However, the articles in question make it clear that their reporting is based in part on communications hacked and edited by a State hostile to Qatar,[107] which casts doubt on the reliability of the information. The full version of the Washington Post article also records Qatar's "consistent[] den[ial] [of] reports that it paid terrorist organizations as part of the deal",[108] and Iraqi Prime Minister

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[103] "Qatar recalls envoy to Egypt in row over Libya strikes", *BBC News* (19 Feb. 2015) (**QCM (A) Vol. IV, Annex 67**).

[104] *Ibid.*

[105] *Ibid.* (emphasis added).

[106] BESUM, para. 2.48.

[107] Paul Wood, "'Billion Dollar Ransom': Did Qatar Pay Record Sum?", BBC, 17 July 2018 (**BESUM Vol. VI, Annex 120**); "Hacked Phone Messages Shed Light on Massive Payoff that Ended Iraqi Hostage Affair", The Washington Post, Undated (**BESUM Vol. VI, Annex 121**).

[108] Joby Warrick, "Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages", The Washington Post, 28 April 2018 (**BESUM Vol. VI**, **Annex 117**).

Haider al-Abadi's statement that the funds in question were received by the Government of Iraq, which still had possession of them.[109] The BBC article Joint Appellants cite likewise confirms that Qatar intended the funds for the Government of Iraq and that Iraq had possession of them.[110] Unsurprisingly, no member of the United Nations Security Council gave any credence to Egypt's "call[] … to open an investigation into Qatar's payment as a ransom to terrorist groups".[111]

2.41 In sum, all of Joint Appellants' allegations about Qatar's alleged "support of terrorism and extremism" are false. International bodies tasked with monitoring terrorist and extremist activities, including terrorist financing, as well as other important international actors, agree that Qatar is and has long been a regional and global leader in anti-terrorism cooperation.[112]

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[109] Maher Chmaytelli, "Iraq says it still has Qatari money sent to free ruling family members", *Reuters* (11 June 2017) (**QCM (A) Vol. IV, Annex 76**).

[110] Paul Wood, "'Billion Dollar Ransom': Did Qatar Pay Record Sum?", BBC, 17 July 2018 (**BESUM Vol. VI, Annex 120**).

[111] BESUM, para. 2.48.

[112] Moreover, aside from a party in good standing to fifteen multilateral agreements relating to security and counter-terrorism and several bilateral treaties and arrangements in the area of security cooperation, Qatar is the *only* GCC-member country that is a contributing member of the Community Engagement and Resilience Fund, the first global effort to support local community efforts to build resilience to violent extremism. Global Community Engagement and Resilience Fund, *Donor Frequently Asked Questions* (last accessed: 2 Feb. 2019) (**QCM (A) Vol. IV, Annex 132**). Qatar has also pledged $10 million to its goals and objectives in May of 2018, and while at the December 2018 Doha Forum, His Highness the Amir pledged $75 million over 5 years ($15 million annually) to the UN Security Council's Counter Terrorism Committee. State of Qatar, Ministry of Justice, "Qatar Doubles Contribution to Global Community Engagement & Resilience Fund" (30 May 2018) (**QCM (A) Vol. III, Annex 42**); Doha Forum, "Qatar Announces Half a Billion USD in Funds to UN Agencies", (Dec. 2018) (**QCM (A) Vol. IV, Annex 126**). In addition, Qatar hosts the central command base of the 79-member Global Coalition against ISIS, as well as the largest U.S. military base in the region. Global Coalition, *79 Partners* (last accessed: 1 Feb. 2019) (**QCM (A) Vol. IV, Annex 131**); Jamie McIntyre, "US base in Qatar still running the fight against ISIS amid diplomatic rift in the Middle East", *Washington Examiner* (5 June 2017) (**QCM (A) Vol. IV, Annex 69**). *See also* Ministry of Defence of United Kingdom, *Defence Secretary hosts Qatari counterpart at historic Horse Guards* (16 Jan. 2018) (**QCM (A) Vol. III, Annex 50**) (recording U.K. Defence Secretary Mr. Gavin Williamson's statement that "Qatar is a vital partner

2.42 Qatar concludes on this point by noting that it is not alone in doubting Joint Appellants' sincerity in claiming that Qatar's alleged support of terrorism is the reason for the aviation prohibitions and other coercive measures. On 20 June 2017, the spokeswoman for the U.S. State Department bluntly asked:

> "Were the actions really about their concerns about Qatar's alleged support for terrorism, *or were they about the long-simmering grievances between and among the GCC countries?*"[113]

B. JOINT APPELLANTS' ALLEGATIONS ABOUT QATAR'S "SYSTEMATIC INTERFERENCE" IN THEIR INTERNAL AFFAIRS ARE FALSE

2.43 Joint Appellants also accuse Qatar of "purposeful and systematic intervention in the[ir] internal affairs", in violation of the Riyadh Agreements and international law.[114] To the extent that this allegation is premised on Qatar's supposed "support for terrorist groups and extremist ideologies",[115] Qatar has

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in the fight against Daesh, hosting the headquarters of the coalition air campaign which is still coordinating strikes on targets in Syria every day".); "Qatar's efforts in combating terrorism win German praise", *Gulf Times* (14 July 2018) (**QCM (A) Vol. IV, Annex 100**) (recording German Minister of Defence Ms. Ursula von der Leyen's praise of Qatar for "making great efforts within the ranks of the [NATO] alliance … to combat terrorism and eliminate it completely".); U.S. Department of State, *Secretary Pompeo's Meeting with Qatari Foreign Minister Al Thani* (26 June 2018) (**QCM (A) Vol. III, Annex 53**) (recording U.S. Secretary of State Mr. Michael Pompeo's appreciation of "the Foreign Minister for Qatar's continued efforts on counterterrorism and countering terrorism financing").

[113] A. Gearan & K. DeYoung, "State Department issues unusual public warning to Saudi Arabia and UAE over Qatar rift", *Washington Post* (20 June 2017) (**QCM (A) Vol. IV, Annex 78**) (emphasis added). The "long-simmering grievances" mentioned by the State Department relate to differences in policy between various GCC members.

[114] BESUM, para. 2.44. The Riyadh Agreements refer to the First Riyadh Agreement of 23 November 2013, its Implementing Mechanism of 17 April 2014, and the Supplementary Riyadh Agreement of 16 November 2014 (**BESUM Vol. II, Annexes 19-21**). These instruments, adopted under the auspices of the GCC, seek to foster dialogue and cooperation in addressing threats to regional security, stability, and peace.

[115] BESUM, para. 2.44.

already refuted it above. To the extent it is premised on other matters, Qatar addresses it below.

2.44 Joint Appellants contend that Qatar has breached its obligation under the Riyadh Agreements to provide "[n]o support … through direct security work or through political influence" to the Muslim Brotherhood.[116] In particular, Joint Appellants refer to Qatar's allegedly "hostile public statements condemning Egypt's designation of the Muslim Brotherhood as a terrorist organization",[117] which Egypt decried as a "gross interference in [its] domestic affairs",[118] and which led to Joint Appellants' recalling their Ambassadors from Qatar in March 2014.[119]

2.45 The "hostile public statements" in question were in fact concerns Qatar expressed in the context of indiscriminate killings of protesters in Egypt—the most notable being the massacre of over 800 protesters in Rab'a Square on 14 August 2013—following the ouster of former Egyptian President Mohammad Morsi.[120] Qatar's concerns were entirely reasonable given reports of "the increasing numbers of victims of demonstrations in Egypt and the killing of a large number of people across the country".[121] Qatar was also concerned that "the decision to convert [popular] political movements to terrorist organizations and converting

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[116] First Riyadh Agreement, 23 and 24 November 2013, Art. 2 (**BESUM Vol. II, Annex 19**).

[117] BESUM, para. 2.20.

[118] Statement of the Arab Republic of Egypt Ministry of Foreign Affairs, "The Egyptian Ministry of Foreign Affairs summons the Qatari Ambassador to Cairo", 4 January 2014 (**BESUM Vol. V, Annex 59**).

[119] BESUM, para. 2.21.

[120] Human Rights Watch, *All According to Plan: The Rab'a Massacre and Mass Killings of Protesters in Egypt* (12 Aug. 2014) (**QCM (A) Vol. IV, Annex 112**).

[121] "Qatar criticizes Egypt's designation of the Muslim Brotherhood as a terrorist organization", BBC Arabic, 4 January 2014 (**BESUM Vol. VI, Annex 104**).

demonstrations into terrorist acts" would not be conducive to ending the violence, and called for "dialogue between the society's political components and the state … without exclusion nor eradication".[122] Several UN bodies and world leaders echoed Qatar's statements, and similarly urged restraint and condemned the killing of peaceful protesters.[123]

2.46 Joint Appellants claim that Qatar's alleged support for the Muslim Brotherhood in breach of the Riyadh Agreements is further evidenced by its 2015 refusal to extradite Yusuf Al-Qaradawi, a Sunni theologian and chairman of the International Union of Muslim Scholars based in Doha.[124] But they fail to mention that the Interpol red notice, issued at Egypt's request and on the basis of which it sought Al-Qaradawi's extradition, was withdrawn because the accusations against him were baseless.[125] They also omit the fact that the Vice President and Prime Minister of the UAE, Sheikh Mohammed bin Rashid Al Maktoum, personally awarded Mr. Al-Qaradawi the "international figure of the year" prize in 2012,[126]

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[122] *Ibid.*

[123] *See, e.g.*, "UN rights chief urges talks to save Egypt from further disastrous violence", *UN News* (15 Aug. 2013) (**QCM (A) Vol. IV, Annex 127**) (noting statements by UN High Commissioner for Human Rights, several UN Special Rapporteurs, and UN Security Council meeting on the situation in Egypt).

[124] BESUM, para. 2.34.

[125] "Interpol removes red notice against Islamic scholar Yusuf Al Qaradawi", *TRT World* (13 Dec. 2018) (**QCM (A) Vol. IV, Annex 103**). Qatar also notes that Joint Appellants designated Mr. Al-Qaradawi as terrorist after the imposition of the aviation prohibitions and other measures of 5 June 2017. *See* Kingdom of Bahrain Ministry Foreign Affairs News Details, "Statement by the Kingdom of Saudi Arabia, the Arab Republic of Egypt, the United Arab Emirates, and the Kingdom of Bahrain", 9 June 2017 (**BESUM Vol. V**, **Annex 74**). Moreover, Joint Appellants' allegation that Mr. Al-Qaradawi "has been supported by the highest levels of the Qatari leadership" simply because he was photographed and dined together with His Highness the Amir of Qatar at a "banquet for scholars, judges and imams" does not withstand scrutiny. BESUM, para. 2.34; "Amir Hosts Iftar banquet for scholars, judges and imams", Gulf Times, 30 May 2018 (**BESUM Vol. VI**, **Annex 118**).

[126] "Video: Dubai ruler praises Al-Qaradawi for his scholarly achievements", *Middle East Monitor* (12 Apr. 2014) (**QCM (A) Vol. IV, Annex 65**).

and that Saudi Arabia awarded him the King Faisal Prize for Islamic Studies,[127] one of the highest accolades in the Muslim world.

2.47 Joint Appellants similarly ignore the international condemnation of Egypt's illegal detention of Mr. Al-Qaradawi's daughter, Ola Qaradawi, and her husband for over 500 days only because of their familial ties with Mr. Al-Qaradawi.[128] Recently, the UN Human Rights Council's Working Group on Arbitrary Detention found, *inter alia*, that their arrest, detention and imprisonment by the Egyptian authorities "lack a legal basis and are thus arbitrary".[129]

2.48 Joint Appellants also allege that "[t]he Muslim Brotherhood presence in Qatar has had grave consequences".[130] They refer to the 11 December 2016 terrorist attack targeting Coptic Christian worshippers at Abbaseya, Egypt, and a statement from the Egyptian Ministry of Interior claiming that the culprit, an Egyptian national, had been radicalised in Qatar.[131] Joint Appellants provide no corroborating evidence for this assertion. Interestingly, the Ministry of Interior's statement also refers to the culprit's repeated travels to North Sinai,[132] which,

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[127] King Faisal Prize, *Professor Yousef A. Al-Qaradawi, Winner of the 1994 KFP Prize for Islamic Studies* (last accessed: 15 Feb. 2019) (**QCM (A) Vol. IV, Annex 134**).

[128] UN Human Rights Council, Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session*, UN Doc A/HRC/WGAD/2018/261 (7-26 April 2018), para. 79.

[129] *Ibid.*, para. 59.

[130] BESUM, para. 2.35.

[131] Official Statement of the Ministry of Interior of the Arab Republic of Egypt, 12 December 2016 (**BESUM Vol. V, Annex 71**); *see also* BESUM, para. 2.35.

[132] Official Statement of the Ministry of Interior of the Arab Republic of Egypt, 12 December 2016 (**BESUM Vol. V, Annex 71**).

according to the U.S. Department of State, constitutes a "terrorist safe haven" used by the ISIS-Sinai Province as a base to plan attacks there and in mainland Egypt.[133]

2.49 In fact, by most accounts, Egypt is among the top 15 sources of foreign terrorist fighters for ISIS. Saudi Arabia is number two.[134] Other accounts indicate that over 100 Bahrainis may have joined ISIS, a significant number given the size of Bahrain's population, and express concerns about possible links between Bahrain's security forces and ISIS.[135] Still other reports indicate that arms supplied by Saudi Arabia often ended up in ISIS's hands in Iraq and Syria.[136] An investigation by CNN found that Saudi Arabia and the UAE transferred weapons to "al Qaeda-linked fighters, hard-line Salafi militias, and other factions waging war in Yemen".[137] A separate investigation by Amnesty International found that the UAE was "recklessly supplying militias" accused of war crimes with advanced weaponry.[138]

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[133] U.S. Department of State, Bureau of Counterterrorism and Countering Violent Extremism, Country Reports on Terrorism, *Chapter 4: Terrorist Safe Havens (Update to 7120 Report)* (2017) (**QCM (A) Vol. III, Annex 47**).

[134] FATF, "Financing of the Terrorist Organisation Islamic State in Iraq and the Levant (ISIL)" (Feb. 2015), p. 21 (**QCM (A) Vol. IV, Annex 113**); E. Benmelech & E.F. Klor, "What Explains the Flow of Foreign Fighters to ISIS?", *National Bureau of Economic Research*, Working Paper 22190 (Apr. 2016), p. 16 (**QCM (A) Vol. IV, Annex 114**); Susan B. Glasser, "Martyrs' in Iraq Mostly Saudis", *Washington Post* (15 May 2005) (**QCM (A) Vol. IV, Annex 61**); *see also* Hernán Longo, "Sharing information in order to fight against terrorism", ICAO, Hong Kong ICAO TRIP Regional Seminar, p. 6, (**QCM (A) Vol. II, Annex 19**).

[135] Ala'a Shehabi, "Why is Bahrain Outsourcing Extremism?", *Foreign Policy* (29 Oct. 2014) (**QCM (A) Vol. IV, Annex 66**).

[136] Bethan McKernan, "US and Saudi Arabia arms significantly enhanced Isis' military capabilities, report reveals", *The Independent* (15 Dec. 2017) (**QCM (A) Vol. IV, Annex 94**).

[137] N. Elbagir, S. Abdelaziz, M.A. El Gheit & L. Smith-Spark, "Sold to an ally, lost to an enemy", *CNN* (Feb. 2019) (**QCM (A) Vol. IV, Annex 106**).

[138] "Yemen: UAE recklessly supplying militias with windfall of Western arms", *Amnesty International* (6 Feb. 2019) ("the UAE has become a major conduit for armoured vehicles, mortar

2.50 Joint Appellants next refer to a 2017 judgment of Egypt's Court of Cassation, which allegedly "confirms that between 2011 and 2013, former President Morsi and other leadership figures in the then Muslim Brotherhood Government were paid by Qatari intelligence agents to disclose military and other secret information vital to Egypt's national security".[139] There are, however, serious questions about the quality of evidence offered in the case, and the politicisation of all aspects of the proceedings due to the strained relations between Egypt and Qatar[140]—indeed, the judgment in question was rendered after the imposition of the aviation prohibitions and other measures of 5 June 2017. Not only that, but a few months before the judgment, the legal framework for the selection of the heads of judicial bodies in Egypt was amended to give the President "discretionary power for selecting, without review, the chief justices of the judiciary, revoking the neutral criterion of seniority…". President el-Sisi exercised that power for the first time just prior to the issuance of the judgment in question.[141]

2.51 Lastly, Joint Appellants accuse Qatar of "offer[ing] lucrative financial incentives to selected Bahraini nationals … who held or had held sensitive and high-level offices", to "naturalize as Qatari citizens and emigrate to Qatar".[142] Joint Appellants' own evidence reflects the fact that Qatar has denied and continues to

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systems, rifles, pistols, and machine guns – which are being illicitly diverted to unaccountable militias accused of war crimes and other serious violations.") (**QCM (A) Vol. IV, Annex 133**).

[139] BESUM, para. 2.45; Morsi and others v. Public Prosecution, Case No. 32611, Judgment of the Court of Cassation of the Arab Republic of Egypt (Criminal Chamber), 16 September 2017 (**BESUM Vol. VII**, **Annex 137**).

[140] "Qatar Espionage case", *The Tahrir Institute for Middle East Policy* (last accessed: 14 Feb. 2019) (**QCM (A) Vol. IV, Annex 121**).

[141] "The Battle over Appointing Judges in Egypt", *Carnegie Endowment for International Peace* (16 Jan. 2018) (**QCM (A) Vol. IV, Annex 119**).

[142] BESUM, para. 2.46.

deny this charge.[143] Unsurprisingly, Joint Appellants offer no further evidence supporting it.

2.52 In sum, all of Joint Appellants' accusations about Qatar's supposedly "systematic interference" in their internal affairs dissolve on analysis. In fact, it is Joint Appellants who, through the imposition of the aviation prohibitions and other coercive measures, have purposefully and systematically sought to intervene in Qatar's internal affairs in breach of the Riyadh Agreements and international law.[144] Instead of raising their grievances (whatever they may really be) within the framework of the regional mechanisms for dialogue and dispute settlement,[145] Joint

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[143] Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014 (**BESUM Vol. V**, **Annex 64**); *see also* ICAO Response to Preliminary Objections (A), Exhibit 80, *Deputy PM and FM: Investigations Proved Involvement of 2 Siege Countries in QNA Hacking* (10 Jan. 2018) (indicating that Bahrain's concerns regarding naturalization were resolved in 2014) (**BESUM Vol. IV, Annex 25**).

[144] *See* ICAO Response to Preliminary Objections (A), Exhibit 43, *Qatar's Siege A Clear Violation of Riyadh Agreement, Director of Government Communication Office Says* (10 July 2017) (**BESUM Vol. IV, Annex 25**). Joint Appellants go as far as to allege that Qatar has repudiated the Riyadh Agreements by way of a letter to the Secretary General of the GCC dated 19 February 2017. However, Qatar's letter is mistranslated to state that the parties "have *made* no effort to implement the Riyadh Agreement and the mechanism of its implementation". Letter of 19 February 2017 from the Minister of Foreign Affairs of the State of Qatar to the Secretary-General of the GCC (**BESUM Vol. V, Annex 72**) (emphasis added). In fact, the proper translation of this sentence is that the parties "have *spared* absolutely no effort in the implementation of the Riyadh Agreement and the mechanism of its execution". *Letter* from Mohamed Bin Abdul Rahman Bin Jassim Al Thani**,** Minister of Foreign Affairs of the State of Qatar, to Abdul Latif Bin Rashid Al-Zayani, Secretary-General of the GCC (19 Feb. 2017) (**QCM (A) Vol. III, Annex 40**) (emphasis added). In view of this fact, Qatar's letter called the other parties to the Agreements to "*agree* to terminate" the Riyadh Agreements. *Id*. (emphasis added). In no way does this letter amount to a repudiation of the Agreements, which Qatar continues to consider binding.

[145] The First Riyadh Agreement affirms its basis in the "main system" of the GCC, including its emphasis on dialogue and its dispute resolution provision contained in Article 10 of the GCC Charter. Article 10, titled "Commission for the Settlement of Disputes", provides:

> "The Cooperation Council shall have a commission called 'Commission for the Settlement of Disputes' and shall be attached to the Supreme Council. The Supreme Council shall form Commission for every case separately based on the nature of the dispute. If a dispute arises over interpretation or implementation of the Charter and such dispute is not resolved

Appellants chose to impose the aviation prohibitions and other coercive measures, which they have said will not be withdrawn until such time as Qatar capitulates to their demands. As His Excellency the Foreign Minister of Qatar, Sheikh Mohammed bin Abdulrahman Al-Thani, put it: "[T]he blockading countries were demanding that we must surrender our sovereignty as the price for ending the siege—something they knew Qatar would never do".[146]

C. JOINT APPELLANTS' ALLEGATIONS OF QATAR'S USE OF MEDIA TO INCITE VIOLENCE AND HATRED ARE FALSE

2.53 Joint Appellants allege further that Qatar supported the rise of "groups like Al-Qaida, Hamas, and the Muslim Brotherhood", and that the "state-owned and-controlled media network *Al Jazeera* [has] served as a platform for [the Muslim Brotherhood] to propound its calls for extremism and violence … against the Egyptian Government", in breach of the Riyadh Agreements.[147]

2.54 These allegations are disproved in the first instance by the international esteem in which Al Jazeera is held. Al Jazeera is widely recognised for its independent, objective and fact-based reporting that includes detailed analysis and

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> within the Ministerial Council or the Supreme Council, the Supreme Council may refer such dispute to the Commission for Settlement of Disputes. The Commission shall submit its recommendations or opinion, as applicable, to the Supreme Council for appropriate action".

Charter of the Co-operation Council for the Arab States of the Gulf, concluded at Abu Dhabi on 25 May 1981, 1288 *UNTS* 151, Article 10 (**BESUM Vol. II, Annex 8**). *See also* ICAO Response to Preliminary Objections (A), Exhibit 80, *Deputy PM and FM: Investigations Proved Involvement of 2 Siege Countries in QNA Hacking* (10 Jan. 2018) (noting the dispute settlement provisions of GCC Charter and Riyadh Agreements) (**BESUM Vol. IV, Annex 25**).

[146] ICAO Response to Preliminary Objections (A), Exhibit 40, *Foreign Minister: Any Threat to Region is Threat to Qatar* (6 July 2017) (**BESUM Vol. IV, Annex 25**).

[147] BESUM, para. 2.14.

diverse perspectives.[148] The high regard for Al Jazeera is reflected by the international reaction to Joint Appellants' demand that it be shut down. The UN Special Rapporteur on freedom of expression, Mr. David Kaye, said that the closure of Al Jazeera would "strike a major blow against media pluralism in a region already suffering from severe restrictions on reporting and media of all kinds".[149] Reporters without Borders condemned Joint Appellants' efforts to stifle media freedom and freedom of expression, calling the demand to shutdown Al Jazeera "an unacceptable act of blackmail".[150]

2.55 Qatar has a long-standing policy of supporting freedom of expression—for which it has paid, and continues to pay, a dear price. Qatar has no role in determining who appears (or does not appear) on Al Jazeera. The network has complete journalistic, editorial independence. Further, neither Mr. Al-Qaradawi, whose appearances on Al Jazeera are singled out for criticism by Joint Appellants,[151] nor the institution of which he is chairman are designated as terrorists by the United Nations Security Council—or Qatar, for that matter.[152] Nor is the Muslim Brotherhood a UN-designated terrorist organisation, or listed as such in the GCC terrorist organisations list.[153] In fact, because there are Muslim

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[148] Aram Bakshian Jr., "The Unlikely Rise of Al Jazeera", *The Atlantic* (10 Jan. 2012) (**QCM (A) Vol. IV, Annex 63**). Unsurprisingly, Joint Appellants' statement that "[t]hey are not alone in exposing that, while purporting to be a 'news outlet', *Al Jazeera* serves as an instrument to destabilize the region" is not accompanied by a single source. *See* BESUM, para. 2.43.

[149] ICAO Response to Preliminary Objections (A), Exhibit 34, BBC, *Qatar condemns Saudi refusal to negotiate over demands* (28 June 2017) (**BESUM Vol. IV, Annex 25**).

[150] "Unacceptable call for Al Jazeera's closure in Gulf crisis", *Reporters Without Borders* (28 June 2017) (**QCM (A) Vol. IV, Annex 122**).

[151] BESUM, paras. 2.19, 2.34.

[152] As explained above, Joint Appellants designated Mr. Al-Qaradawi as a terrorist only *after* the unilateral coercive measures of 5 June 2017.

[153] *Letter* from Abdul Latif Bin Rashid Al-Zayani, GCC Secretary General, to Khalid Bin Mohamed Al Ativa, Minister of Foreign Affairs of the State of Qatar (19 May 2014) (**QCM (A) Vol. III,**

Brotherhood-affiliated political parties and societies in countries across the Middle East and North Africa, including members of parliament and government officials,[154] it is natural for such individuals to appear from time-to-time on news channels like Al Jazeera. Indeed, for many years Appellant Bahrain has had members of a Muslim Brotherhood-affiliated political party serve in its Parliament, and Bahrain's Foreign Minister has recognised that the party respects the rule of law.[155]

2.56 Ultimately, Qatar and Joint Appellants appear to have a fundamental difference of views as to media independence and what constitutes media incitement.[156] That a news organisation's coverage of an issue may be inconsistent

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Annex 38). Nor is Hamas listed on the GCC terrorist organizations list or designated as a terrorist organization by the UN or Qatar.

[154] Political organizations affiliated with the Muslim Brotherhood actively participate in electoral politics and serve in government in countries throughout the Middle East and North Africa region, including Morocco, Tunisia, Jordan, Kuwait, Yemen, Libya, Iraq, Algeria, and Bahrain. *See* C. Alexander & S. Dodge, "Muslim Brotherhood Is at the Heart of Gulf Standoff With Qatar", *Bloomberg* (7 June 2017) (listing several countries in which the Muslim Brotherhood participates in government and politics) (**QCM (A) Vol. IV, Annex 75**); Marc Lynch, "In Uncharted Waters: Islamist Parties Beyond Egypt's Muslim Brotherhood", *Carnegie Endowment for International Peace* (16 Dec. 2016) (describing the various levels of political participation of Muslim Brotherhood-affiliated groups in several countries) (**QCM (A) Vol. IV, Annex 115**).

[155] Kylie Moore-Gilbert, "A Band of (Muslim) Brothers? Exploring Bahrain's Role in the Qatar Crisis", *Middle East Institute* (3 Aug. 2017) ("[T]he Brotherhood's Bahrain affiliate operates as a legal political society and has won seats in Bahrain's parliament on a number of occasions".) (**QCM (A) Vol. IV, Annex 117**); Ibrahim Hatlani, "Bahrain Between its Backers and the Brotherhood", *Carnegie Endowment for International Peace* (20 May 2014) ("Bahrain's foreign minister Khaled bin Ahmed Al Khalifa commented at a press conference in Pakistan that his government was not labelling the political arm of the local Brotherhood branch, known as the Islamic Minbar, a terrorist organization. He stated that the group has respected the rule of law and has not acted against the security of the country".) (**QCM (A) Vol. IV, Annex 111**).

[156] This is also evident in the statistics compiled by the Committee to Protect Journalists in 2018: 25 journalists were imprisoned in Egypt; 16 journalists were imprisoned in Saudi Arabia and; 6 journalists were imprisoned in Bahrain. By contrast, zero journalists were imprisoned in Qatar. Committee to Protect Journalists, *Data & Research* (2018) (**QCM (A) Vol. IV, Annex 124**). At the same time, the UN Special Rapporteur on extrajudicial, summary or arbitrary killings, Ms. Agnès Callamard, has launched an international inquiry into the murder of journalist Jamal Khashoggi, seeking to "review and evaluate, from a human rights perspective, the circumstances surrounding

with a particular State's preferred narrative does not mean that the news organisation is promoting extremism. To the contrary, it is doing its job.

2.57 It should also be recalled that the aviation prohibitions and other measures adopted on 5 June 2017 were preceded by an anti-Qatar media campaign—in clear violation of the Riyadh Agreements' prohibition on media incitement—that began with the illegal hacking of the Qatar News Agency ("QNA") website on 24 May 2017. The hackers attributed fabricated statements to His Highness the Amir of Qatar Sheikh Tamim bin Hamad Al-Thani,[157] with third-party reports attributing the cyber-attack to the UAE.[158] Qatar's investigation of the incident, which was assisted by international experts from third-party States, confirmed the hacking and found compelling evidence of the involvement of some of the Joint Appellants.[159]

2.58 Qatar also appealed to the Secretary General of the GCC, expressing concern over the propagation of false information by media under the jurisdiction

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the killing" at the Saudi Consulate in Istanbul, Turkey in October 2018. Office of the High Commissioner for Human Rights, *Independent human rights expert to visit Turkey to launch international inquiry into Khashoggi case* (25 Jan. 2019) (**QCM (A) Vol. IV, Annex 129**). Saudi Arabia's trial of some of the suspects involved in the murder has been deemed "insufficient" by the UN Office of the High Commissioner for Human Rights. "Khashoggi trial in Saudi Arabia falls short of independent, international probe needed: UN rights chief", *UN News* (4 Jan. 2019) (**QCM (A) Vol. IV, Annex 128**).

[157] *See* Peter Salisbury, "The fake-news hack that nearly started a war this summer was designed for one man: Donald Trump", *Quartz* (20 Oct. 2017) (**QCM (A) Vol. IV, Annex 92**).

[158] K. DeYoung & E. Nakashima, "UAE orchestrated hacking of Qatari government sites, sparking regional upheaval, according to U.S. intelligence officials", *Washington Post* (16 July 2017) (**QCM (A) Vol. IV, Annex 84**). *See also* C. Bing and J. Schectman, "Inside the UAE's secret hacking team of American mercenaries", *Reuters* (30 Jan. 2019) (**QCM (A) Vol. IV, Annex 105**) (noting that the UAE hacking operations also targeted Qatar and Qatar's leadership). *See also* ICAO Response to Preliminary Objections (A), Exhibit 80, *Deputy PM and FM: Investigations Proved Involvement of 2 Siege Countries in QNA Hacking* (10 Jan. 2018), p. [PDF] 1346 (noting cooperation of FBI and British National Crime Agency in hacking investigation) (**BESUM Vol. IV, Annex 25**).

[159] *Letter* from Muhammad Bin Abdul Rahman Al Thani, Minister of Foreign Affairs of the State of Qatar, to Abdulatif Bin Rashid Al Zayani, GCC Secretary General (7 Aug. 2017) (**QCM (A) Vol. III, Annex 39**)

and control of Appellants Saudi Arabia and the UAE.[160] However, this did not prevent Joint Appellants from using the QNA hacking as the immediate pretext for their later actions. Nor did it stem the flow of misinformation.[161] During its technical mission to Qatar in November 2017, the Office of the High Commissioner for Human Rights found a "widespread defamation and hatred campaign against Qatar and Qataris in various media linked to the four countries as well as on social media" that "may amount to a form of incitement".[162]

2.59 State-controlled media channels and outlets in Joint Appellants also exacerbated the fear and confusion generated by the aviation prohibitions themselves. On 9 August 2017, the Saudi-controlled news network Al Arabiya published a video simulation of a military jet shooting down a Qatar Airways civilian airplane with an air-to-air missile, with an accompanying voice-over stating that international law permits States to shoot down any aircraft that violated a State's national airspace.[163]

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[160] *Ibid.*

[161] *See* ICAO Response to Preliminary Objections (A), Exhibit 43, *Qatar Siege a Clear Violation of Riyadh Agreement, Director of Government Communications Office Says* (10 July 2017) (**BESUM Vol. IV, Annex 25**); ICAO Response to Preliminary Objections (A), Exhibit 80, *Deputy PM and FM: Investigations Proved Involvement of 2 Siege Countries in QNA Hacking* (10 Jan. 2018) (**BESUM Vol. IV, Annex 25**).

[162] ICAO Response to Preliminary Objections (A), Exhibit 77, OHCHR Technical Mission to the State of Qatar, 17-24 November 2017, Report on the Impact of the Gulf Crisis on Human Rights (December 2017), paras. 14, 20 (**BESUM Vol. IV, Annex 25**).

[163] "Emergency corridors opened before Qatar Airways", *Al Arabiya* (9 Aug. 2017) (**QCM (A) Vol. IV, Annex 88**). *See also* Kevin Jon Heller, "Saudi Arabia Threatens to Shoot Down a Qatari Airways Plane", *OpinioJuris* (18 Aug. 2017) (**QCM (A) Vol. IV, Annex 123**) (arguing that through this video "Saudi Arabia is threatening to engage in state terrorism – the use of violence to spread panic among Qatari civilians in order to persuade the Qatari government to supposedly stop supporting terrorist groups".).

2.60 Such incitement to hatred and propaganda through the media represents a clear violation of the Riyadh Agreements' restrictions on media incitement.[164] Joint Appellants' accusations are not only meritless, they are also more appropriately lodged against Joint Appellants themselves.

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2.61 As recounted above, starting on 5 June 2017, Joint Appellants imposed the aviation prohibitions in violation of their obligations under the Chicago Convention and its Annexes. In an effort to justify their unlawful actions, they assert against Qatar baseless accusations for which they are the actual guilty parties. In addition to having soundly refuted Joint Appellants' allegations, the following Chapters confirm the ICAO Council's jurisdiction to hear the dispute between the Parties regarding their violations of the Chicago Convention.

[164] *See* ICAO Response to Preliminary Objections (A), Exhibit 80, *Deputy PM and FM: Investigations Proved Involvement of 2 Siege Countries in QNA Hacking* (10 Jan. 2018) (noting media incitement by Joint Appellants in violation of Riyadh Agreements) (**BESUM Vol. IV, Annex 25**).

CHAPTER 3

THE COURT SHOULD DENY JOINT APPELLANTS' SECOND GROUND OF APPEAL

3.1 Joint Appellants' First Preliminary Objection to the jurisdiction of the ICAO Council and their Second Ground of Appeal to the Court posits that

> "the ICAO Council was without jurisdiction, or in the alternative … the claims made by Qatar were inadmissible, on the grounds that ... *[t]he present dispute would require the Council to determine issues that fall outside its jurisdiction*: to rule on the lawfulness of the countermeasures adopted by the Applicants, including certain airspace restrictions, the Council would be required to rule on Qatar's compliance with critical obligations under international law entirely unrelated to, and outwith, the Chicago Convention ...".[165]

3.2 Joint Appellants frame this objection "in two alternative ways":

(1) As an objection to the jurisdiction of the ICAO Council "insofar as, when properly characterised, the real issue in dispute between the Parties cannot be confined to matters relating to the interpretation or application of the Chicago Convention, but concerns the wider dispute between the Parties"; and

(2) "[I]n the alternative", "as going to the admissibility of Qatar's claims … insofar as final adjudication by the ICAO Council of Qatar's claims would necessarily involve the Council adjudicating upon matters that fall outside

[165] ICJ Application (A), para. 19(i) (emphasis added).

the narrow scope of its jurisdiction under the Chicago Convention, as to which the Appellants have not consented to it deciding".[166]

3.3 This Chapter demonstrates why both arguments fail as a matter of law and thus why the ICAO Council properly rejected Joint Appellants' First Preliminary Objection.

3.4 Before turning to that demonstration, however, it is important to underscore the dangers to the international legal order that lurk in Joint Appellants' arguments. The crux of those arguments is that a body empowered to adjudicate a dispute concerning the "interpretation or application" of a specific treaty is deprived of that power whenever the respondent State asserts a defence based on lawful "non-reciprocal" countermeasures. The perils of this position, were the Court to accept it, are self-evident. Respondent States would be able to avoid compulsory dispute settlement brought pursuant to a treaty compromissory clause whenever they so choose merely by asserting a "lawful" countermeasures defence—a defence that, like all other forms of self-help, is already vulnerable to abuse.[167] The law of countermeasures would thus become a trump card that would undermine the entire system of international dispute settlement. In Qatar's view, *that* is the real significance of the jurisdictional and admissibility questions raised in Joint Appellants' Second Ground of Appeal.

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[166] BESUM, para. 5.2.

[167] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), *in Report of the International Law Commission on the work of its fifty-third session*, UN Doc. A/56/10 (hereinafter "*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*"), p. 128, para. 2. That potential for abuse is even more acute in the present case, as explained in Chapter 2 of the present Counter-Memorial.

3.5 The remainder of this Chapter is structured as follows: **Section I** disposes of Joint Appellants' attempts to impose *a priori* restrictions on the ICAO Council's jurisdiction over disputes "relating to the interpretation or application" of the Chicago Convention and its Annexes. **Section II** demonstrates that the dispute Qatar submitted to the Council is indeed such a dispute and that Joint Appellants' countermeasures defence does not change this conclusion. Finally, **Section III** addresses Joint Appellants' alternative argument that, notwithstanding the above, Qatar's claim would be inadmissible for reasons of "judicial propriety".

I. The ICAO Council Is Empowered to Exercise its Dispute Settlement Functions "to their Full Extent"

3.6 Joint Appellants argue that in light of the "principle of speciality", the Council's jurisdiction under Article 84 of the Chicago Convention[168] "must be regarded as circumscribed and as limited to matters falling with its particular area of specialization", namely, "international civil aviation".[169]

3.7 However, the principle of speciality does not limit the Council's functions under Article 84, as Joint Appellants appear to suggest.[170] It does the opposite, in

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[168] Article 84 of the Chicago Convention reads:

> "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".

Chicago Convention, Art. 84 (**BESUM Vol. II, Annex 1**). In this Counter-Memorial, Qatar employs the words "disagreement" and "dispute" interchangeably, without conceding that the word "disagreement" in Article 84 is completely synonymous with the word "dispute" as used in many other compromissory clauses.

[169] BESUM, paras. 5.13, 5.23.

[170] *Ibid.*, paras. 5.11, 5.17.

fact. In a key paragraph of its Advisory Opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* that Joint Appellants studiously ignore, the Court stressed that the principle of speciality has a dual meaning. While an international organisation "is not a State, but an international institution with a special purpose" that "only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose",[171] it has power "to exercise these functions to their *full extent*, in so far as the Statute does not impose restrictions upon it".[172]

3.8 In the area of international civil aviation, the Council is therefore empowered to exercise the dispute settlement functions Article 84 gives it "to their full extent". This means, at very least, that the Council has jurisdiction to decide disputes "relating to the interpretation or application" of the Chicago Convention and its Annexes notwithstanding a disputing party's defences raising issues falling outside the Convention, or the fact that the dispute in question arises in the context of a broader dispute between the parties.

3.9 Neither Article 84 nor any other provision of the Chicago Convention imposes restrictions upon the Council's power to decide disputes. Joint Appellants appear to recognise this. They thus suggest that the restrictions they seek to impose on the Council's power can be inferred from the aims and objectives of ICAO as

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[171] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, para. 25 (citing *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, P.C.I.J., Series B, No. 14, p. 64).

[172] *Ibid.* (emphasis added).

set out in Article 44 of the Chicago Convention and "the logic of the overall system contemplated by the [UN] Charter".[173] They are mistaken.

3.10 ICAO's aims and objectives include "insur[ing] that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines"; "avoid[ing] discrimination between contracting States"; and "promot[ing] safety of flight in international air navigation".[174] The Council's exercise of jurisdiction over the dispute created by Joint Appellants' sudden imposition of the aviation prohibitions serves these aims and objectives; it does not undermine them.

3.11 In this respect, it bears recalling that ICAO is a specialised agency of the United Nations within the meaning of Article 57 of the UN Charter. The principles that guide it, as well as the activities it undertakes pursuant to those principles, must therefore be considered to give effect to the Purposes of the United Nations, defined in Article 1 of the Charter. Those include "bring[ing] about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes"; "develop[ing] friendly relations among nations … and … tak[ing] other appropriate measures to strengthen universal peace"; and "achiev[ing] international co-operation in solving international problems of an economic, social, cultural, or humanitarian character".[175]

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[173] BESUM, paras. 5.16 (citing *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, I.C.J. Reports 1996, para. 26) , 5.19.

[174] Chicago Convention, Art. 44(f)-(h) (**BESUM Vol. II, Annex 1**).

[175] Charter of the United Nations, 1 U.N.T.S. 16 (26 June 1945) (entry into force: 24 Oct. 1945), Art. 1.

3.12 The Preamble of the Chicago Convention itself explicitly links ICAO to these purposes. It indicates that the "development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security", and that "it is desirable to avoid friction and to promote … cooperation between nations and peoples upon which the peace of the world depends".[176] Again, the Council's exercise of jurisdiction over this dispute can only serve these objectives, not undermine them.

3.13 Nor do any restrictions on the Council's dispute settlement functions follow from "pragmatic considerations relating to the composition of the ICAO Council and the experience and expertise of the representatives of its Members", as Joint Appellants wrongly claim.[177] Their assertion that the Council is "ill-equipped to resolve complex legal disputes between States in areas falling outside the narrow and specialist compass of the rules of international law relating to international civil aviation"[178] is contradicted by the Council's dispute resolution practice.[179]

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[176] Chicago Convention, Preamble (**BESUM Vol. II, Annex 1**). In the course of its history, ICAO has notably acted within the limits of its competences and purposes when it condemned the policies of apartheid and racial discrimination in South Africa. *See* ICAO Assembly, *Resolution A15-7: Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa*, ICAO Doc. 8528 (22 June-16 July 1965) (**QCM (A) Vol. II, Annex 1**). ICAO further decided to stop inviting South Africa to attend ICAO meetings because it acted in flagrant contradiction with the Preamble of the Chicago Convention by maintaining its apartheid policies. *See* ICAO Assembly, *Resolution A18-4: Measures to be taken in pursuance of Resolutions 2555 and 2704 of the United Nations General Assembly in relation to South Africa*, ICAO Doc. 8958 (15 June-7 July 1971) (**QCM (A) Vol. II, Annex 2**). In light of ICAO's objectives, and the Council's previous practice, Joint Appellants' suggestion that its field of operation is merely "technical" is plainly false. BESUM, para. 5.23.

[177] BESUM, para. 5.25.

[178] *Ibid.*

[179] For example, in *Pakistan v. India*, the parties presented arguments concerning the termination and suspension of treaties under general international law. *See, e.g.*, ICAO Council, 74th Session, *Minutes of the Second Meeting*, ICAO Doc. 8956-C/1001 (27 July 1971) (**QCM (A) Vol. II, Annex 4**); ICAO Council, 74th Session, *Minutes of the Third Meeting*, ICAO Doc. 8956-C/1001 (27 July

Moreover, ICAO Member States are free to include in their delegations to the Council experts with a wide variety of skills and knowledge, or even private lawyers.[180] And the Council itself can take expert advice on any difficult legal question, be it of domestic or international law, should it consider it necessary.[181]

3.14 The Court's jurisprudence under Article 84 of the Chicago Convention eliminates any remaining doubts about the Council's power to exercise its dispute settlement functions to their full extent. In the 1972 *ICAO Council Appeal* case, the Court made clear that the Council's jurisdiction under Article 84 is complemented by the appeal mechanism established in the same article, which ensures that the Council performs its functions within the scope of its jurisdiction. In the words of the Court:

> "In … providing for judicial recourse by way of appeal to the Court against decisions of the Council concerning interpretation and application … the Chicago Treaties gave member States, and through

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1971) (**QCM (A) Vol. II, Annex 5**); ICAO Council, 74th Session, *Minutes of the Fourth Meeting*, ICAO Doc. 8956-C/1001 (28 July 1971) (**QCM (A) Vol. II, Annex 6**); ICAO Council – 74th Session, Minutes of the Fifth Meeting, ICAO document 8987-C/1004, 28 July 1971 (**BESUM Vol. V, Annex 27**). In *United States v. 15 European States*, the parties presented arguments concerning the adequacy of negotiations and the exhaustion of local remedies, and the Council rendered a decision on these issues of public international law. *See, e.g.*, ICAO Council, 161st Session, *Summary Minutes of the Fourth Meeting*, ICAO Doc. C-MIN 161/4 (15 Nov. 2000) (**QCM (A) Vol. II, Annex 13**); ICAO Preliminary Objections (A), Exhibit 1, Summary Minutes of the Council, Sixth Meeting 161st Session, ICAO document C-MIN 161/6, 16 November 2000 (**BESUM Vol. III, Annex 24**). In *Brazil v. United States*, the parties presented arguments concerning the temporal limitations in making claims under general international law, and the Council once again rendered a decision on this issue. *See, e.g.*, ICAO Preliminary Objections (A), Exhibit 2, ICAO Council – 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO document C-MIN 211/9, 5 July 2017 (**BESUM Vol. III, Annex 24**); ICAO Council, 211th Session, *Ninth Meeting: Summary of Decisions*, ICAO Doc. C-DEC 211/9 (21 June 2017) (**QCM (A) Vol. III, Annex 23**).

[180] Indeed, Appellant Bahrain did so at the hearing before the ICAO Council. *See* 214th Session, *Summary Minutes of Eighth Meeting* (26 June 2018), ICAO Doc. C-MIN 214/8, para. 121 (**BESUM Vol. V, Annex 53**).

[181] ICAO Council, *Rules for the Settlement of Differences*, ICAO Doc. 7200 (9 April 1957) (hereinafter "ICAO Rules"), Art. 8 (**BESUM Vol. II, Annex 6**).

> them the Council, the possibility of ensuring a certain measure of supervision by the Court over those decisions. To this extent, these 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 provisions of the treaties governing its action*".[182]

3.15 Accordingly, neither the principle of speciality, nor the aims and objectives of ICAO, or any "pragmatic considerations" limit the Council's jurisdiction over disputes "relating to the interpretation or application" of the Chicago Convention and its Annexes. To the contrary, the Council is empowered to exercise its jurisdiction "to its full extent". That is exactly what it did in its Decision of 29 June 2018 on Qatar's Application A.

II. The Dispute Qatar Submitted to the ICAO Council "Relates to the Interpretation or Application" of the Chicago Convention and its Annexes

3.16 Joint Appellants observe that Article 84 of the Chicago Convention "circumscribe[s] *ratione materiae* [the Council's jurisdiction] to matters relating to the 'interpretation or application' of the Chicago Convention or its Annexes".[183] Qatar agrees; the meaning of the terms of Article 84 is clear. Joint Appellants argue, however, that the dispute Qatar brought before the Council only raises issues of the

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[182] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, para. 26 (emphasis added); *see also ibid.*, Separate Opinion of Judge de Castro, para. 7; *ibid.*, Separate Opinion of Judge Dillard, p. 105; *ibid.*, Declaration of Judge Lachs, p. 75 ("… the Council, in view of its limited experience on matters of procedure, and being composed of experts in other fields than law, is no doubt in need of guidance, and it is surely this Court which may give it. Such guidance would be of great importance for the further conduct of this case and future cases, and in the interest of the confidence of States entrusting it with the resolution of disagreements arising in the field of civil aviation".).

[183] BESUM, para. 5.11.

interpretation or application of the Chicago Convention and its Annexes "on its face", and that it "concerns only one element of the real dispute between the Parties".[184] As they see it, "[t]he real subject-matter of the dispute … concerns Qatar's failure to abide by … fundamental obligations of a completely different character" that fall outside the Council's jurisdiction.[185] Joint Appellants also argue that "[a]ny final adjudication on [Qatar's] claims … would *necessarily and inevitably* require the ICAO Council to consider and rule upon matters which undoubtedly fall outside its limited jurisdiction *ratione materiae*".[186] This is because, they say, "the airspace restrictions were adopted … as lawful countermeasures".[187]

3.17 Joint Appellants' argument on these issues is repetitive in the extreme. They devote a full chapter of their Memorial,[188] as well as sections in two other chapters, to the alleged "real issue" in dispute.[189] The terms "real issue" and "real dispute" appear no fewer than 67 times in the Memorial, as if repeating the same erroneous arguments might somehow give them merit. It does not.

3.18 Qatar's response will be more concise. Joint Appellants' countermeasures defence does not deprive the Council of its jurisdiction over the dispute Qatar submitted to it because (1) it is irrelevant to the Court's assessment of the "real issue" in dispute (**Section II.A**); and (2) even if it were somehow relevant (*quod*

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[184] *Ibid.*, para. 5.27.

[185] *Ibid.*, paras. 5.28-5.29.

[186] *Ibid.*, para. 5.30 (some emphasis added).

[187] *Ibid.*

[188] *Ibid.*, Chapter II.

[189] *Ibid.*, Chapter I, Section 3; Chapter V, Sections 3 and 4.

non), it would not convert this dispute into one over which the Council has no jurisdiction (**Section II.B**).

A. JOINT APPELLANTS' COUNTERMEASURES DEFENCE HAS NO BEARING ON THE ASSESSMENT OF THE "REAL ISSUE" IN DISPUTE

3.19 In the Introduction to their Memorial, Joint Appellants assert that "[t]he issues of jurisdiction and admissibility raised by the … second ground of appeal are *novel and a matter of first impression*, whether in the jurisprudence of the Court or of other international tribunals".[190] This claim is refuted by the Court's jurisprudence. In the prior case involving an appeal from a decision of the ICAO Council, the Court overwhelmingly rejected a substantially similar argument from the appellant party.

3.20 Specifically, in the 1972 *ICAO Council Appeal* case, India argued that the dispute Pakistan raised before the Council did not relate to the interpretation or application of the Chicago Convention because, in its view, it required the Council to determine international law matters outside of the Chicago Convention (namely, whether the Chicago Convention was validly suspended and/or terminated as between India and Pakistan). Similar to what Joint Appellants argue here, India argued that the Council had neither jurisdiction nor the necessary expertise to rule upon such matters.[191]

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[190] *Ibid.*, para. 1.31 (emphasis added).

[191] *See* ICAO Council, 74th Session, *Minutes of the Second Meeting*, ICAO Doc. 8956-C/1001 (27 July 1971), p. 23 (**QCM (A) Vol. II, Annex 4**); *I.C.J Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Memorial submitted by the Government of India (22 Dec. 1971), paras. 68-85; Reply submitted by the Government of India (17 April 1972), paras. 44, 63-74; Oral Arguments, pp. 504-523 (Mr. Palkhivala).

3.21 The dangers of this argument were immediately obvious to the Court. If a defence on the merits could affect the competence of the Council, the "parties would be in a position themselves to control that competence, which would be inadmissible".[192] In the Court's view, the jurisdiction of the ICAO Council "must depend on the character of the dispute submitted to it and on the issues thus raised—not on those defences on the merits, or other considerations, which would become relevant *only after the jurisdictional issues had been settled*".[193] It made no difference if such considerations "are claimed to lie outside the Treaties". The Council cannot be deprived of its jurisdiction "if, irrespective of this, issues concerning the interpretation or application of these instruments are nevertheless in question".[194]

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

[193] *Ibid.* (emphasis added). *See also ibid.*, para. 31 ("[A] mere *unilateral* affirmation of … contentions—contested by the other party—cannot be utilized so as to negative the Council's jurisdiction. The point is not that these contentions are necessarily wrong but that their validity has not yet been determined. Since therefore the Parties are in disagreement as to whether the Treaties ever were (validly) suspended or replaced by something else; as to whether they are in force between the Parties or not: and as to whether India's action in relation to Pakistan overflights was such as not to involve the Treaties, but to be justifiable *aliter et aliunde*:—these very questions are in issue before the Council, and no conclusions as to jurisdiction can be drawn from them, at least at this stage, so as to exclude *ipso facto* and *a priori* the competence of the Council".) (emphasis added).

[194] *Ibid.* Joint Appellants argue that the Court's Judgment "foreshadowed the application of the real issue test as it has been developed in subsequent cases, but did not need to apply it in that case". BESUM, para. 5.89. However, the text of the Judgment leaves no room for ambiguity. Later in the Judgment, the Court expressly stated that "the legal issue that has to be determined by the Court really amounts to this, namely whether the dispute, in the form in which the Parties placed it before the Council, and have presented it to the Court in their final submissions … is one that can be resolved without any interpretation or application of the relevant Treaties at all. *If it cannot, then the Council must be competent*". *Ibid.*, para. 28 (emphasis added).

3.22 As did the Council when the same argument was before it, the Court overwhelmingly rejected India's appeal.[195] It affirmed the ICAO Council's jurisdiction by a vote of 14 to two. Even the two dissenting Judges did not take the view that the ICAO Council lacked jurisdiction to address the merits of Pakistan's application.[196]

3.23 It is just the same here. Joint Appellants are effectively trying—to borrow the Court's language—to "control [the] competence" of the Council by casting a "defence on the merits … in a particular form" (i.e., countermeasures). As long as "issues concerning the interpretation or application of [the Chicago Convention and its Annexes] are nevertheless in question"—and *Joint Appellants admit they are*[197]—their unilateral assertions "cannot be utilized so as to negative the Council's jurisdiction".[198]

3.24 Joint Appellants wisely choose not to argue that the Court decided the 1972 *ICAO Council Appeal* case wrongly. Instead, they try to limit the reach of the Court's holding to defences "aris[ing] *within* the bounds of the Chicago Convention", whereas their "good faith invocation of countermeasures took the

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[195] The ICAO Council rejected India's objection by a vote of 20 to zero, with four abstentions. *See* ICAO Council, *Action of the Council: Seventy-fourth Session*, ICAO Doc. 8987-C/1004 (8 July 1971, 27-29 July 1971, 28 September – 17 December 1971), p. 43 (**QCM (A) Vol. II, Annex 3**).

[196] *See Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, Dissenting opinion of Judge Morozov, I.C.J. Reports 1972, pp. 157-163; *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, Dissenting opinion of Judge Nagendra Singh, I.C.J. Reports 1972, para. 19 (stating that he was "not express[ing] any views on the merits of the issue of jurisdiction").

[197] BESUM, paras. 5.27 (stating that claim submitted to the ICAO Council by Qatar "on its face rais[es] issues of the interpretation and application of the Chicago Convention"), 5.30 ("Qatar's claims in the ICAO Application are ... carefully framed so as only to allege breaches by the Appellants of their obligations under the Chicago Convention".).

[198] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, paras. 27, 31.

dispute *outside* of the scope of the Convention".[199] But the Court's 1972 Judgment forecloses this manoeuvre. Just like Joint Appellants' invocation of countermeasures, India's defence was "claimed to lie outside the [t]reaties".[200] The Court described India's argument as follows:

> "[India's] contention is to the effect that since India … *was not invoking any right that might be afforded by the Treaties*, but was acting outside them on the basis *of a general principle of international law*, 'therefore' the Council, whose jurisdiction was derived from the Treaties, and which was entitled to deal only with matters arising under them, must be incompetent".[201]

3.25 Moreover, the Court did not distinguish between defences arising within and outside the Chicago Convention when it held that the jurisdiction of the ICAO Council "must depend on the character of the dispute submitted to it … not on those defences on the merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled".[202]

3.26 More fundamentally, there is no reason why a defence "aris[ing] *within* the bounds of the Chicago Convention" should be treated differently than a defence that raises issues "claimed to lie outside the treaties". If either type of defence were allowed to affect the competence of the Council (or of any other international court

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[199] BESUM, paras. 5.90-5.91 (emphasis added). As shown in Chapter 2 of this Counter-Memorial, Joint Appellants' invocation of countermeasures is far from having been made in good faith.

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

[201] *Ibid.*, para. 31 (emphasis added).

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

or tribunal), a disputing party would still be in a position *itself* "to control that competence, which would be inadmissible".[203]

3.27 The implications of Joint Appellants' position cannot be overstated. Were the Court to adopt it, there would be nothing to stop a respondent State from invoking a "lawful countermeasures" defence in any proceeding before the ICAO Council to escape judicial scrutiny of its actions. Indeed, there would be nothing to stop a respondent State in any proceeding before *any* international court or tribunal with limited jurisdiction *ratione materiae* from doing the same.

3.28 For the reasons the Court already explained in the 1972 *ICAO Council Appeal* case, Joint Appellants' countermeasures defence has no bearing on the assessment of the "real issue" in dispute.

B. JOINT APPELLANTS' COUNTERMEASURES DEFENCE, EVEN IF IT WERE RELEVANT, DOES NOT CONVERT THIS DISPUTE INTO ONE OVER WHICH THE COUNCIL DOES NOT HAVE JURISDICTION

3.29 The Court need not look beyond its Judgment in the 1972 *ICAO Council Appeal* case to conclude that the Council properly dismissed Joint Appellants' First Preliminary Objection. But even if the Court were to depart from its previous jurisprudence and consider Joint Appellants' defence in its assessment of the "real issue" in dispute, its ultimate conclusion would be exactly the same.

3.30 Qatar agrees with Joint Appellants that the proper characterisation of a dispute "is a matter for objective assessment",[204] and that "it is the Court's duty to

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[203] *Ibid.*

[204] BESUM, para. 5.45.

isolate the real issue in the case".[205] Qatar also agrees that the formulation of the dispute as set out in an applicant's pleadings,[206] and the "object of the claim" and its relation to the interpretation or application of the treaty in question,[207] play an important role in this regard. But Qatar disagrees with the conclusion Joint Appellants purport to draw from these considerations. As shown below, both such considerations confirm the conclusion that the Council properly upheld its jurisdiction.

1. Qatar's pleadings before the ICAO Council indicate that the subject-matter of the dispute falls squarely within the scope of the Chicago Convention and its Annexes

3.31 Joint Appellants argue that "even on a characterisation based only on Qatar's pleadings, it is clear that the dispute before the ICAO Council concerns matters falling beyond the scope of the Chicago Convention".[208] This is demonstrably false for several reasons.

3.32 *First*, Qatar's Application and Memorial to the ICAO Council clearly state a dispute "relating to the interpretation or application" of the Chicago Convention

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[205] *Ibid.*, para. 5.49 (citing *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, para. 29; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, para. 30; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, para. 26).

[206] BESUM, paras. 5.48 (citing *Interhandel Case (Switzerland v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 21; *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment, I.C.J. Reports 1960, pp. 33-34; *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, paras. 22, 36). *See also Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, para. 26; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, para. 38.

[207] BESUM, paras. 5.53, 5.59-5.67.

[208] *Ibid.*, para. 5.77.

and its Annexes both in fact and in law. In its Application, Qatar stated that the dispute was occasioned by the fact that:

> "On 5 June 2017 the Governments of the Respondents announced, with immediate effect and without any previous negotiation or warning, that Qatar-registered aircraft are not permitted to fly to or from the airports within their territories and would be barred not only from their respective national air spaces, but also from their Flight Information Regions (FIRs) extending beyond their national airspace even over the high seas".[209]

3.33 The Application further stated that:

> "The actions of the Respondents continue to have serious impact on the safety, security, regularity and economy of civil aviation in the region. Qatar Airways, the national carrier of the Applicant, operates some 800 flights per day and carries thousands of passengers of many nationalities world-wide. The travel plans and bookings of thousands of travelers of many nationalities were upset, families forcibly separated and bookings/ticketing by Qatar Airways were not honored by the Respondents' airlines. Qatar Airways operations were barred from established international airways, including those over the high seas. Alternative routes/route segments were for weeks not created or implemented and are still insufficient, in spite of continuing efforts and proposals by Qatar. Rerouting the flights to limited corridors extends the flight times and fuel consumption and causes considerable economic losses".[210]

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[209] ICAO Application (A), p. 1 (**BESUM Vol. III, Annex 23**).

[210] *Ibid.*

3.34 Qatar's Memorial before the Council reiterated these facts and argued that "[t]he actions of the Respondents show contemptuous disregard for multiple provisions of the Chicago Convention and its Annexes".[211] The Memorial specified that the actions complained of "violated the leading spirit of the Chicago Convention" proclaimed in the Convention's Preamble, as well as Articles 2, 3*bis*, 4, 5, 6, 9, 12, 37 and 89 of the Convention.[212]

3.35 A dispute over whether measures adopted by a State party to a treaty violate the provisions of that treaty is by definition a dispute "relating to the interpretation or application" of its provisions.[213]

3.36 *Second*, neither Qatar's request that the Council determine, based on the *very same facts*, violations of "other rules of international law"[214] nor Qatar's brief reference in the Memorial to the context in which the aviation prohibitions were imposed[215] can be reasonably construed as reflecting Qatar's "recogni[tion]" that the factual dispute arose following the Joint Appellants' decision to impose countermeasures.[216] And even if they could, they would still be irrelevant to the

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[211] *Ibid.*, p. 5.

[212] ICAO Memorial (A), Section (g) (**BESUM Vol. III, Annex 23**).

[213] The Court has on numerous occasions exercised its jurisdiction under the compromissory clause of a treaty to declare that a State has violated a provision of that treaty. *See, e.g., Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, Judgment, I.C.J. Reports 2012, paras. 49-52; *Application of the Interim Accord of 13 September 1995 (FYROM v. Greece)*, Judgment, I.C.J. Reports 2011, para. 58; *Avena and Other Mexican Nationals (Mexico v. United States)*, Judgment, I.C.J. Reports 2004, paras. 27-28; *Oil Platforms (Iran v. United States)*, Judgment, I.C.J. Reports 2003, para. 31; *LaGrand (Germany v. United States)*, Jurisdiction, Admissibility, Merits, Judgment, I.C.J. Reports 2001, para. 42.

[214] ICAO Application (A), p. 1; ICAO Memorial (A), Section (e) (1)-(3) (**BESUM Vol. III, Annex 23**).

[215] ICAO Memorial (A), Section (g) (**BESUM Vol. III, Annex 23**).

[216] BESUM, para. 5.74.

assessment of the "real issue" in dispute. The Court has made clear that to identify the subject-matter of the dispute "[i]n particular, it takes account of the facts that the applicant identifies as the basis for its claim".[217] As is evident from its Application and Memorial before the Council, Qatar's claims are based *solely* on the aviation prohibitions.

3.37 Joint Appellants nevertheless expend considerable effort trying to show that Qatar's Response before the Council "implicitly acknowledged that there exists a dispute between the Parties as to whether it has breached its other international obligations outside the Chicago Convention".[218] Their effort is wasted. Qatar readily acknowledges that there is a dispute between the Parties concerning Qatar's compliance with its counterterrorism and non-interference obligations, including under the Riyadh Agreements. It thus never "shifted its position"[219] or "sought to modify the way it had characterized the dispute"[220] before the ICAO Council in light of Joint Appellants' First Preliminary Objection, as Joint Appellants wrongly suggest.

3.38 As explained in Chapter 2, Qatar denies in the strongest possible terms that it has ever violated any of the obligations Joint Appellants claim. But that is not the point here. The mere fact that the Parties' dispute involving other matters co-exists with the dispute about the aviation prohibitions does not convert those other matters into the "real issue" in dispute before the Council. The Court has repeatedly decided disputes that were intertwined with other disagreements between the

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[217] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, para. 26.

[218] BESUM, para. 5.40; *see also ibid*., para. 5.81.

[219] BESUM, para. 1.5.

[220] *Ibid.*, para. 5.75.

litigating States. Each and every time, it has ruled that the existence of other, related disputes did not deprive it of jurisdiction.[221]

3.39 Indeed, the Court has made clear that

> "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form *only one element in a wider and long-standing political dispute between the States concerned*. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; *if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes*".[222]

3.40 Similarly, in *Bolivia v. Chile*, the Court rejected Chile's argument that Bolivia's Application "obfuscate[d] the true subject-matter of Bolivia's claim—territorial sovereignty and the character of Bolivia's access to the Pacific

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[221] *See, e.g., United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, I.C.J. Reports 1980, para. 37; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, para. 54; *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, para. 32; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, para. 96; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, para. 16; *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Provisional Measures, Order (3 Oct. 2018), para. 38.

[222] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, I.C.J. Reports 1980, para. 37 (emphasis added).

Ocean".[223] The Court stressed that "applications that are submitted to the Court often present a particular dispute that arises in the context of a *broader* disagreement between parties".[224]

3.41 The Court confirmed this view in its most recent jurisprudence.[225]

3.42 To conclude on this point, Joint Appellants admit—in line with the Court's jurisprudence—that the formulation of the dispute in Qatar's ICAO Application and Memorial merit "particular attention".[226] And despite their attempts to obfuscate the true subject-matter of the dispute, Qatar's pleadings before the Council make it clear that it falls squarely within the ambit of the Chicago Convention and its Annexes. An analysis of the object of Qatar's claims, undertaken below, confirms this conclusion.

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[223] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, para. 32.

[224] *Ibid.* (emphasis added). *See also In the matter of an arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct. 2015), para. 152 ("There is no question that there exists a dispute between the Parties concerning land sovereignty over certain maritime features in the South China Sea … The Tribunal does not accept, however, that it follows from the existence of a dispute over sovereignty that sovereignty is also the appropriate characterisation of the claims the Philippines has submitted in these proceedings. In the Tribunal's view, it is entirely ordinary and expected that two States with a relationship as extensive and multifaceted as that existing between the Philippines and China would have disputes in respect of several distinct matters … The Tribunal agrees with the International Court of Justice in United States Diplomatic and Consular Staff in Tehran that there are no grounds to 'decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.'").

[225] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment (13 Feb. 2019), para. 36: "As the Court has observed, applications that are submitted to it often present a particular dispute that arises in the context of a broader disagreement between parties".

[226] BESUM, para. 5.71.

2. The object of Qatar's claims relates solely to the interpretation or application of the Chicago Convention and its Annexes

3.43 Joint Appellants devote several paragraphs of their Memorial to a discussion of how "[t]he 'real issue' test may determine [the Court's] jurisdiction *ratione materiae*".[227] Each and every case they refer to in the context of this discussion, however, confirms the conclusion that Qatar's claims relate to the interpretation or application of the Chicago Convention and its Annexes, and thus that the Council properly found that it has jurisdiction.

3.44 Before turning to those cases, it is worth recalling once again the Court's judgment in the 1972 *ICAO Council Appeal* case. As the Court put it in that case,

> "the *legal issue that has to be determined by the Court* really amounts to this, namely whether the dispute, in the form in which the Parties placed it before the Council, and have presented it to the Court in their final submissions … is one that can be resolved without *any* interpretation or application of the relevant Treaties at all. *If it cannot, then the Council must be competent*".[228]

3.45 The same emphasis on the "legal issue that has to be determined by the Court" permeates all of the cases Joint Appellants discuss in their Memorial. In the *Aegean Sea Continental Shelf* case,[229] for example, Greece characterised the dispute before the Court as one relating to the delimitation of the continental shelf, and hence outside the scope of its reservation to the title of jurisdiction (which

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[227] BESUM, paras. 5.53, 5.56-5.70.

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

[229] This case is discussed at paragraph 5.53 of the Memorial. Joint Appellants admit that "[w]hile the Court may not have used the language of 'real issue' from the *Nuclear Tests* cases, it nevertheless applied the test in substance".

excluded disputes "relating to the territorial status of Greece"). The Court rejected this argument by looking to the first submission in Greece's Application, which requested the Court to "adjudge and declare … that [certain Greek islands] … [were] entitled to the portion of the continental shelf which appertains to them according to the applicable principles and rules of international law".[230] The Court considered that "[t]he very essence of the dispute" was the "entitlement of those Greek islands to a continental shelf". The object of the claim stated in Greece's Application, the delimitation of the boundary, was "a secondary question *to be decided after, and in the light of, the decision upon the first basic question*".[231]

3.46 Similarly, in *Bolivia v. Chile*, the Court looked to the object of Bolivia's claims before the Court, as stated in its Application, to reject Chile's objection that "the true subject-matter of Bolivia's claim" was "territorial sovereignty and the character of Bolivia's access to the Pacific Ocean"[232] (matters that were outside the Court's jurisdiction[233]). The Court held that

> "while it may be assumed that sovereign access to the Pacific Ocean is, in the end, Bolivia's goal, *a distinction must be drawn between that goal and the related but distinct dispute presented by the Application*, namely, whether Chile has an obligation to negotiate Bolivia's sovereign access to the sea and, if such an obligation exists, whether Chile has breached it. *The Application does not ask*

[230] *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, para. 12.

[231] *Ibid.*, para. 83 (emphasis added).

[232] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, para. 32.

[233] *Ibid.*, para. 22.

> *the Court to adjudge and declare that Bolivia has a right to sovereign access.*[234]

3.47 Joint Appellants point out that Chile had also objected to the Court's jurisdiction on grounds that "Bolivia had framed the Application in an artificially narrow fashion, because the relief sought by Bolivia would lead to negotiations with a judicially predetermined outcome on matters falling outside of the Court's jurisdiction".[235] The Court rejected that argument as well, recalling again that "Bolivia [did] not ask [it] to declare that it has a right to sovereign access to the sea nor to pronounce on the legal status of the 1904 Peace Treaty".[236] As Joint Appellants admit, the Court accepted that Bolivia's claims "could be determined [by the Court] *without* touching on the question of Bolivia's substantive right to sovereign access to the sea".[237]

3.48 The same principle is also expressed in the two cases decided by arbitral tribunals constituted under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS") that Joint Appellants refer to: the *South China Sea* and *Chagos Marine Protected Area* cases.[238] In the former case, the tribunal considered that the Philippines' claims "were properly characterized as claims not concerning sovereignty", because the tribunal considered itself, as Joint Appellants

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[234] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, para. 32 (emphasis added).

[235] BESUM, para. 5.59 (citing *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, para. 33).

[236] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, para. 33.

[237] BESUM, para. 5.59 (emphasis added).

[238] *Ibid.*, paras. 5.60-5.66.

point out, "able to determine the dispute without resolving questions of sovereignty, whether implicitly or explicitly".[239]

3.49 In the latter case, the tribunal reached the opposite conclusion. It declined to exercise jurisdiction in respect of certain of Mauritius's claims because it determined that the 'real issue' between the parties concerned a dispute over territorial sovereignty, rather than the interpretation or application of UNCLOS.[240] The claims in question were presented in Mauritius' first submission, which asked the tribunal to adjudge and declare that "the United Kingdom is not entitled to declare [a marine protected area] or other maritime zones because it is not the 'coastal State' within the meaning of [UNCLOS]".[241]

3.50 The tribunal acknowledged the existence of an interpretive dispute over the meaning of the term "coastal State" which existed alongside the dispute between the Parties with respect to sovereignty over the Chagos Archipelago".[242] Employing a novel test that asked "where the relative weight of the dispute lies", the tribunal concluded that "the Parties' dispute with respect to Mauritius' First Submission is properly characterised as relating to land sovereignty over the Chagos Archipelago. The Parties' differing views on the 'coastal State' for the purposes of the Convention are simply one aspect of this larger dispute".[243] The

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[239] *Ibid.*, para. 5.66 (citing *In the matter of an arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct. 2015), paras. 152-153).

[240] BESUM, para. 5.61.

[241] *In the matter of the Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland)*, PCA Case No. 2011-03, Award (18 Mar. 2015), para. 158.

[242] *Ibid.*, paras. 209, 211.

[243] *Ibid.*, paras. 211-212.

reasons for that were twofold: because prior to the initiation of the arbitration there was "scant evidence that Mauritius was specifically concerned with the United Kingdom's implementation of the Convention" and because the "consequences of a finding that the United Kingdom is not the coastal State extend well beyond the question of the validity of the [marine protected area]".[244]

3.51 These cases have a common thread: international courts and tribunals will determine the "real issue" in dispute by reference to the stated object of the applicant State's claims.[245] The *South China Sea* and *Chagos Marine Protected Area* cases suggest that the jurisdictional inquiry may go beyond the claims as submitted by the applicant State and delve into "the actual objective" of those claims.[246] Even if the latter inquiry were warranted in this case, the conclusion would be the same: the true object of Qatar's claims relates to the interpretation or application of the Chicago Convention and its Annexes.

3.52 This is evident from Qatar's Application to ICAO, in which it asked the Council:

> "- To determine that the Respondents violated by their actions against the State of Qatar their obligations under the Chicago Convention, its Annexes and other rules of international law,

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[244] *Ibid.*, para. 212.

[245] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, para. 28; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, para. 83; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, para. 32.

[246] *In the matter of an arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct. 2015), para. 152.

> - To deplore the violations by the Respondents of the fundamental principles of the Chicago Convention and its Annexes,
>
> - To urge the Respondents to withdraw, without delay, all restrictions imposed on the Qatar-registered aircraft and to comply with their obligations under the Chicago Convention and its Annexes [and]
>
> - To urge the Respondents to negotiate in good faith the future harmonious cooperation in the region to safeguard the safety, security regularity and economy of international civil aviation".[247]

3.53 None of Qatar's claims, reiterated in the Memorial,[248] "can be resolved without any interpretation or application of the relevant Treaties at all".[249]

3.54 Nor does their "actual objective" lie outside the Chicago Convention and its Annexes. Just the opposite. Qatar seeks a determination that the aviation prohibitions violate the Chicago Convention and its Annexes. It is Joint Appellants, not Qatar, that introduced allegations concerning the breach of international obligations lying outside that framework in an attempt to justify their breaches of the Chicago Convention.[250] But those allegations have nothing to do with the object of Qatar's claims before the Council, which can be resolved without any

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[247] ICAO Application (A), pp. 2-3 (**BESUM Vol. III, Annex 23**).

[248] ICAO Memorial (A), Section (f) (**BESUM Vol. III, Annex 23**).

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

[250] Qatar recalls in this respect that the Court "[has] repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party". *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, para. 29.

adjudication of the merits of Joint Appellants' defence, as explained in the following section.

3. The Council does not need to address the merits of Joint Appellants' countermeasures defence to decide this case

3.55 In light of the Court's jurisprudence, the "real issue" in dispute before the Council is plainly the violations of the Chicago Convention and its Annexes occasioned by Joint Applicants' aviation prohibitions. There are still other reasons that confirm this conclusion.[251] Far from being "necessary aspects of the dispute between the Parties",[252] the merits of Joint Appellants' countermeasures defence need not even be addressed by the Council in order to decide Qatar's claims.

3.56 At the outset, States' entitlement to countermeasures under international law is governed by the "secondary rules of State responsibility".[253] As such, countermeasures "provide[] a shield against an *otherwise well-founded claim for the breach of an international obligation*".[254] In *Gabčíkovo-Nagymaros Project*, the Court first concluded that Czechoslovakia had committed an internationally wrongful act, and then secondarily examined "whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary's prior failure to comply with its obligations under international law".[255]

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[251] Qatar offers these additional observations without prejudice to its arguments on the merits of Joint Appellants' countermeasures defence.

[252] BESUM, para. 5.39.

[253] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, p. 31, para. 3.

[254] *Ibid.*, p. 71, para. 1 (emphasis added).

[255] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, para. 82.

3.57 This means that Joint Appellants' countermeasures defence is at most—in the words of the Court in the *Aegean Sea Continental Shelf* case—"a secondary question *to be decided after, and in the light of, the decision upon the first basic question*";[256] namely, whether the aviation prohibitions are otherwise wrongful. Indeed, if the Council finds that they are not,[257] the countermeasures issue does not even arise.

3.58 Joint Appellants' countermeasures defence therefore only becomes an issue if the Council finds that their conduct is otherwise wrongful. But even in that case, there are at least three reasons why the Council could decide Qatar's claims without addressing the merits of Joint Appellants' countermeasures defence.

3.59 *First*, the Council could find that, as *lex specialis*, the Chicago Convention excludes countermeasures as a circumstance precluding wrongfulness.[258] "States

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[256] *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, para. 83 (emphasis added).

[257] Qatar notes in this respect that in spite of their invocation of countermeasures, Joint Appellants do not concede that the aviation prohibitions were wrongful under the Chicago Convention. Indeed, Joint Appellants' "good faith" invocation of countermeasures is "entirely without prejudice to the Appellants' position on the merits of the claim made by Qatar under the Chicago Convention". BESUM, fn. 143; *see also ibid.*, fn. 355 ("The accuracy of this statement of facts is not a matter for the Court at this stage, and the Appellants reserve their rights in this regard".).

[258] As Joint Appellants admit, at the jurisdictional phase before the Council, Qatar argued that the question of countermeasures was "one for the merits" and that at that stage of the proceedings it "will provide a robust defence on the facts and in law". BESUM, paras. 5.35-5.38 (citing ICAO Response to Preliminary Objections (A), paras. 75-77, 82 (**BESUM Vol. III, Annex 25**) and ICAO Council –214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO Doc. C-MIN 214/8, 23 July 2018, para. 62 (**BESUM Vol. V, Annex 53**)). To infer from these responses that Qatar "did not dispute the availability, in principle, of countermeasures as a circumstance precluding the wrongfulness of the airspace restrictions under general international law", or that "Qatar did not seek to suggest that the Chicago Convention precludes States parties from resorting to countermeasures" is incorrect. *See* BESUM, paras. 2.60-2.61. In any event, Qatar here confirms that at the merits stage of the dispute it will challenge the availability of countermeasures as a circumstance precluding wrongfulness under the framework of the Chicago Convention on grounds of *lex specialis*.

may agree between themselves on … rules of international law which may not be the subject of countermeasures …".[259] This possibility is reflected in Article 55 of the International Law Commission's ("ILC") Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA"), which provides that the Articles "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".[260]

3.60 In this respect, Qatar recalls that "[t]o the extent that *derogation* clauses or other treaty provisions (e.g. those prohibiting *reservations*) are properly interpreted as indicating that the treaty provisions are 'intransgressible', they may entail the exclusion of countermeasures".[261] The Council could very well find that the provisions of the Chicago Convention do exactly that. Indeed, the Convention contains only one derogation clause, Article 89, entitled "War", which provides:

> "In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council".[262]

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[259] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, p. 133, para. 10.

[260] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) (hereinafter "ARSIWA"), Art. 55.

[261] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, p. 133, para. 10 (emphasis added) (citation omitted).

[262] Chicago Convention, Art. 89 (**BESUM Vol. II, Annex 1**).

3.61 This means that, in the absence of war or a state of national emergency duly declared and notified to the ICAO Council—neither of which exists here—States may not lawfully derogate from their obligations under the Convention.[263] Tellingly, no other State before Joint Appellants has ever sought to justify non-performance of obligations under the Chicago Convention on grounds of countermeasures.[264] By contrast, States have invoked Article 89.[265]

3.62 Countermeasures are inconsistent with the scheme of the Chicago Convention in another critical respect. Countermeasures are, by their very nature, discriminatory. They must always target the specific State that the injured State considers responsible for an internationally wrongful act.[266] Yet a large number of the provisions of the Chicago Convention expressly prohibit discrimination among aircraft of ICAO member States.[267] Indeed one of the "aims and objectives of the

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[263] Ruwantissa Abeyratne, *Convention on International Civil Aviation, A Commentary* (2014), p. 149 ("Therefore, unless a State is at war (which the Convention does not define) or has declared a state of national emergency, it would be bound by the provisions of the Convention") (**QCM (A) Vol. IV, Annex 110**).

[264] This is not surprising. The tit-for-tat risk inherent in countermeasures is potentially destructive of the smooth and interdependent operation of civil aviation worldwide. In ICAO's 75-year history, and despite periods of grave political tension between States, actions like the far-reaching aviation prohibitions at issue in this case are very exceptional.

[265] When Israel became a member of ICAO in 1949, Egypt and Iraq relied on Article 89 to deny to Israeli aircraft the right to fly over their respective territories because of the official state of war that then existed between them and Israel. *See* Ruwantissa Abeyratne, *Convention on International Civil Aviation, A Commentary* (2014), p. 677, referring to ICAO Doc. 6922-C/803, Annex A, at 125 which reproduces the letter from the Government of Egypt to ICAO dated 16 Oct. 1949 (**QCM (A) Vol. IV, Annex 110**).

[266] ARSIWA, Art. 49, para. 1; *see also Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, pp. 129-131; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, para. 83.

[267] *See, e.g.*, Chicago Convention, Art. 9(b) (conferring on Member States the right "temporarily to restrict or prohibit flying over the whole or any part of its territory" in exceptional circumstances or during a period of emergency, or in the interest of public safety, "*on condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States*".) (**BESUM Vol. II, Annex 1**) (emphasis added).

Organization" is precisely to "*[a]void discrimination* between contracting States".[268]

3.63 In addition, even though the Chicago Convention does not prohibit reservations, no State party has ever made a reservation to any of its provisions—or submit any request to that effect before the Council or any other organ of the organisation.[269] All ICAO member States accept the Convention without reservation.

3.64 Finally, pursuant to Article 82 of the Chicago Convention, ICAO Member States have undertaken "*not* to enter into any … obligations and understandings [which are inconsistent with the terms of the Chicago Convention]".[270] The ILC Report on the Fragmentation of International Law identifies clauses of that type as "an express exception to the *lex posterior rule*, designed to guarantee the *normative power* of the earlier treaty".[271]

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[268] *Ibid.*, Art. 44(g) (emphasis added).

[269] Article 20(3) of the Vienna Convention on the Law of Treaties ("VCLT") provides that "[w]hen a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization". Vienna Convention on the Law of Treaties (adopted 22 May 1969), 1155 U.N.T.S. 331, Art. 20(3). *See also* International Law Commission, *Guide to Practice on Reservations to Treaties*, Conclusion 2.8.8, in *Yearbook of the International Law Commission 2011*, Vol. II, Part II, UN Doc. A/CN.4/SER.A/2011/Add.1 (Part 2), p. 31. This provision can be seen as reflective of customary international law. *See* International Law Commission, 59th Session, *Twelfth report on reservations to treaties by Mr. Alain Pellet, Special Rapporteur*, UN Doc. A/CN.4.584 (15 May 2007), pp. 45-46, paras. 67-68.

[270] Chicago Convention, Art. 82 (**BESUM Vol. II, Annex 1**) (emphasis added). To the extent that Joint Appellants base their countermeasures defence on the Riyadh Agreements, this provision alone defeats their claim.

[271] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (13 Apr. 2006), para. 268 (some emphasis added).

3.65 If the Council were to conclude that, as a result of the aforementioned provisions of the Chicago Convention and other elements, countermeasures are disallowed as a circumstance precluding the wrongfulness of the aviation prohibitions, there can be no question that it could also decide Qatar's claims "without touching" on the question of the alleged breaches of the international obligations Joint Appellants try to hide behind. Indeed, the very question whether the Chicago Convention excludes countermeasures is in itself a question "relating to the interpretation or application of the Convention and its Annexes". Joint Appellants' countermeasures defence cannot possibly deprive the Council of its jurisdiction to decide this issue.

3.66 The *United States Diplomatic and Consular Staff in Tehran* case illustrates all of the foregoing points. In that case, Iran, just like Joint Appellants here, claimed that its conduct was justified by prior unlawful activities of the United States.[272] Iran did not specifically refer to the theory of countermeasures and the Court noted that it failed to "explain on what legal basis ... these allegations ... constitute a relevant answer to the United States' claims".[273] Nevertheless, after having found Iran responsible for breaches of diplomatic and consular law, the Court considered that it was bound to examine whether Iran's unlawful conduct "might be justified by the existence of special circumstances".[274] The Court did not consider Iran's

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[272] *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, paras. 37-38.

[273] *Ibid.*, para. 82.

[274] *Ibid.*, para. 80. Commenting on the Court's judgment, Cannizzaro and Bonafè write:

> "Although the Court did not unveil the legal qualification of the special circumstances which could have justified the Iranian conduct, there is little doubt that it referred to the regime of countermeasures under the customary law of state responsibility".

defence to fall outside its jurisdiction as circumscribed by the jurisdictional titles invoked by the United States.[275] Nor did the Court consider that such a defence deprived it of its jurisdiction to entertain the United States' claims.

3.67 The Court ultimately concluded that there was no need to examine Iran's defence because "even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran's conduct and thus a defence to the United States' claims".[276] The Court found that not to be the case because "diplomatic law *itself* provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions".[277]

3.68 *Second*, even if countermeasures were an available defence under the Chicago Convention, the "real issue" in dispute would remain firmly rooted in its framework. This is also because countermeasures are only a *temporary* bar to State responsibility, not a defence *in limine*.[278] The Council could still find the aviation prohibitions wrongful under the Chicago Convention and its Annexes, and simply take judicial notice of Joint Appellants' countermeasures defence. The fact that the

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Enzo Cannizzaro & Beatrice Bonafè, "Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case", *European Journal of International Law*, Vol. 16 No. 3 (2005), p. 492 (**QCM (A) Vol. IV, Annex 108**).

[275] Namely, the Optional Protocols to the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, and the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States.

[276] *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, para. 83.

[277] *Ibid.* (emphasis added).

[278] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, p. 71, para. 2 ("[C]ircumstances precluding wrongfulness … do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists".).

legal consequences of such a finding would be precluded "for the time being"[279] does not mean that the Council's judgment would not be "capable of effective application".[280] As soon as the preclusive effect of the countermeasures defence ceased, the Council's judgment would entitle Qatar to demand, pursuant to Article 27 of ARSIWA:[281] (1) Joint Appellants' compliance with their obligations under the Chicago Convention, which includes the cessation of the aviation prohibitions,[282] and (2) compensation for any material loss caused by Joint Appellants' breaches of the Convention.

3.69 *Third and finally*, the Council could assess the legality of Joint Appellants' countermeasures defence without addressing the substantive premise thereof (i.e., Qatar's alleged noncompliance with its obligations under international law beyond the framework of the Chicago Convention). The Council unquestionably has jurisdiction to assess whether Joint Appellants complied with the other necessary conditions governing countermeasures.[283] For example, questions relating to the conditions that must be met before the adoption of countermeasures,[284] including

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[279] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, p. 75, Art. 22, para. 4.

[280] *Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 22.

[281] ARSIWA, Art. 27.

[282] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, p. 75, Art. 27, p. 86, para. 3.

[283] Joint Appellants concede that the "real issue" in dispute "continues to fall within [an international court's or tribunal's] jurisdiction although it implicates other aspects in peripheral or ancillary fashion". BESUM, para. 5.67 (citing *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Preliminary Objections, Judgment, 1925, P.C.I.J., Series A, No. 6, p. 18); *see also ibid.*, para. 5.61 (citing *In the matter of the Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland)*, PCA Case No. 2011-03, Award (18 Mar. 2015), para. 220).

[284] *See* ARSIWA, Art. 52.

procedural preconditions, can all be examined and decided without delving into Qatar's alleged breaches of international law.

3.70 For all the foregoing reasons, and consistent with the Court's longstanding jurisprudence, Joint Appellants' violations of the Chicago Convention are unmistakably the "real issue" in the dispute Qatar submitted to the ICAO Council. The Council was therefore correct in finding that it has jurisdiction to hear Qatar's claims.

III. The Adjudication of Qatar's Claims by the ICAO Council is Entirely Consistent with Judicial Propriety

3.71 Joint Appellants argue that "[e]ven if the Court were to … conclude that the ICAO Council in principle has jurisdiction over Qatar's claims … that is not the end of the analysis of the ICAO Council's competence to hear the dispute".[285]

3.72 Actually, it is. Joint Appellants' "alternative argument" on the admissibility of Qatar's claims is not really an "alternative" one. It is, at root, an obvious repurposing of their errant jurisdictional objection.[286] Here once again they assert that if the Council were to pass upon their countermeasures defence it would adjudicate "beyond the[] bounds"[287] of Article 84 without their consent. The argument is no more convincing when dressed up in these new clothes than it was in the old ones.

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[285] BESUM, para. 5.96.

[286] Hence, it can be dispensed with on the same grounds and without determining whether questions of admissibility of claims may be raised as a preliminary matter before the Council, an issue to which, curiously, Joint Appellants devoted 24 pages of their Memorial.

[287] BESUM, para. 5.118; *see also ibid*., paras. 5.119-5.124.

3.73 As shown above, the Council does not need to pass judgment on Qatar's compliance with its international obligations owed to Joint Appellants outside the framework of the Chicago Convention in order to adjudicate Qatar's claims under that framework. Whether countermeasures remain an available defence to wrongfulness under the Chicago Convention is by definition for the Council to decide in the first instance;[288] countermeasures do not rule out *in limine* a breach of the Chicago Convention;[289] and they are subject to Joint Appellants' compliance with necessary conditions that transcend their substantive premise.[290]

3.74 Moreover, none of the closed set of exceptional circumstances which gave rise to the doctrine of judicial propriety in the Court's jurisprudence apply here. Qatar's claims have not become devoid of purpose (*Northern Cameroons*)[291] or object (*Nuclear Tests*)[292] by virtue of Joint Appellants' countermeasures defence; none of the factors identified in *Free Zones* has the remotest connection to this case;[293] the dispute is plainly not a "non-legal one" (*Haya de la Torre*);[294] there is no issue of adjudicating the international responsibility of a State that is not party

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[288] *See supra*, paras. 3.59-3.67.

[289] *See supra*, para. 3.68.

[290] *See supra*, para. 3.69. Even if the Council needed to determine the substantive premise of the alleged countermeasures, Joint Appellants must be deemed to have implicitly consented to this determination via *forum prorogatum*. The doctrine of *forum prorogatum* "is relevant … in determining … the extent to which [the respondent State] may tacitly have accepted jurisdiction over matters not covered by the original title relied on". Hugh Thirlway, *The International Court of Justice* (2016), p. 53. There is no reason why the same logic should not apply to the respondent State when raising a countermeasures defence.

[291] *Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, p. 38.

[292] *Nuclear Tests (Australia v. France)*, Judgment, para. 62.

[293] *Free Zones (France/Switzerland)*, Order of 19 August 1929, P.C.I.J. Series A, No. 22, p. 15; *Free Zones (France/Switzerland)*, Judgment of 7 June 1932, P.C.I.J. Series A/B, No. 46, pp. 161-162.

[294] BESUM, para. 5.100.

to the proceedings before the Council (*Monetary Gold*);[295] and Qatar is not trying to circumvent the limits of the ICAO Council's contentious jurisdiction (*Western Sahara*).[296]

3.75 In fact, what would offend judicial propriety would be accepting Joint Appellants' submissions, not Qatar's. It is they who seek to prevent the Council from exercising its jurisdictional powers "to their full extent".[297] And it is they who are trying to circumvent the principle of consent by trying to control the Council's jurisdiction by means of (baseless) unilateral assertions.

3.76 Tellingly, Joint Appellants close their judicial propriety argument with the peculiar assertion that "in order not to compromise [their] position, the only possible solution would be for the ICAO Council expressly to leave undecided the Appellants' invocation of countermeasures, merely recognizing it as a defence available under general international law…".[298] In other words, Joint Appellants suggest that it would be *proper* for the Council to declare that a countermeasures defence is available to them, but *improper* for it to consider that defence. In Qatar's view, such a confused conception of judicial propriety shows only one thing: that Joint Appellants' admissibility argument is logically and legally unsound, and must therefore be rejected.

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[295] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, p. 32.

[296] *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, para. 33.

[297] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, para. 25.

[298] BESUM, para. 5.133.

3.77 The present dispute relates to the interpretation and application of the Chicago Convention and its Annexes. The Council therefore has jurisdiction. In line with the Court's prior jurisprudence, that is the end of the debate. Qatar cannot be deprived of its right to have its claims heard by Joint Appellants' unilateral assertions that the "real dispute" between the Parties concerns international obligations falling outside the scope of the Convention. Accordingly, the Council properly dismissed Joint Appellants' First Preliminary Objection, and the Court should do the same with respect to the Second Ground of Appeal.

CHAPTER 4

THE COURT SHOULD DENY JOINT APPELLANTS' THIRD GROUND OF APPEAL

4.1 Joint Appellants' Second Preliminary Objection before the ICAO Council and Third Ground of Appeal in these proceedings is that the Council incorrectly found that it had jurisdiction because:

1. Qatar allegedly did not comply with "the precondition of negotiation contained in Article 84 of the Chicago Convention";[299] and

2. Qatar allegedly did not comply with "the requirements of Article 2(g)"[300] of the ICAO Rules for the Settlement of Differences.

4.2 Joint Appellants base both claims on the assertion that Qatar "has failed to show that it in fact made a genuine attempt, or indeed any attempt at all, to initiate negotiations about the airspace restrictions … prior to submitting [its Application] to the ICAO Council".[301]

4.3 This Chapter demonstrates that the ICAO Council did not err in upholding its jurisdiction over Application A. The record shows that in spite of Joint Appellants' total refusal to negotiate, Qatar made many genuine attempts to do so

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[299] BESUM, para. 6.1.

[300] *Ibid.* Article 2(g) provides: "Any Contracting State submitting a disagreement to the Council for settlement (hereinafter referred to as "the applicant") shall file an application to which shall be attached a memorial containing: … (g) A statement that negotiations to settle the disagreement had taken place between the parties but were not successful". ICAO Council, Rules for the Settlement of Differences, Art. 2(g) (**BESUM Vol. II, Annex 6**).

[301] *Ibid.*, para. 6.4.

with them with a view to resolving the dispute over the aviation prohibitions. Indeed, the evidence in this respect is overwhelming, as is the evidence showing that Joint Appellants rebuffed Qatar's efforts at every turn by insisting on "non-negotiable" preconditions (**Section I**).

4.4 Qatar's Memorial to the ICAO Council also fully complied with Article 2(g) of the ICAO Rules for the Settlement of Differences. And even assuming *arguendo* that it did not, any ostensible noncompliance was later cured and is not appealable to the Court in any event (**Section II**).

I. The Council Properly Held that Qatar Satisfied the Negotiation Requirement

A. INTERNATIONAL LAW REQUIRES A GENUINE ATTEMPT TO NEGOTIATE WITH A VIEW TO RESOLVING THE DISPUTE

4.5 Article 84 of the Chicago Convention provides in relevant part:

> "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".[302]

4.6 The Court has explained the contents of negotiation requirements like that stated in Article 84 on many occasions. In *Georgia v. Russian Federation*, the Court held that such requirements call for "at the very least … a genuine *attempt* by one of the disputing parties to engage in discussions with the other disputing

[302] Chicago Convention, Art. 84 (**BESUM Vol. II, Annex 1)** (emphasis added).

party, with a view to resolving the dispute".[303] The Court added that where "negotiations are attempted or have commenced … the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked".[304]

4.7 Joint Appellants agree with this description of the requirement in *Georgia v. Russian Federation*.[305] They therefore also agree that Article 84 does not require that negotiations have actually taken place. As the Court stated, the requirement may be satisfied by a genuine *attempt* by one of the disputing parties to engage in discussions with the other with a view to resolving the dispute if that attempt fails or becomes futile.[306]

4.8 A negotiation requirement can also be discharged, however, when a disputing party is confronted with an "immediate and total refusal" to negotiate on the other side. Such a blanket refusal plainly excludes any possibility for an amicable settlement. This was precisely the situation in *United States Diplomatic and Consular Staff in Tehran*. In that case, the Court held that the Iranian

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[303] *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, para. 157 (emphasis added).

[304] *Ibid*., para. 159 (citing to *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Jurisdiction, Judgment, 1924, P.C.I.J. Series A, No. 2, p. 13; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, pp. 345-346; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, para. 51; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Reports 1988, para. 55).

[305] BESUM, paras. 6.28-6.29, 6.36.

[306] "[W]hether negotiations ... have taken place, and whether they have failed or become futile or deadlocked, are essentially questions of fact 'for consideration in each case". *Georgia v. Russian Federation*, Preliminary Objections, Judgment, I.C.J. Reports 2011, para. 160 (quoting *Mavrommatis Palestine Concessions*, Jurisdiction, Judgment, 1924 P.C.I.J. Series A, No. 2, p. 13).

Government's "refusal … to enter into any discussion on the matter" despite the United States' protests was sufficient to discharge the negotiation requirement under Article XXI, paragraph 2 of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran.[307] Indeed, the Court's Judgment makes no mention of any attempts by the United States to negotiate after its efforts to make its views known to Iran were rebuffed.[308]

4.9 This result makes perfect sense. A contrary rule would allow one party to a dispute to frustrate the other's access to a dispute settlement mechanism conditioned on negotiations, merely by refusing to engage with it.

4.10 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

> "parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; *they are under an obligation so to conduct themselves that*

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[307] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, para. 51. Article XXI, paragraph 2 reads: "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means". Joint Appellants do not differentiate between requirements to negotiate as found in Article 84 of the Chicago Convention and requirements to seek a satisfactory adjustment of a dispute by diplomacy as found in Article XXI, paragraph 2 of the Treaty of Amity between the United States and Iran. *See* BESUM, para. 6.53(b). The Court also does not differentiate between the requirement in Article XXI, paragraph 2 and other negotiation requirements found in treaties. *See Georgia v. Russian Federation*, Preliminary Objections, Judgment, I.C.J. Reports 2011, para. 133.

[308] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, para. 47; *see also id*., para. 48.

> *the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it …".*[309]

4.11 If a State refuses even to come to the negotiation table, still less with the open mind that international law requires, there is obviously no chance for meaningful exchanges and no chance that the dispute can be resolved by negotiation.

4.12 Joint Appellants ignore these basic points when recounting the contents of the negotiation requirement in their Memorial.[310]

4.13 Joint Appellants, however, emphasise the fact that the attempt to negotiate must be made "with a view to resolving the dispute".[311] But they inappropriately try to reframe this requirement in more stringent terms. They assert that

> "the negotiations, or the attempt to initiate negotiations, must directly concern the disagreement between the two States submitted for adjudication and must have *particularly addressed* (or at least have sought to address) the *specific* question of interpretation or application of the treaty that gives rise to the dispute between the parties".[312]

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[309] *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, para. 85(a) (emphasis added).

[310] In their Memorial, Joint Appellants cite to *United States Diplomatic and Consular Staff in Tehran* only once and for a rather minor point. *See* BESUM, para. 6.53(b), fn. 439.

[311] *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, para. 157; *see* BESUM, para. 6.27.

[312] BESUM, para. 6.31 (emphasis added).

4.14 This is not what the Court held in *Georgia v. Russian Federation*. There, the Court stated that for the negotiation requirement to be satisfied,

> "it is *not* necessary that a State must expressly refer to a *specific* treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court …. [T]he exchanges must refer to the *subject-matter of the treaty* with *sufficient clarity* to enable the State against which a claim is made to identify that there is, or may be, a *dispute with regard to that subject-matter*".[313]

4.15 Joint Appellants are therefore wrong when they claim that the party attempting to negotiate must have sought to address "the *specific* question of interpretation or application of the treaty that gives rise to the dispute between the parties".[314] Rather, international law requires only that the "subject-matter" of the treaty giving rise to the dispute be addressed with "sufficient clarity" to enable the other disputing party to conclude that "there is, or may be, a dispute with regard to that subject-matter".[315]

4.16 Finally, the Court has made clear that what constitutes "negotiation" should be assessed with flexibility. In *Mavrommatis Palestine Concessions*, the Court's predecessor held:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been

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[313] *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, para. 30 (emphasis added).

[314] BESUM, para. 6.31 (emphasis added).

[315] *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, para. 30.

> commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can be therefore no doubt that the dispute cannot be settled by diplomatic negotiation".[316]

4.17 Similarly, no specific format or procedure is required. In the *South West Africa* cases, the Court ruled that "collective negotiations" in the context of an international organisation should not be distinguished from "direct negotiations" between the disputing parties, observing that "it is not so much the form of negotiation that matters as the *attitude and views* of the Parties on the substantive issues of the question involved".[317] Indeed, "diplomacy by conference or parliamentary diplomacy has come to be recognized … as one of the established modes of international negotiations".[318]

4.18 The Court reaffirmed this finding in *Georgia v. Russian Federation*, in which it stated that "the Court has come to accept less formalism in what can be considered negotiations".[319]

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[316] *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Jurisdiction, Judgment, 1924, P.C.I.J. Series A, No. 2, p. 13 (emphasis omitted). The Court continued: "But it is equally true that if the diplomatic negotiations between the Governments commence at a point where the previous discussions left off, it may well happen that the nature of the latter was such as to render superfluous renewed discussion of the opposing contentions in which the dispute originated. No general and absolute rule can be laid down in this respect. It is a matter for consideration in each case". *Ibid*.

[317] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, pp. 345-346 (emphasis added).

[318] *Ibid.*, p. 346.

[319] *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, para. 160.

4.19 Judge Buergenthal echoed these points in his book on ICAO, writing as early as 1969 that

> "The requirement of prior negotiations does not necessarily demand that the parties engage in direct negotiations. It could undoubtedly also be satisfied by negotiations carried on in a parliamentary or conference forum, provided both parties to the dispute participated therein on opposite sides. The dispute between the United States and Czechoslovakia over the launching of balloons demonstrates how, *within the ICAO framework, parliamentary diplomacy can take the place of direct negotiations*".[320]

4.20 In sum, Joint Appellants' description of Article 84's negotiation requirement in the Memorial is incomplete—and, in certain critical respects, wrong. They acknowledge that Article 84 does not require that negotiations have actually taken place as long as there has been a genuine attempt to negotiate.[321] They fail, however, to acknowledge that a disputing party is not required to even attempt to negotiate when faced with the other party's "immediate and total refusal" to enter into any discussion on the matter. Finally, Joint Appellants acknowledge that the attempt to negotiate must be made "with a view to resolving the dispute", but they improperly seek to impose stringent requirements that the Court has specifically rejected when they allege that the attempt "must have particularly addressed … the specific question of interpretation or application of the treaty that gives rise to the dispute between the parties".[322]

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[320] Thomas Buergenthal, *Law-making in the International Civil Aviation Organization* (1969), p. 131 (**BESUM Vol. VI, Annex 125**) (emphasis added).

[321] *See* BESUM, paras. 6.28-6.29, 6.36.

[322] *Ibid.*, paras. 6.28, 6.31.

4.21 Qatar will demonstrate below that the negotiation requirement in Article 84 has plainly been met in this case.

B. QATAR GENUINELY ATTEMPTED TO NEGOTIATE WITH A VIEW TO RESOLVING THE DISPUTE

4.22 Qatar submitted its Application to the ICAO Council on 30 October 2017.[323] The disagreement over the aviation prohibitions arose 147 days earlier, on 5 June 2017. As the record placed before the Council shows, Qatar tried repeatedly during this interval to engage Joint Appellants in negotiations through multiple avenues and in multiple fora, including through direct means (**Section I.B.1**), ICAO (**Section I.B.2**), the World Trade Organization ("WTO") (**Section I.B.3**) and the facilitation of other States (**Section I.B.4**). Joint Appellants frustrated those efforts at every turn. At all times, they conditioned resolving the aviation dispute to Qatar's capitulation to their wider demands.

4.23 In these circumstances, there can be no question that the Article 84 negotiation requirement was satisfied and the ICAO Council correctly determined that it had jurisdiction.

4.24 Before turning to those circumstances, however, it is important to dispel Joint Appellants' argument based not on the facts of the case but on a patently incorrect characterisation of Qatar's Article 2(g) statement in its Memorial to the ICAO Council, which reads as follows:

> "The Respondents *did not permit any opportunity to negotiate the aviation aspects of their hostile actions* against the State of Qatar. They repeatedly gave an

[323] ICAO Application (A) (**BESUM Vol. III, Annex 23**).

> ultimatum to the State of Qatar on matters unrelated to air navigation and air transport. The last contact with the Respondents was a conference call with officials of the Respondents on 5 and 6 June 2017 that did not result in any understanding. In fact, the crisis gradually escalated when the Respondents declared all Qatar's citizens and resident 'undesirable' (*persona non grata*) in their territories and ordered them to leave the Respondents' territories within 14 days. The severance of diplomatic relations makes *further* negotiating efforts futile".[324]

4.25 Joint Appellants claim that this statement constitutes "a clear and candid admission by Qatar that it failed to make any attempt prior to the filing of its Application to engage in negotiations with the Appellants in relation to the disagreement" and is thus an "implicit[] admi[ssion] that [Qatar] did not comply with the jurisdictional precondition of negotiations under Article 84 of the Chicago Convention".[325]

4.26 Joint Appellants ironically base their argument on the first sentence of the statement: "Respondents did not permit any opportunity to negotiate the aviation aspects of their hostile actions …".[326] This is ironic because this fact, if true,[327]

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[324] ICAO Memorial (A), Section (g) (**BESUM Vol. III, Annex 23**) (emphasis added).

[325] BESUM, para. 6.45; *see also id.*, para. 6.59.

[326] ICAO Memorial (A), Section (g) (**BESUM Vol. III, Annex 23**); BESUM, para. 6.46.

[327] Qatar obviously does not dispute that "[t]he policy rationales underlying the precondition of negotiations in Article 84 would be frustrated if an Applicant were permitted to unilaterally declare that negotiations would be futile before even attempting to initiate them. If it were otherwise, the precondition of negotiation would easily be circumvented". BESUM, para. 6.48. But the same policy rationales would equally be frustrated if a Respondent were permitted to escape jurisdiction by declaring that their actions are non-negotiable only to later insist that the Applicant should nevertheless have sought to negotiate with it.

would necessarily mean that the negotiation requirement has been met.[328] Moreover, the statement refers solely to Joint Appellants' conduct and cannot be taken to mean that *Qatar* did not make any attempt to negotiate. All the more so, given that at the end of its Article 2(g) statement, Qatar unequivocally states that "[t]he severance of diplomatic relations makes *further* negotiating efforts futile".[329] If anything, Qatar's Article 2(g) statement was therefore "a clear and candid admission" that it had in fact genuinely attempted to negotiate.

4.27 In light of the above, Joint Appellants' claim that there is an inconsistency between Qatar's Memorial and Response to the Preliminary Objections before the ICAO Council[330] is without merit. As demonstrated below, Qatar made multiple genuine attempts to negotiate with a view to resolving the dispute notwithstanding Joint Appellants' refusal to engage with it.

1. Qatar unsuccessfully tried to settle the dispute through direct means

4.28 The aviation prohibitions were not the only measure Joint Appellants took against Qatar on 5 June 2017. That same day, also without prior warning, they severed all diplomatic and consular relations with Qatar, expelled Qatar's diplomats from their territories, closed their embassies and consulates in Doha and withdrew their own diplomats from Qatar.[331]

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[328] *See United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, paras. 47-48, 51-2.

[329] ICAO Memorial (A), Section (g) (**BESUM Vol. III, Annex 23**) (emphasis added).

[330] *See* BESUM, paras. 6.40, 6.59.

[331] ICAO Preliminary Objections (A), Exhibit 6, *Declaration of the Arab Republic of Egypt* (16 Nov. 2014) (**BESUM Vol. III, Annex 24**); ICAO Preliminary Objections (A), Exhibit 7, *Declaration of the Kingdom of Bahrain* (5 June 2017) (**BESUM Vol. III, Annex 24**); ICAO Preliminary Objections (A), Exhibit 8, *Declaration of Kingdom of Saudi Arabia* (5 June 2017)

4.29 Joint Appellants argue that the "absence of diplomatic relations does not constitute an obstacle to the ability of a State to attempt to initiate negotiations",[332] but this ignores the reality of inter-State dialogue and communication. At the very least, the absence of diplomatic channels between Qatar and Joint Appellants made it much more difficult for Qatar even to attempt to negotiate. But the severance of relations also conveyed a message: Joint Appellants had no interest in talking, let alone negotiating, with Qatar.

4.30 That message soon became explicit. Just two days after the imposition of the aviation prohibitions, the Minister of State for Foreign Affairs of the UAE

(**BESUM Vol. III, Annex 24**); ICAO Preliminary Objections (A), Exhibit 9, *Declaration of the United Arab Emirates* (5 June 2017) (**BESUM Vol. III, Annex 24**).

[332] BESUM, para. 6.53(b). Joint Appellants seek to establish this proposition by reference to the Court's jurisprudence, but Qatar fails to see how that jurisprudence supports it. In both *United States Diplomatic and Consular Staff in Tehran* and *Oil Platforms*, the Court had no difficulty concluding that the negotiation requirement in Article XXI, paragraph 2 of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran was fulfilled. In the former case, and as explained above, the Court reached that conclusion on the basis of the Iranian Government's "immediate and total refusal" to negotiate. *See United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, paras. 47-48, 51-52. In the latter, with respect to Iran's claims under the Treaty, the United States did not even challenge the jurisdiction of the Court on the basis that the negotiation requirement had not been satisfied. *Oil Platforms (Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, para. 16. This suggests a recognition on the part of the United States of the opposite conclusion from that drawn by Joint Appellants; namely, the absence of diplomatic relations *is* an obstacle to the ability of a State to attempt to initiate negotiations. With respect to the United States' counter-claims under the Treaty, the Court similarly held that the negotiation requirement had been satisfied without referring to any specific negotiations between the parties. *Oil Platforms (Iran v. United States of America)*, Merits, Judgment, I.C.J. Reports 2003, para. 107. This further suggests that the absence of diplomatic relations may constitute an obstacle to negotiations. Joint Appellants' reliance on Article 63 of the Vienna Convention on the Law of Treaties, providing that "[t]he severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by treaty", does not detract from this observation. BESUM, para. 6.53(b). While this may be true in terms of the continued legal bindingness of the treaty provisions in question, which after all is the subject of Article 63, it says nothing as to whether the relations established between the parties under that treaty may be affected as a matter of fact.

stated that there was "nothing to negotiate" with Qatar.[333] Then on 22 June 2017, Joint Appellants issued the so-called 13 Demands.[334] These included demands that Qatar "[s]cale down diplomatic ties with Iran"; "shut down Al Jazeera and its affiliate stations"; "halt military cooperation with Turkey inside of Qatar"; and "align [its] military, political, social and economic policies with the other Gulf and Arab countries".[335] Qatar was also instructed to "[a]gree to all the demands within 10 days", and "[c]onsent to monthly compliance audits in the first year after agreeing to the demands, followed by quarterly audits in the second year, and annual audits in the following 10 years".[336]

4.31 Qatar considered Joint Appellants' demands to be patently unreasonable.[337] It was not alone. The Secretary of State of the United States publicly stated that

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[333] Jon Gambrell, "Emirati diplomat to AP: 'Nothing to negotiate' with Qatar", *Associated Press* (7 June 2017) (**QCM (A) Vol. IV, Annex 72**).

[334] ICAO Response to the Preliminary Objections (A), Exhibit 28, *State of Qatar Announces Receipt of Paper Containing Demands from Siege Countries, Egypt* (**BESUM Vol. IV, Annex 25**); ICAO Response to the Preliminary Objections (A), Exhibit 29, *List of demands by Saudi Arabia, other Arab nations* (**BESUM Vol. IV, Annex 25**).

[335] ICAO Response to the Preliminary Objections (A), Exhibit 29, *List of demands by Saudi Arabia, other Arab nations* (**BESUM Vol. IV, Annex 25**).

[336] ICAO Response to the Preliminary Objections (A), Exhibit 29, *List of demands by Saudi Arabia, other Arab nations* (**BESUM Vol. IV, Annex 25**). On or about 19 July 2017, Joint Appellants supplemented the 13 Demands with 6 Principles, focusing on compliance with the 2014 Riyadh Agreement and outcomes of the 2017 Riyadh Summit, addressing extremism and refraining from acts of provocation and interference in the affairs of other States. *See* "Arab countries' six principles for Qatar 'a measure to restart the negotiation process'", *The National* (19 July 2017) (**QCM (A) Vol. IV, Annex 85**); 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) (**BESUM Vol. IV, Annex 25**).

[337] ICAO Response to the Preliminary Objections (A), Exhibit 39, *Qatari, German Foreign Ministers: Dialogue Only Option to Resolve Crisis* (4 July 2017), p. 3 (**BESUM Vol. IV, Annex 25**).

Joint Appellants' demands were "difficult to meet".[338] The United Kingdom's Foreign Secretary similarly suggested that the demands were not "realistic".[339] And the German Foreign Ministry characterised the 13 Demands as "very provocative".[340]

4.32 On 27 June 2017, the Minister of Foreign Affairs of Saudi Arabia confirmed that the 13 Demands were "non-negotiable".[341] He added:

> "It's very simple. We made our point. We took our steps and it's up to the Qataris to amend their behaviour. Once they do, things will be worked out. But if they don't, they will remain isolated. … If Qatar wants to come back into the [Gulf Cooperation Council] pool, they know what they have to do".[342]

4.33 The same day, the UAE's Ambassador to the Russian Federation confirmed what would happen if Qatar did not capitulate to the 13 Demands within the ten days they gave it: "[W]e'd no longer be interested in bringing Qatar back into the Gulf and the Arab fold".[343]

4.34 And as if there was any lingering doubt over the character of Joint Appellants' demands of Qatar, the following day, 28 June 2017, the Minister of

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[338] ICAO Response to the Preliminary Objections (A), Exhibit 30, *Qatar demands difficult to meet, says US* (25 June 2017) (**BESUM Vol. IV, Annex 25**).

[339] *Ibid.*

[340] "Saudi demands from Qatar 'very provocative': Germany", *Reuters* (26 June 2017) (**QCM (A) Vol. IV, Annex 80**).

[341] ICAO Response to the Preliminary Objections (A), Exhibit 34, *Qatar condemns Saudi refusal to negotiate over demands* (28 June 2017) (**BESUM Vol. IV, Annex 25**).

[342] *Ibid.*

[343] ICAO Response to the Preliminary Objections (A), Exhibit 31, *Qatar facing indefinite isolation, UAE says* (27 June 2017) (**BESUM Vol. IV, Annex 25**).

Foreign Affairs of Saudi Arabia reiterated: "Our demands on Qatar are *non-negotiable*".[344]

4.35 It is unclear to Qatar how Joint Appellants can in good faith take the view that Qatar failed to discharge its obligation to negotiate when they themselves, after severing diplomatic relations, took the view that there was "nothing to negotiate" unless Qatar adhered to their demands, which themselves were "non-negotiable".

4.36 As stated, the Court has made clear that a disputing party's "immediate and total refusal" to negotiate, without more, dispenses with the need to examine the other party's attempts to negotiate.[345] The Court has also suggested that when a disputing party "insists upon its own position without contemplating any modification of it", it is not complying with its obligation to conduct itself so that the negotiations are "meaningful".[346]

4.37 In this case, Joint Appellants have not only refused to negotiate, but have also expressly conditioned any negotiation on acceptance of demands that themselves are non-negotiable. *A fortiori*, the negotiation requirement is satisfied even without examining the details of Qatar's specific attempts to negotiate.

4.38 That said, the record shows that in spite of Joint Appellants' severance of all diplomatic channels of communication and their refusal to negotiate absent Qatar's capitulation to their demands, Qatar repeatedly and publicly asserted its

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[344] Naser Al Wasmi, "UAE and Saudi put pressure on Qatar ahead of demands deadline", *The National* (28 June 2017) (**QCM (A) Vol. IV, Annex 81**) (emphasis added).

[345] *See United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, para. 52.

[346] *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, para. 85(a).

openness to dialogue and negotiation, including over the question of the aviation prohibitions.[347] For example, on 11 September 2017, Qatar's Deputy Prime Minister and Minister of Foreign Affairs stated before the UN Human Rights Council that Qatar was ready to enter dialogue to end the Gulf crisis.[348] Then, on 19 September 2017, His Highness the Amir of Qatar spoke before the UN General Assembly, saying:

> "[W]e have taken an open attitude towards dialogue without dictation, and have expressed our readiness to resolve differences through compromises based on common undertakings. Resolving conflicts by peaceful means is actually one of the priorities of our

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[347] ICAO Response to the Preliminary Objections (A), Exhibits 16-18, 20-21, 23-26, 32, 34-40, 42, 44, 48-57, 59-63, 66-72, 74 (**BESUM Vol. IV, Annex 25**). Joint Appellants seek to discount Qatar's evidence postdating the date of filing of Qatar's Application (30 October 2017), arguing that "compliance with any preconditions for jurisdiction must be fulfilled as at the date of seisin". BESUM, paras. 6.75, 6.90-6.92. Although Qatar satisfied the negotiation requirement as of the date of the submission of the dispute to the Council, Qatar does not concede that the negotiation requirement *must* be satisfied as of that date. Qatar maintains that, although the Court generally considers issues of jurisdiction and admissibility as of the date of the Application, this is not an iron-clad rule. In *Mavrommatis Palestine Concessions*, the Court's predecessor held that "[e]ven …if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications", noting that "[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law". *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Jurisdiction, Judgment, 1924, P.C.I.J. Series A, No. 2, p. 34. Much more recently, in *Croatia v. Serbia*, the Court held that the relevant date was that of the decision on jurisdiction, not that of the filing of the Application because "it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew". *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, I.C.J. Reports 2008, para. 85. This logic is equally applicable here given Joint Appellants' intransigence. In any event, the Court has accepted that "conduct subsequent to the application … may be relevant for various purposes", in particular to "confirm the existence of a dispute". *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, para. 43. There is no reason why it should be otherwise in the case of other requirements found in a jurisdictional clause. It follows that, at the very least, Qatar's evidence postdating 30 October 2017 may serve to confirm the futility of negotiations already evident at that time.

[348] Permanent Mission of the State of Qatar to the United Nations Office in Geneva, Switzerland, *HE the Foreign Minister delivers a statement before the 36th Session of the Human Rights Council* (11 Sept. 2017) (**QCM (A) Vol. III, Annex 54**).

> foreign policy. From here, I renew the call for an unconditional dialogue based on mutual respect for sovereignty …".[349]

4.39 Although Joint Appellants could have exercised their right to reply to Qatar's address (as Qatar did with respect to the UAE's, Saudi Arabia's and Bahrain's addresses[350]), they all remained silent after His Highness the Amir of Qatar spoke.

4.40 Joint Appellants sweepingly dismiss these and other expressions of openness as a mere "tactic", accusing Qatar of "tak[ing] no concrete steps actually to attempt to initiate negotiations".[351] It lies ill in the mouth of Joint Appellants to accuse Qatar of "tactics" when they themselves first refused, and then conditioned any negotiation on prior acceptance of demands that third States characterised as unrealistic[352] and provocative.[353]

4.41 Joint Appellants further dismiss Qatar's attempts to negotiate because they "were not addressed to [them], but instead they were either addressed to third

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[349] UN 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 (**QCM (A) Vol. III, Annex 55**).

[350] *See* UN General Assembly, 72nd Session, General Debate, *Statement by His Highness Sheikh Abdullah Bin Zayed Al Nahyan, Minister of Foreign Affairs and International Cooperation of the United Arab Emirates* (22 Sept. 2017) (**QCM (A) Vol. III, Annex 57**); UN General Assembly, 72nd Session, General Debate, *H.E. Mr. Shaikh Khalid Bin Ahmed Bin Mohamed Al Khalifa, Minister for Foreign Affairs of Bahrain* (22 Sept. 2017) (**QCM (A) Vol. III, Annex 58**); UN General Assembly, 72nd Session, General Debate, *H.E. Mr. Adel Ahmed Al-Jubeir, Minister of Foreign Affairs of Saudi Arabia, Summary of Statement* (23 Sept. 2017) (**QCM (A) Vol. III, Annex 59**).

[351] BESUM, para. 6.61.

[352] ICAO Response to the Preliminary Objections (A), Exhibit 30, *Qatar demands difficult to meet, says US* (25 June 2017) (**BESUM Vol. IV, Annex 25**); "Qatar given 10 days to meet 13 sweeping demands by Saudi Arabia", *The Guardian* (23 June 2017) (**QCM (A) Vol. IV, Annex 79**).

[353] "Saudi demands from Qatar 'very provocative': Germany", *Reuters* (26 June 2017) (**QCM (A) Vol. IV, Annex 80**).

parties and subsequently reported in the media or constitute press releases issued by Qatar to the world at large".[354] As the Court has stressed, however, "it is not so much the form of negotiation that matters as the *attitude and views* of the Parties on the substantive issues of the question involved".[355] And Qatar's attitude and views were clear: it remained open to "unconditional dialogue".[356] Joint Appellants' position was equally clear: there was "nothing to negotiate" with Qatar.[357]

4.42 In fact, the only time that one of the Joint Appellants' leaders actually agreed to engage with Qatar directly (albeit only very briefly), His Highness the Amir did take "concrete steps" to attempt negotiations. On 8 September 2017, with the facilitation of the President of the United States, His Highness the Amir of Qatar called the Crown Prince of Saudi Arabia by telephone. As reported by the official news agency of Saudi Arabia, the Saudi Press Agency, during this conversation, "the Emir of Qatar expressed his desire to sit at the dialogue table and discuss the demands of the four countries".[358] According to Qatar News Agency ("QNA"), His Highness the Amir also welcomed a proposal made by the Saudi Crown Prince "to

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[354] BESUM, para. 6.76.

[355] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa),* Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 346 (emphasis added); *see also Georgia v. Russian Federation*, Preliminary Objections, Judgment, I.C.J. Reports 2011, para. 160 ("[T]he Court has come to accept less formalism in what can be considered negotiations …").

[356] UN 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 (**QCM (A) Vol. III, Annex 55**).

[357] Jon Gambrell, "Emirati diplomat to AP: 'Nothing to negotiate' with Qatar", *Associated Press* (7 June 2017) (**QCM (A) Vol. IV, Annex 72**).

[358] "Saudi Arabia suspends dialogue, saying Qatar 'distorting facts'", *The Guardian* (8 Sept. 2017) (**QCM (A) Vol. IV, Annex 89**) (emphasis added).

assign two envoys to settle [the] issues in dispute",[359] which of course include the aviation prohibitions. Immediately after the call, however, Saudi Arabia reversed course and announced the "suspension of *any* dialogue or communication with the authority in Qatar".[360] It did this only because QNA failed to report that it was Qatar that had initiated the call.[361] The prospects of negotiation returned to zero, despite His Highness the Amir of Qatar's genuine attempt to negotiate.

4.43 Joint Appellants' Memorial has difficulty characterising this call as something other than a genuine attempt to negotiate. They make four rather defensive arguments, none of which have any merit.

4.44 *First*, Joint Appellants argue that "the evidence of the content of the supposed conversation is unreliable", and criticise Qatar for "rel[ying] only on press reports" and not providing "a transcript or contemporaneous note or an official statement from Qatar".[362] However, one of the press reports on which Qatar relies originates from Saudi Arabia's official news agency, which expressly relays that "the Emir of Qatar expressed his desire to sit at the dialogue table and discuss the demands of the four countries".[363] While there is some inconsistency in the press accounts about whether the Saudi Crown Prince proposed the two envoys, *all*

[359] "Hopes for Qatar crisis breakthrough raised, shattered within minutes", *Gulf News* (9 Sept. 2017) (**QCM (A) Vol. IV, Annex 90**).

[360] "Saudi Arabia suspends dialogue, saying Qatar 'distorting facts'", *The Guardian* (8 Sept. 2017) (**QCM (A) Vol. IV, Annex 89**) (emphasis added).

[361] "Qatar crisis: Saudi Arabia angered after emir's phone call", *BBC News* (9 Sept. 2017) (**QCM (A) Vol. IV, Annex 91**).

[362] BESUM, para. 6.78.

[363] "Saudi Arabia suspends dialogue, saying Qatar 'distorting facts'", *The Guardian* (8 Sept. 2017) (**QCM (A) Vol. IV, Annex 89**).

of the press accounts, including those from Saudi Arabia and the UAE,[364] agree on the general content of the conversation.

4.45 *Second*, Joint Appellants argue that "Qatar did not itself claim that it offered to negotiate in the phone call".[365] Again, Qatar relies on the consensus description of the call in press reports, as described above, which leaves no doubt that the call constituted a genuine attempt by His Highness the Amir of Qatar to negotiate the dispute, including the aviation prohibitions, among other things. In fact, a report from Gulf News, a news agency operating out of Dubai, UAE, records a statement by a Saudi Foreign Ministry official stating that "[t]he call was at the request of Qatar and was a *request for dialogue* with the four countries on the demands …".[366]

4.46 *Third*, Joint Appellants argue that this phone conversation was only with Saudi Arabia, not the other three Appellants.[367] That, of course, is true. However, according to the account of the call by the Saudi official news agency itself, His Highness the Amir "expressed his desire to sit at the dialogue table and discuss the demands of the *four countries* to ensure the interests of *all parties* …".[368] Given that in all their actions since June 2017, including with respect to the aviation prohibitions, Joint Appellants have acted jointly and in concert—and continue to do so before the Court—it would be excessively formalistic to discount the call just

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[364] "Hopes for Qatar crisis breakthrough raised, shattered within minutes", *Gulf News* (9 Sept. 2017) (**QCM (A) Vol. IV, Annex 90**); "Saudi Arabia suspends dialogue, saying Qatar 'distorting facts'", *The Guardian* (8 Sept. 2017) (**QCM (A) Vol. IV, Annex 89**).

[365] BESUM, para. 6.79.

[366] "Hopes for Qatar crisis breakthrough raised, shattered within minutes", *Gulf News* (9 Sept. 2017) (**QCM (A) Vol. IV, Annex 90**) (emphasis added).

[367] BESUM, para. 6.82.

[368] "Hopes for Qatar crisis breakthrough raised, shattered within minutes", *Gulf News* (9 Sept. 2017) (**QCM (A) Vol. IV, Annex 90**) (emphasis added).

because the leaders of the other three Appellants were not on the line. Indeed, the account of the call by the Saudi official news agency makes reference to "details … to be announced later after Saudi Arabia concludes an understanding with Bahrain, the United Arab Emirates and Egypt",[369] which again demonstrates the degree of coordination among Joint Appellants.

4.47 *Fourth*, Joint Appellants argue that the telephone conversation did not concern "compliance with relevant international obligations in the field of civil aviation".[370] Relatedly, they add that:

> "such a discussion as to the need for dialogue, couched in the most general terms, and in the context of a far-wider dispute between the Parties, self-evidently does not constitute either negotiations in relation to the interpretation or application of the Chicago Convention or an attempt to initiate negotiations in that regard".[371]

4.48 As explained above, however, the negotiation requirement is satisfied as long as there is a genuine attempt to negotiate "with a view to resolving the dispute". All the press reports agree that His Highness the Amir of Qatar "expressed his desire to sit at the dialogue table and discuss the demands of the four countries",[372] which were raised in the context of measures which included the aviation prohibitions. The same sources also say that His Highness the Amir

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[369] *Ibid.*

[370] BESUM, para. 6.80.

[371] *Ibid.*, para. 6.81.

[372] "Saudi Arabia suspends dialogue, saying Qatar 'distorting facts'", *The Guardian* (8 Sept. 2017) (**QCM (A) Vol. IV, Annex 89**).

and the Crown Prince were favourably predisposed to "assign[ing] two envoys to settle issues in dispute",[373] one of which is the aviation prohibitions.

4.49 The fact that the "issues in dispute" include matters beyond just the aviation prohibitions does not mean that the call should be discounted as a genuine attempt to negotiate an amicable resolution of the Parties' dispute under the Chicago Convention. Nor can it be denied that the resolution of those broader issues could also bring about the resolution of the aviation prohibitions.[374] As explained above, Joint Appellants' view of the subject-matter of negotiations is excessively formalistic and unsupported by the Court's jurisprudence.[375]

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[373] "Hopes for Qatar crisis breakthrough raised, shattered within minutes", *Gulf News* (9 Sept. 2017) (**QCM (A) Vol. IV, Annex 90**).

[374] This does not mean that the dispute under the Chicago Convention is somehow subsumed under the broader dispute between the Parties, nor does it mean that the "real issue" of the dispute lies outside of the Chicago Convention, as Joint Appellants allege at BESUM, para. 6.89. Qatar recalls the Court's statement in *United States Diplomatic and Consular Staff in Tehran* to the effect that

> "legal disputes between sovereign States by their very nature are likely to occur in political contexts, *and often form only one element in a wider and long-standing political dispute between the States concerned*. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes".

United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980, para. 37 (emphasis added).

[375] *See supra*, paras. 4.13-4.15.

4.50 In any event, it is not true that Qatar's attempts "did not deal with the specific subject-matter of Qatar's claims" under the Chicago Convention.[376] On 28 June 2017, the BBC reported that His Excellency the Foreign Minister of Qatar "condemned its Gulf neighbours for refusing to negotiate *over their demands for restoring air, sea and land links*".[377] "Air links" is an obvious reference to the aviation prohibitions.

4.51 On 5 July 2017, His Excellency the Foreign Minister of Qatar stated:

> "The answer to our disagreements is not blockades and ultimatums. It is dialogue and reason. We in Qatar are always open to both, and we welcome any serious efforts to resolve our differences with our neighbours … And we always welcome dialogue and negotiations. … Qatar continues to call for dialogue … Qatar stands ready to engage in a negotiations process with a clear framework and set of principles that guarantee that our sovereignty is not infringed upon".[378]

4.52 Although His Excellency the Foreign Minister did not expressly refer to the aviation prohibitions in his speech, he repeatedly referred to the "blockade" and also referred to "extraordinary, unprovoked and hostile actions against Qatar".[379] Such actions no doubt encompassed the aviation prohibitions, among other measures.

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[376] BESUM, para. 6.83.

[377] ICAO Response to the Preliminary Objections (A), Exhibit 34, *Qatar condemns Saudi refusal to negotiate over demands* (28 June 2017) (**BESUM Vol. IV, Annex 25**) (emphasis added).

[378] ICAO Response to the Preliminary Objections (A), Exhibit 40, *Foreign Minister: Any Threat to Region is Threat to Qatar* (5 July 2017) (**BESUM Vol. IV, Annex 25**).

[379] *Ibid.*

4.53 On 22 July 2017, His Highness the Amir of Qatar delivered his first public address following the imposition of the aviation prohibitions and other measures on 5 June 2017. He expressly stated that Qatar is "ready for dialogue and for reaching settlements on all contentious issues in this context".[380] The "contentious issues" included, of course, the aviation prohibitions, which His Highness the Amir also specifically mentioned during his speech.[381]

4.54 Despite Qatar's calls for negotiation, on 30 July 2017, Joint Appellants' Foreign Ministers reiterated their inflexibility. At a joint press conference with his counter-parts from the other three Appellants, the Minister of Foreign Affairs of Saudi Arabia stated that "there is no negotiation over the 13 demands".[382] Importantly, the Minister added that "we made a decision not to allow our airspace or borders to be used and this is our sovereign right".[383] There is thus no doubt that the subject-matter concerning which there could be "no negotiation" included, among other things, the aviation prohibitions.

4.55 In conclusion, Qatar tried repeatedly to engage with Joint Appellants to settle the dispute before it instituted proceedings before the ICAO Council on 30 October 2017. All of its efforts were rebuffed, and even now there is no indication that this is going to change unless Qatar capitulates to Joint Appellants' demands.

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[380] "Emir speech in full text: Qatar ready for dialogue but won't compromise on sovereignty", *The Peninsula* (22 July 2017), p. 7 (**QCM (A) Vol. IV, Annex 86**).

[381] *Ibid.* ("I also thank all those who opened their airspace and territorial waters when our brothers closed theirs".) *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) (**BESUM Vol. IV, Annex 25**).

[382] 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) (**BESUM Vol. IV, Annex 25**).

[383] *Ibid.*

On 27 May 2018, Bahrain's Foreign Minister stated that the circumstances did not indicate "any glimmer of hope" for a solution.[384] And as recently as 26 September 2018, the Saudi Minister of Foreign Affairs warned that "if [Qatar] [does not change] we're patient people. We'll wait for ten, fifteen, twenty years, fifty years. … We have no issue".[385]

4.56 The present situation is thus reminiscent of *United States Diplomatic and Consular Staff in Tehran*. Just like Iran, Joint Appellants refused to enter into any discussions on any issue, including on the aviation prohibitions. This can be seen in, among other things, their closure of all diplomatic channels of communication and their political leaders' repeated statements that they were unwilling to negotiate. The conclusion is therefore inescapable: just as in *United States Diplomatic and Consular Staff in Tehran*, the negotiation requirement was satisfied.

2. Qatar unsuccessfully tried to settle the dispute through ICAO

4.57 Qatar also sought to engage Joint Appellants through ICAO's institutional framework. The record shows that Joint Appellants excluded the aviation prohibitions from the Council's discussion of Qatar's request under Article 54(n) of the Chicago Convention,[386] while denying their wrongfulness under the Chicago

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[384] "Bahrain sees 'no glimmer of hope' for ending Qatar crisis soon", *Reuters* (27 May 2018) (**QCM (A) Vol. IV, Annex 99**).

[385] Council on Foreign Relations, *A Conversation with Adel al-Jubeir* (26 Sept. 2018) (**QCM (A) Vol. IV, Annex 125**). Joint Appellants had reiterated their "firm position on the necessity of Doha fulfilling the 13 demands" at an earlier meeting during the 29th Arab League Summit. *See* ICAO Response to the Preliminary Objections (A), Exhibit 85, *Arab Quartet stresses Qatar must meet 13 demands to mend ties* (14 April 2018) (**BESUM Vol. IV, Annex 25**).

[386] Article 54(n) of the Chicago Convention provides that "[t]he Council shall … [c]onsider any matter relating to the Convention which any contracting State refers to it". Chicago Convention, Art. 54(n) (**BESUM Vol. II, Annex 1**).

Convention. The message was once again clear: Qatar should look for prospects of amicable settlement of the dispute elsewhere.

4.58 At the outset, it bears recalling that—in the words of Judge Buergenthal—"within the ICAO framework, parliamentary diplomacy can take the place of direct negotiations" provided that "both parties to the dispute participated therein on opposite sides".[387] Indeed, the significance of ICAO's good offices cannot be overstated—notably, in none of the disputes formally submitted to it did the Council have to render a decision on the merits because the parties were ultimately able to settle their disputes amicably.[388]

4.59 It follows that Joint Appellants' argument that Qatar's engagement of the ICAO framework should not be considered a "genuine attempt to negotiate" because Qatar sought to engage the ICAO organs, not Joint Appellants, and did not include in its letters and requests an invitation to negotiate addressed directly to them,[389] is irrelevant. What is relevant is that Qatar engaged ICAO's organs since the very first day of the aviation prohibitions, informing them of its views on the legality of those measures under the Chicago Convention and asking for their intervention.[390] When informed of Qatar's appeals, Joint Appellants first remained silent[391] and then either refused to discuss them at all or expressed the view that the

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[387] Thomas Buergenthal, Law-making in the International Civil Aviation Organization, 1969, Part III, p. 131 (**BESUM Vol. VI, Annex 125**).

[388] Paul Stephen Dempsey, *Public International Air Law* (2017), p. 921 (**QCM (A) Vol. IV, Annex 116**).

[389] BESUM, paras. 6.65-6.66.

[390] *See* ICAO Response to the Preliminary Objections (A), Exhibits 1-6 (**BESUM Vol. IV, Annex 25**).

[391] Two days after the imposition of the aviation prohibitions, on 7 June 2017, the ICAO Secretary General replied to Qatar's 5 June appeal, stating that she had "brought the matter to the attention of the relevant Representatives on the Council of ICAO". *Letter* from Fang Liu, ICAO Secretary General to Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority,

aviation prohibitions do not give rise to a breach of the Chicago Convention or its Annexes.

4.60 Indeed, towards the end of the Council's 211th Session, on 23 June 2017, when the Council discussed how it would address Qatar's request under Article 54(n) of the Chicago Convention, seeking the intervention of the Council in connection with Joint Appellants' aviation prohibitions,[392] the three Appellants on the Council (Egypt, Saudi Arabia and the UAE) refused to discuss them. Saudi Arabia stated that "the focus of the discussion should rest on safety, security and air navigation".[393] The UAE agreed.[394] And Egypt foreshadowed Joint Appellants' First Preliminary Objection by warning ICAO to "not delve into political considerations".[395] The Council nonetheless agreed to have an extraordinary session, later scheduled for 31 July 2017, to discuss Qatar's request.[396]

4.61 Joint Appellants' refusal to discuss the aviation prohibitions is also reflected in their joint working paper submitted prior to the Council's extraordinary

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Reference No. AN 13/4/3/Open-AMO66892 (7 June 2017) (**QCM (A) Vol. III, Annex 22**). At the time, three of the Joint Appellants (Egypt, Saudi Arabia and the UAE) were among the thirty-six Member States serving on the ICAO Council. They were thus formally notified of Qatar's complaint. None of them, however, provided any response of any kind.

[392] ICAO Council, 211th Session, *Summary Minutes of the Tenth Meeting*, ICAO Doc. C-MIN 211/10 (23 June 2017), para. 9 ("the intervention of the ICAO Council in the Matter of the Actions of the Arab Republic of Egypt, the Kingdom of Saudi Arabia, the United Arab Emirates (UAE) and the Kingdom of Bahrain to close their Airspace to aircraft registered in the State of Qatar") (**QCM (A) Vol. III, Annex 24**).

[393] ICAO Council, 211th Session, *Summary Minutes of the Tenth Meeting*, ICAO Doc. C-MIN 211/10 (23 June 2017), para. 15 (**QCM (A) Vol. III, Annex 24**).

[394] *Ibid.*, para. 18.

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

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

session.[397] Joint Appellants again invited the Council to defer the discussion on the aviation prohibitions as a "non-urgent matter[]" and "limit its deliberations to the urgent Article 54 (n) matters which are related to the safety of international civil aviation".[398]

4.62 The discussions at the extraordinary session of the Council, at which Qatar and all four Appellants were present,[399] are even more revealing. Qatar complained of "the successive NOTAMs 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".[400] It also requested that Joint Appellants "lift the unjust air blockade that had been imposed upon it by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates", noting that "it was a dispute that touched upon the Convention's essence".[401] The UAE, on behalf of all four Appellants, argued that "their airspace closures were legitimate, justified, and a proportionate response to Qatar's actions

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[397] 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) (**BESUM Vol. IV, Annex 25**). Prior to the submission of that working paper, the President of the Council invited Bahrain (and Qatar) to participate, without a vote, in the extraordinary session on the grounds of special interest; both States accepted. ICAO Response to the Preliminary Objections (A), Exhibit 10, *ICAO Council, Extraordinary Session, Summary Minutes, ICAO Doc. C-MIN Extraordinary Session* (31 July 2017), paras. 4-5 (**BESUM Vol. IV, Annex 25**).

[398] 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), para. 5.1(b) (**BESUM Vol. IV, Annex 25**).

[399] 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 (**BESUM Vol. IV, Annex 25**).

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

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

and were permitted under international law",[402] and reiterated the position stated in their working paper that "the Council should limit its 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".[403]

4.63 Members of the Council well understood the intractable nature of the situation with which the Council was faced. Spain, for example, stated that "it would have liked to have seen the matter at hand resolved through negotiations between the five Parties" but "*that had not been possible*".[404]

4.64 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 Application with the Council under Article 84 (and, as explained above, it persists to the present day).

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[402] *Ibid.*, para. 32. This statement was preceded by the statement of the Minister of Foreign Affairs of Saudi Arabia at a joint press conference with his counterparts from the other Appellants the day before to the effect that "we made a decision not to allow our airspace or borders to be used and this is our sovereign right". 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) (**BESUM Vol. IV, Annex 25**). A disputing party that consistently maintains the view that the facts do not give rise to a dispute concerning the interpretation or application of a treaty cannot be criticizing at the same time the other disputing party for failing to undertake a genuine attempt to negotiate; rather, in these circumstances, it is obvious that the dispute cannot be settled by negotiation. *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, para. 21.

[403] 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 (**BESUM Vol. IV, Annex 25**).

[404] 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. 75 (**BESUM Vol. IV, Annex 25**) (emphasis added).

4.65 In conclusion, Qatar's efforts at multilateral diplomacy, just like its efforts at bilateral diplomacy, failed to resolve the dispute. They were met at all times with Joint Appellants' refusal to discuss the aviation prohibitions or even to acknowledge the possibility that they may have breached the Chicago Convention. Although these exchanges took place in a multilateral setting, they nonetheless qualify as genuine attempts to negotiate. As stated, the Court has made clear that "diplomacy by conference or parliamentary diplomacy has come to be recognized … as one of the established modes of international negotiations".[405] The Court has equally made clear that no specific format for negotiations is required.[406] Joint Appellants' criticism of Qatar's reliance on these exchanges is therefore misplaced.

3. Qatar unsuccessfully tried to settle the dispute through the WTO

4.66 In addition to trying to settle the dispute through direct means and within the ICAO framework, Qatar also tried to negotiate about the aviation prohibitions within the WTO framework.

4.67 Specifically, on 31 July 2017, Qatar asked Appellants Saudi Arabia, Bahrain and the UAE "to enter into consultations concerning measures adopted in the context of coercive attempts at economic isolation imposed … against the State of Qatar".[407] Qatar's Request for Consultations expressly stated that the measures

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

[406] *See ibid.*

[407] ICAO Response to the Preliminary Objections (A), Exhibit 11, World Trade Organization, *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. 8(i) (**BESUM Vol. IV, Annex 25**); ICAO Response to the Preliminary Objections (A), Exhibit 12, World Trade Organization, *Bahrain — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS527/1 (4 Aug. 2017), para. 8(i) (**BESUM Vol. IV, Annex 25**); ICAO Response to the Preliminary Objections (A), Exhibit 13, World Trade Organization, *United Arab*

included 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]".[408]

4.68 The three States responded by joint letter dated 10 August 2017, in which they "decline[d] to engage in consultations on this matter" because, they said, "the measures referenced in the Request implement diplomatic and national security decisions with respect to which all WTO members maintain full sovereignty".[409]

4.69 In their Memorial, Joint Appellants claim that Qatar's attempts to engage in consultations within the WTO framework are irrelevant to the negotiation requirement under Article 84 of the Chicago Convention. This is true, they say, because the Request for consultations "made no mention of the relevant obligations contained in the Chicago Convention and IASTA that Qatar alleged in its Applications and Memorials had been breached".[410]

Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WT/DS526/1 (4 Aug. 2017), para. 8(i) (**BESUM Vol. IV, Annex 25**).

[408] *Ibid.*

[409] 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 (**BESUM Vol. IV, Annex 25**).

[410] BESUM, para. 6.73; *see also* ICAO Rejoinder (A), paras. 122-126 (**BESUM Vol. IV, Annex 26**).

4.70 As explained, however, Qatar was not required to expressly refer to the Chicago Convention,[411] only the subject-matter of the dispute in question.[412] By referring to the three Appellants' prohibition on Qatari aircraft from accessing their airspace, and their prohibition on flights to and from their territories operated by aircraft registered in Qatar, Qatar plainly did that.

4.71 Joint Appellants' other argument in this respect is equally unavailing. They argue that Qatar's request was not addressed to Egypt and hence "clearly cannot constitute an attempt to initiate negotiations in [this] regard".[413] However, nothing in the three Appellants' response to Qatar's request for consultations deviates from similar statements made by Egypt itself[414] and on behalf of Egypt[415] in ICAO, which betrays the degree of coordination among Joint Appellants and the artificiality of trying to draw distinctions between them in this context.

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[411] *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, para. 30.

[412] *See ibid.*

[413] BESUM, para. 6.72.

[414] *See* ICAO Council, 211th Session, *Summary Minutes of the Tenth Meeting*, ICAO Doc. C-MIN 211/10 (23 June 2017), para. 20 (**QCM (A) Vol. III, Annex 24**).

[415] *See* 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. 32 (**BESUM Vol. IV, Annex 25**); 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) (**BESUM Vol. IV, Annex 25**).

4. Qatar unsuccessfully tried to settle the dispute through the facilitation of third States

4.72 Joint Appellants argue that Qatar did not make any genuine attempt to negotiate "through other channels, such as via the Emir of Kuwait",[416] but they nowhere bother to elaborate why this is so. Again, the record proves them wrong. There were still more efforts to settle the dispute through the intervention of other States. In particular, Kuwait and the United States actively pursued efforts to bring the Parties together, but to no avail owing to Joint Appellants' intransigence.

4.73 Already on 7 June 2017, His Highness the Emir of Kuwait was briefing His Highness the Amir of Qatar "on his efforts in trying to resolve the crisis".[417] Three days later, His Excellency the Foreign Minister of Qatar stated in a televised interview that His Highness the Emir of Kuwait's efforts were "ongoing", and that Qatar "value[d] and appreciate[d]" the efforts, and would "not lose hope" in the process.[418] Then, on 12 June, His Excellency the Foreign Minister 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".[419] On 17 June 2017, he reemphasised the strong efforts of His Highness the Emir of Kuwait and noted that there were

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[416] BESUM, para. 6.82.

[417] ICAO Response to the Preliminary Objections (A), Exhibit 19, *HH the Emir Meets HH the Emir of Kuwait* (7 June 2017) (**BESUM Vol. IV, Annex 25**).

[418] ICAO Response to the Preliminary Objections (A), Exhibit 22, *The Foreign Minister's Interview with RT on GCC Crisis* (10 June 2017) (**BESUM Vol. IV, Annex 25**).

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

"continued visits by the Kuwaiti brothers to the countries that have undertaken those unfair measures".[420]

4.74 Joint Appellants' issuance of their 13 Demands on 22 June 2017 threatened to derail the process, but it did not stop the efforts of His Highness the Emir of Kuwait, who called for unconditional dialogue. Qatar responded to His Highness's appeal favourably,[421] whereas Joint Appellants did not.[422] 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".[423]

4.75 On 30 August 2017, in a joint press conference with the Russian Foreign Minister, His Excellency the Foreign Minister of Qatar referred to

> "the 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, in the contrary, none of the siege countries responded, in continuation of their approach of not responding and ignoring any

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[420] ICAO Response to the Preliminary Objections (A), Exhibit 26, *HE Foreign Minister Expresses Surprise of Reaction of GCC Countries Blockading Qatar* (17 June 2017) (**BESUM Vol. IV, Annex 25**).

[421] ICAO Response to the Preliminary Objections (A), Exhibits 19, 33-36, 38-39, 42, 44-46, 48-49, 59-62, 65-68, 72-74 (**BESUM Vol. IV, Annex 25**).

[422] 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) (**BESUM Vol. IV, Annex 25**).

[423] ICAO Response to the Preliminary Objections (A), Exhibit 65, *UAE Press: Qatar has distorted details of phone call* (11 Sept. 2017) (**BESUM Vol. IV, Annex 25**) (emphasis added).

> mediation efforts, whether from Kuwait or any other friendly country …".[424]

4.76 The "other friendly country" referred to in His Excellency's statement was the United States, which also tried to facilitate a resolution of the dispute, only to see its proposals ignored by Joint Appellants.[425] Two weeks after the announcement of the aviation prohibitions, media reported that the U.S. Secretary of State "has had more than 20 phone calls and meetings with leaders from the gulf and elsewhere".[426] On 27 June 2017, the Secretary of State met with His Excellency the Foreign Minister of Qatar and expressed the importance of reaching a satisfactory solution as soon as possible, as well as his readiness to provide support to achieve this.[427] Referring to this meeting, His Excellency the Foreign Minister of Qatar stated: "We agree that the State of Qatar will engage in a constructive dialogue with the parties concerned if they want to reach a solution and overcome this crisis".[428]

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[424] 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 (**BESUM Vol. IV, Annex 25**).

[425] 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), p. 2 (**BESUM Vol. IV, Annex 25**).

[426] ICAO Response to the Preliminary Objections (A), Exhibit 27, *State Dept. Lashes Out at Gulf Countries Over Qatar Embargo* (20 June 2017), p. 3 (**BESUM Vol. IV, Annex 25**); ICAO Response to the Preliminary Objections (A), Exhibit 47, *Tillerson Tries Shuttle Diplomacy in Qatar Dispute* (11 July 2017) (**BESUM Vol. IV, Annex 25**).

[427] ICAO Response to the Preliminary Objections (A) Exhibit 33, *Foreign Minister Meets US Counterpart* (27 June 2017) (**BESUM Vol. IV, Annex 25**).

[428] ICAO Response to the Preliminary Objections (A), Exhibit 32, *Foreign Minister: Siege Countries' Allegations Should be Supported by Evidence* (27 June 2017) (**BESUM Vol. IV, Annex 25**).

4.77 Joint Appellants were not open to negotiation, however. After holding talks with the U.S. Secretary of State on 27 June 2017, the Saudi Foreign Minister reiterated once again that the 13 Demands were non-negotiable.[429]

4.78 On 11 July 2017, media reported that the U.S. Secretary of State would take the Qatar-U.S. memorandum of understanding on counterterrorism to "leaders in Saudi Arabia, United Arab Emirates and Bahrain to see if it will be enough to end a standoff that has led [them] to blockade Qatar for more than a month".[430] Two days later, representatives of Qatar, the United States and Kuwait met to discuss the results of the U.S. Secretary of State's visit to Saudi Arabia.[431] At the meeting, His Excellency the Foreign Minister of Qatar once again expressed Qatar's openness "to constructive dialogue".[432]

4.79 On 25 July 2017, His Excellency the Foreign Minister of Qatar praised "the great efforts made by U.S. Secretary of State Rex Tillerson during his recent visit to the Gulf countries, which came out with proposals we are going to respond to".[433] However, five days later, his Saudi counterpart reiterated at a joint press

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[429] ICAO Response to the Preliminary Objections (A), Exhibit 34, *Qatar condemns Saudi refusal to negotiate over demands* (28 June 2017) (**BESUM Vol. IV, Annex 25**).

[430] ICAO Response to the Preliminary Objections (A), Exhibit 47, *Tillerson Tries Shuttle Diplomacy in Qatar Dispute* (11 July 2017) (**BESUM Vol. IV, Annex 25**).

[431] ICAO Response to the Preliminary Objections (A), Exhibit 48, *Foreign Minister Meets Kuwaiti Minister of State for Cabinet Affairs, U.S. Secretary of State* (13 July 2017) (**BESUM Vol. IV, Annex 25**).

[432] *Ibid.*

[433] ICAO Response to the Preliminary Objections (A), Exhibit 54, *Qatar's Foreign Minister Says Visit to Washington Aims to Inform US Politicians about Negative Impacts of Gulf Crisis* (25 July 2017), p. 1 (**BESUM Vol. IV, Annex 25**).

conference with the Foreign Ministers of the other three Appellants that "there is no negotiation over the 13 demands".[434]

4.80 As recounted earlier, the President of the United States intervened, facilitating a direct call between His Highness the Amir of Qatar and the Crown Prince of Saudi Arabia on 8 September 2017.[435] Although the conversation appeared to yield progress, the very next day Saudi Arabia accused Qatar of distorting facts and declared that "any dialogue or communication with [the] authority in Qatar shall be suspended".[436]

4.81 On 22 October 2017, the U.S. Secretary of State made clear that Saudi Arabia was not being supportive. He announced that "I did in my meeting with the Crown Prince Mohammad bin Salman ask him to please engage, please engage in dialogue", but he concluded that "it's not clear the parties are ready to engage".[437]

4.82 This unwillingness to engage was common to all four Appellants. As His Excellency the Foreign Minister of Qatar later explained:

> "[T]he U.S. secretary of state visited Qatar and then Saudi Arabia and met with the siege countries, and then returned to Doha with a proposal of principles

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[434] 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) (**BESUM Vol. IV, Annex 25**).

[435] ICAO Response to the Preliminary Objections (A), Exhibit 63, *Emir holds telephone talks with US President* (9 Sept. 2017) **BESUM Vol. IV, Annex 25**).

[436] ICAO Response to the Preliminary Objections (A), Exhibit 64, *Official source: What was published by Qatar News Agency is continuation of Qatari authority's distortion of facts* (9 Sept. 2017) (**BESUM Vol. IV, Annex 25**).

[437] ICAO Response to the Preliminary Objections (A), Exhibit 73, *Remarks With Qatari Foreign Minister Sheikh Mohammed bin Abdulrahman al-Thani* (22 Oct. 2017) (**BESUM Vol. IV, Annex 25**).

> and a roadmap and asked for a response to this proposal within five days …. [We] responded to the roadmap and the list of principles after the five days mentioned by the U.S. secretary of state …. After that, we asked about the measures that should follow. The American response was that *the siege countries did not respond and therefore the matter stalled at that time*".[438]

4.83 Joint Appellants thus frustrated the efforts by Kuwait and the United States to facilitate a resolution of the dispute. As best summarised by the U.S. Secretary of State in an interview conducted a few days before the commencement of proceedings before the Council: "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".[439]

4.84 For all these reasons, Qatar has clearly discharged its obligation to negotiate with Joint Appellants the dispute under the Chicago Convention occasioned by the aviation prohibitions. It tried repeatedly to engage them through multiple avenues in multiple fora. Joint Appellants spurned every overture at every turn. The ICAO Council was therefore correct in finding that Qatar had satisfied the requirements of Article 84 of the Chicago Convention and deciding that it has jurisdiction to address the merits of Qatar's claim.

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[438] ICAO Response to the Preliminary Objections (A), Exhibit 80, *Deputy PM and FM: Investigations Proved Involvement of 2 Siege Countries in QNA Hacking* (10 Jan. 2018) (**BESUM Vol. IV, Annex 25**) (emphasis added).

[439] ICAO Response to the Preliminary Objections (A), Exhibit 71, *Tillerson Faults Saudi-Led Bloc for Failing to End Qatar Crisis* (19 Oct. 2017) (**BESUM Vol. IV, Annex 25**).

II. The ICAO Council Properly Held that Qatar's Application and Memorial Complied with Article 2(g) of the ICAO Rules for the Settlement of Differences

4.85 Joint Appellants argue almost in passing that Qatar's claim is inadmissible because the Memorial it submitted to the Council did not comply with Article 2(g) of the ICAO Rules for the Settlement of Differences. Article 2(g) provides:

> "Any Contracting State submitting a disagreement to the Council for settlement … shall file an application to which shall be attached a memorial containing: … (g) A statement that negotiations to settle the disagreement had taken place between the parties but were not successful".[440]

4.86 Joint Appellants appear to misconstrue the nature of the Article 2(g) requirement. They claim in their Application, for example, that it requires an applicant to "*establish*[] in its Memorial that negotiations to settle the disagreement had taken place between the parties but were not successful".[441] But that is not at all what Article 2(g) says. Article 2(g) states simply that the applicant "shall file an application to which shall be attached a memorial containing: … [a] *statement* that negotiations to settle the disagreement had taken place but were not successful".[442] Similarly, the French version of the Rules refers to "une déclaration *attestant* que des négociations ont eu lieu entre les parties pour régler le désaccord, mais qu'elles n'ont pas abouti".[443]

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[440] ICAO Rules, Art. 2(g) (**BESUM Vol. II, Annex 6**).

[441] ICJ Application (A), para. 19(ii) (emphasis added).

[442] ICAO Rules, Art. 2(g) (**BESUM Vol. II, Annex 6**) (emphasis added).

[443] ICAO Council, *Règlement pour la Solution des Différends* (1957, amended 10 Nov. 1971), Art. 2(g) (**QCM (A) Vol. II, Annex 10**) (emphasis added).

4.87 An applicant's memorial to the ICAO Council is therefore required only to "state" (or "attester"), not "establish" or "affirm",[444] that negotiations to settle the disagreement had taken place but were not successful. This is quite obviously a requirement of form and has been treated consistently as such by the Council. Indeed, in both *Cuba v. United States* and *United States v. 15 EU Member States*, allegations of fact sufficed for the Council to consider that the Article 2(g) requirement had been met.[445]

4.88 Qatar's Memorial to the Council satisfied the Article 2(g) requirement. The last page of the Memorial contains "A statement of attempted negotiations" where Qatar stated: "The Respondents did not permit any opportunity to negotiate the aviation aspects of their hostile actions".[446] Even if Joint Appellants were correct that this is "an acknowledgement … that negotiations to settle the disagreement have not taken place between the Parties",[447] their "immediate and total refusal" to negotiate unless Qatar capitulated to their demands, which is reflected in this statement, would have been enough to discharge the requirement that Article 2(g) purports to "reflect"[448] for the reasons explained above.[449]

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[444] BESUM, para. 6.97.

[445] ICAO Council, *Cuba v. United States*, Memorial of Cuba (11 July 1966), para. 9 (**QCM (A) Vol. II, Annex 11**); ICAO Council, *United States v. 15 EU Member States*, Memorial of the United States, p. 16 (14 Mar. 2000) (**QCM (A) Vol. II, Annex 12**).

[446] ICAO Memorial (A), Section (g) (**BESUM Vol. III, Annex 23**).

[447] BESUM, para. 6.97.

[448] *Ibid.*, para. 6.96.

[449] *See supra*, para. 4.26.

4.89 But as explained above,[450] Joint Appellants are not correct. The last sentence of Qatar's Article 2(g) statement reads: "The severance of diplomatic relations makes *further* negotiating efforts futile".[451] The use of the word "further" reflects what Qatar's Response in the ICAO proceedings and the present Chapter in this Counter-Memorial have amply shown: Qatar did attempt to negotiate.

4.90 In sum, Qatar's Memorial statement is more than enough to satisfy the Article 2(g) requirement. And even if it were not, Qatar's Response to Joint Appellants' Preliminary Objections formally amended its pleadings to include the statement: "Negotiations to settle the disagreement had taken place between the parties but were not successful".[452] If somehow even that were not enough, the minor procedural defect Joint Appellants allege would not be a proper basis for appeal to the Court against the Council's Decision of 29 June 2018, for the reasons explained in the following Chapter concerning Joint Appellants' First Ground of Appeal.

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4.91 For all these reasons, the Court should deny Appellants' Third Ground of Appeal.

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[450] *Ibid.*

[451] ICAO Memorial (A), Section (g) (**BESUM Vol. III, Annex 23**) (emphasis added).

[452] ICAO Response to the Preliminary Objections (A), para. 91 (**BESUM Vol. IV, Annex 25**).

CHAPTER 5

THE COURT SHOULD DENY JOINT APPELLANTS' FIRST GROUND OF APPEAL

5.1 Consistent with the exaggerated tone of their entire submission, Joint Appellants' First Ground of Appeal posits that the procedure adopted by the ICAO Council in rejecting their preliminary objections was "*manifestly* flawed and in violation of *fundamental* principles of due process, which constitute general principles of law, as well as violations of the ICAO Council's own applicable procedural rules".[453] As Joint Appellants see it, "[t]hese failures were *so grave* and *so widespread* as to denude the proceedings and the Decision of *any* judicial character".[454] The consequence of the alleged violations, they say, is that the ICAO Council's decision on jurisdiction is "null and void, and should be set aside".[455] Joint Appellants are mistaken. Their arguments, and with them their First Ground of Appeal, fail for at least three reasons.

5.2 *First*, as the Court held in the 1972 *ICAO Council Appeal* case, whether or not the ICAO Council has jurisdiction is "an objective question of law" to be answered without regard to the procedure followed before the ICAO Council.[456] Even if they occurred (*quod non*), the alleged procedural irregularities Joint Appellants point to are therefore irrelevant in determining whether the ICAO Council correctly decided that it has jurisdiction to hear Qatar's claim (**Section I**).

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[453] BESUM, para. 1.2(a) (emphasis added).

[454] *Ibid.*, para. 3.1 (emphasis added).

[455] *Ibid.*, para. 1.2(a).

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

5.3 *Second*, even assuming *arguendo* that the Court were to consider it necessary to rule on the alleged procedural violations, and even if Joint Appellants could be heard to complain about them now, having failed to do so at the hearing before the Council, none of the Council's actions constitutes the "grave" or "widespread" procedural irregularities Joint Appellants claim. In fact, the ICAO Council complied with the applicable procedural framework and acted consistently with its own practice (**Section II**).

5.4 *Third*, the ostensible procedural irregularities that Joint Appellants identify, even if they occurred and were not waived (*quod non*), did not "prejudice in any fundamental way the requirements of a just procedure"[457] (**Section III**).

5.5 For all three reasons, each of which is independently sufficient, the Court should reject Joint Appellants' First Ground of Appeal.

I. The Court Does Not Need to Rule on the Alleged Procedural Violations

5.6 The Court has already effectively rejected the exact arguments Joint Appellants make in their First Ground of Appeal. Specifically, in the 1972 *ICAO Council Appeal* case, India appealed from an ICAO Council decision rejecting its preliminary objections in a dispute brought by Pakistan. Just like Joint Appellants here, India argued that the ICAO Council's decision was "vitiated" by procedural irregularities.[458] Indeed, the alleged procedural irregularities India invoked closely resemble the ones Joint Appellants raise in this case: (1) the Council failed to state

[457] *Ibid*., para. 45.

[458] *Ibid*., para. 93.

reasons in its decision;[459] (2) the Council's decision was vitiated by the fact that the questions were framed in the wrong manner;[460] and (3) it was not supported by a statutory majority.[461]

5.7 The Court rejected India's arguments. But it first considered the nature of its appellate function in respect of jurisdictional decisions of the ICAO Council. The Court viewed its role as "giv[ing] a ruling as to whether the Council [had] jurisdiction in the case".[462] Making that ruling required the Court only to answer "an objective question of law"[463] that "cannot depend on what occurred before the Council".[464] Because the Council had answered the "objective question of law" concerning its jurisdiction correctly, the Court considered the procedural irregularities India alleged irrelevant.

5.8 The Court explained:

> "*[I]f there were in fact procedural irregularities, the position would be that the Council would have 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 jurisdiction, then, even in the

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[459] *I.C.J. Oral Arguments, Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Minutes of the public sitting held at the Peace Palace, The Hague, from 19 June to 3 July, and on 18 August 1972, p. 607.

[460] *Ibid*., para. 93.

[461] *Ibid.*

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

[463] *Ibid.*

[464] *Ibid.*

> absence of any irregularities, the Council's decision to assume it would have stood reversed".[465]

5.9 It is therefore only appropriate to reverse a jurisdictional decision by the ICAO Council if it did not "[reach] the right conclusion". If it "reached the right conclusion", even "in the wrong way", the decision must stand. For the reasons explained in Chapters 3 and 4 of this Counter-Memorial, the Council plainly reached the right conclusion in this case. Joint Appellants' argument of procedural violations is therefore irrelevant and should be rejected.

5.10 Joint Appellants' never once mention this aspect of the Court's holding in the *1972 ICAO Council's Appeal* case in their Memorial, still less do they argue why the Court should take a different approach here. Qatar considers Joint Appellants' silence telling.

5.11 Joint Appellants only argue that "[a]s the guardian of the integrity of the international judicial process, it falls to the Court to exercise its supervisory authority in respect of procedural deficiencies by the ICAO Council".[466] But the drafters of the Chicago Convention (and of the International Air Services Transit Agreement ("IASTA")) did not entrust the Court with the role of a "guardian of the integrity of the international judicial process".[467] Rather, as the Court itself observed in its 1972 Judgment, the appeal system established under Article 84 of the Chicago Convention aims to "ensur[e] a *certain* measure of supervision by the Court" over the Council's decision-making, and to provide "reassurance for the

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[465] *Ibid*. (emphasis added).

[466] BESUM, para. 3.11.

[467] Nor did they entrust the Court with the responsibility to "set and supervise judicial decision-making in the international legal system", as Joint Appellants boldly allege. *Ibid*. It is for the ICAO Member States and Council to set the procedures for decision-making under Article 84.

Council … that means exist for determining whether a decision as to its own competence is in conformity or not with the provisions of the treaties governing its actions".[468]

5.12 The fact that the Court found irrelevant India's procedural complaints shows that the Court did not consider that its "supervisory authority" reaches procedural questions. By assessing the Council's jurisdiction as an "objective question of law", and making sure the Council gets it right, the Court fully discharges the role entrusted to it under the Chicago Convention.

II. The ICAO Council Properly Discharged its Functions under Article 84 of the Chicago Convention

5.13 Even if, for the sake of argument, the Court were to deem it appropriate to rule on the putative procedural irregularities Joint Appellants raise, their First Ground of Appeal would still have to be rejected because the complaints they raise are meritless. The Council proceedings were entirely consistent with the letter and the spirit of the 1957 ICAO Rules for the Settlement of Differences ("ICAO Rules") and the Rules of Procedure for the Council.

A. JOINT APPELLANTS WERE AFFORDED AMPLE OPPORTUNITY TO PLEAD THEIR CASE

1. The Council extended Joint Appellants' time-limits for the filing of their first responsive brief

5.14 The Article 84 proceedings before the Council began on 30 October 2017 when Qatar filed Application (A) and its Memorial with the Secretary General of

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

ICAO.[469] After verifying that Application (A) complied with the formal requirements of Article 2 of the ICAO Rules, the Secretariat transmitted it and the Memorial to each of the Joint Appellants on 3 November 2017.[470] On 20 November 2017, the Council fixed the time-limit for the filing of the Counter-Memorials pursuant to Article 3(1)(c) of the ICAO Rules.[471] The Council gave Joint Appellants 12 weeks to file their Counter-Memorial (i.e., through 12 February 2018).[472]

5.15 Joint Appellants acted jointly in the proceedings before the Council from their very first procedural act. Specifically, on 16 January 2018, Egypt asked for a six-week extension of the time-limit to submit a Counter-Memorial on behalf of itself and the other Appellants. The Council granted the request on 9 February 2018[473] and set 26 March 2018 as the new time-limit for the filing of the Counter-Memorial.[474]

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[469] ICAO Memorial (A) (**BESUM, Vol. III, Annex 23**). *See also* ICAO Rules, Art. 2 (**BESUM Vol. II, Annex 6**).

[470] ICAO Application (A) (**BESUM, Vol. V, Annex 43**).

[471] *See* ICAO Rules, Art. 3(1)(c) (**BESUM Vol. II, Annex 6**).

[472] Letter of 17 November 2017 from the Secretary-General of ICAO to the Appellants (**BESUM, Vol. V, Annex 43**). Article 28 of the Rules leaves the fixing of time-limits for the filing of briefs to the discretion of the ICAO Council. In general, however, the ICAO Council must fix time-limits with a view to "avoid[ing] any possible delays and to ensure fair treatment of the party or the parties concerned". ICAO Rules, Art. 28 (**BESUM Vol. II, Annex 6**).

[473] Letter of 9 February 2018 from the Secretary-General of ICAO to the Appellants (**BESUM, Vol. V, Annex 45**).

[474] *Ibid.*

2. The Council gave Joint Appellants every opportunity to make their case in writing

5.16 In lieu of submitting their respective Counter-Memorials, Joint Appellants decided to challenge the ICAO Council's jurisdiction. On 19 March 2018, they jointly submitted a document titled "Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates" (the "Preliminary Objections") in accordance with Article 5 of the ICAO Rules.[475]

5.17 Qatar was invited to present comments on the Preliminary Objections by 2 May 2016.[476] It did so within the time-limit set by the Council.[477] Joint Appellants then took the unusual step of asking to submit a reply to Qatar's response.

5.18 The ICAO Council had never previously allowed a party to submit additional pleadings following an applicant's response to a preliminary objection. Qatar therefore opposed Joint Appellants' request.[478] The Council nevertheless

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[475] ICAO Preliminary Objections (A) (**BESUM, Vol. III, Annex 24**). Article 5 of the Rules allows a respondent to challenge the jurisdiction of the Council through a "special pleading" which must be filed "at the latest before the expiry of the time-limit set for delivery of the counter-memorial". According to the ICAO Rules, when a party files a preliminary objection, the proceedings on the merits are suspended. *See* ICAO Rules, Art. 5(2) (**BESUM Vol. II, Annex 6**).

[476] *Letter* from Fang Liu, ICAO Secretary General, to Essa Abdulla Al-Malki, Agent for the State of Qatar (20 Mar. 2018) (**QCM (A) Vol. III, Annex 32**).

[477] BESUM, para. 3.24.

[478] Letter of 28 May 2018 from the Secretary-General of ICAO to the Appellants, attaching Email of 25 May 2018 from the Delegation of the State of Qatar to the Secretary-General of ICAO (**BESUM, Vol. V, Annex 48**). During the ICAO Council proceedings, Qatar complained about the prejudice resulting from this improper shift in the position of the parties in the case. *See, e.g.*, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 41 (**BESUM Vol. V, Annex 53**).

authorised them to file a "rejoinder" no later than 12 June 2018.[479] This time, Joint Appellants complied with the deadline.

5.19 The President's decision to permit Joint Appellants to file a rejoinder meant that they were given two opportunities to brief the Council in writing on the issue of jurisdiction, while Qatar was only granted one.[480]

3. The Council also afforded Joint Appellants an opportunity to present their arguments orally

5.20 The day after Joint Appellants submitted their rejoinder, the President of the Council notified the Parties that a hearing on the preliminary objections would take place during a half-day session on 26 June 2018.[481]

5.21 In the same communication, the President invited the Parties to an informal briefing on the topic of "Settlement of Disputes", scheduled on 19 June 2018. Joint Appellants claim that, during the informal briefing, they raised "strong objections" to the scheduling of "only one half-day session for the hearing" because "it would

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[479] *See* Letter of 28 May 2018 from the Secretary-General of ICAO to the Appellants (**BESUM, Vol. V, Annex 49**); *see also* Letter of 28 May 2018 from the Secretary-General of ICAO to the Appellants, attaching Email of 25 May 2018 from the Delegation of the State of Qatar to the Secretary-General of ICAO (**BESUM, Vol. V, Annex 48**).

[480] Joint Appellants seem to suggest that Qatar is at fault for this because it "did not seek a right of reply". BESUM, para. 3.25. But after the President of the Council had decided that Article 7(1) of the ICAO Rules allowed Joint Appellants to file a rejoinder, seeking a "right of reply" would have been futile. This is because the "rejoinder" is the last pleading under Article 7(4) of the Rules. ICAO Rules, Art. 7(4) (**BESUM Vol. II, Annex 6**). Qatar could have exceptionally sought permission from the Council to submit an additional pleading, but this would have required an additional hearing at best, and therefore, more time before the ICAO Council could begin to consider the merits of Joint Appellants' jurisdictional objections—time that Qatar simply did not have in view of the urgency of the situation.

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

not permit them sufficient time properly to coordinate and present their case".[482] These criticisms are unfounded for at least two reasons.

5.22 *First*, under the ICAO Rules "oral arguments may be admitted at the discretion of the Council".[483] It follows that the time allocated to the presentation is also subject to the Council's discretion. Allocating a half-day session to the hearing was entirely consistent with past Council practice—less time was allotted to *Brazil v. United States*, the immediately prior case before the Council.[484] *Second*, and irrespective of the practice of the Council, the only party that could be said to have been prejudiced by the President's decision was Qatar. Joint Appellants had already enjoyed two opportunities to brief their objections in writing. In contrast, Qatar only had one such opportunity *and* it was the party responding to the last written pleading before the hearing.

5.23 At the 19 June 2018 briefing, the President also informed Joint Appellants "that [they] would be treated as one side …".[485] Joint Appellants do not claim to have objected to that decision.

5.24 Joint Appellants also complain that "the precise schedule and format of the hearing remained in a state of flux until … the day of the hearing".[486] It is unclear, however, how this placed Joint Appellants at a disadvantage *vis-a-vis* Qatar. Qatar

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[482] BESUM, para. 3.27; *see also ibid.*, para. 1.11.

[483] *See* ICAO Rules, Art. 12(2) (**BESUM Vol. II, Annex 6**).

[484] ICAO Preliminary Objections (A), Exhibit 2, ICAO Council – 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO document C-MIN 211/9, 5 July 2017, para. 9 (**BESUM Vol. III, Annex 24**).

[485] BESUM, para. 3.27.

[486] *Ibid.*

was in the exact same position. There is no valid argument that coordination proved difficult because Joint Appellants were four States acting as a single party. They had, after all, already formulated agreed-upon arguments in their written pleadings.

4. The Council soundly rejected Joint Appellants' preliminary objections

5.25 The hearing took place as scheduled on 26 June 2018. The Parties made their arguments in two rounds for each side. When they were done, the ICAO Council decided to vote by secret ballot.[487] After concluding that a decision would require approval by a majority of 19 votes[488] and clarifying, in response to a query raised by Appellant Bahrain, that Joint Appellants "had a preliminary objection for which they provided two justifications",[489] the Council voted on the question "Do you accept the preliminary objection?".[490] Out of 33 Members of the Council eligible to vote, only four members voted in favour of accepting the objection; 23 voted against it; and six abstained.[491] Accordingly, Joint Appellants' objections to the Council's jurisdiction were rejected.[492]

5.26 One day after the hearing, the Secretariat circulated a draft of the ICAO Council's Decision "so that [it] could be considered and approved" at the Council's next session, which took place on 29 June 2018.[493] Joint Appellants did not

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

[488] *Ibid.*, para. 112.

[489] *Ibid.*, para. 123.

[490] *Ibid.*, para. 124.

[491] *Ibid.*

[492] *Ibid.*, para. 125.

[493] ICAO Council – 214th Session, Summary Minutes of the Eleventh Meeting of 29 June 2018, ICAO document C-MIN 214/11 (Draft), 10 September 2018, para. 1 (**BESUM Vol. V, Annex 55**).

complain about any "grave" or "widespread" procedural irregularities when they sent their comments on the draft Decision. Nor did they express any concern about what they now say was the Council's failure to adhere to its "fundamental duty"[494] to provide reasons. They only thing they did do was point out certain "inaccuracies related to the names of participants at the meeting".[495]

B. JOINT APPELLANTS' PROCEDURAL COMPLAINTS ARE BASELESS

5.27 Joint Appellants now claim that the ICAO Council's Decision is "null and void" because the procedure it adopted "was manifestly flawed and in violation of fundamental principles of due process … as well as violations of the ICAO Council's own applicable procedural rules".[496] In particular, Joint Appellants allege that:

1. The ICAO Council failed to hold deliberations before proceeding to a vote by secret ballot, and as a result the Council was unable to provide reasons in its Decision, in contravention of Article 15 of the ICAO Rules;[497]

2. Insufficient time was allocated to the Joint Appellants to present their case before the ICAO Council;[498]

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[494] BESUM, para. 3.49.

[495] ICAO Council – 214th Session, Summary Minutes of the Eleventh Meeting of 29 June 2018, ICAO document C-MIN 214/11 (Draft), 10 September 2018, para. 3 (**BESUM Vol. V, Annex 55**).

[496] BESUM, para. 1.2(a).

[497] *Ibid*., paras. 3.36-3.46, 3.65(b).

[498] *Ibid*., para. 3.58.

3. The Council "abdicated" its duty to interpret the Chicago Convention by deferring to the Director of the Bureau of Legal Affairs the question on the number of votes required to uphold the Preliminary Objection;[499] and

4. The ICAO Council incorrectly required 19 votes out of 33 members entitled to vote to uphold the Preliminary Objections, even though Article 52 of the Chicago Convention provides only that a mere "majority" is needed.[500]

5.28 None of these allegations has merit. Qatar will address each in turn.[501]

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[499] *Ibid*., para. 3.62.

[500] *Ibid*., para. 3.65(a).

[501] Joint Appellants also accuse the ICAO Council of failing to take "the safeguards necessary to preserve the integrity of the process" because it did not take notice of or act upon the fact that Mr. John Augustin, once a member of ICAO's Legal and External Relations Bureau who advised the ICAO Council during the Article 54(n) proceedings brought by Qatar in June 2017, later became an advisor to Qatar and participated in the subsequent Article 84 proceedings. *See Ibid*., para. 3.4. Even though Joint Appellants only dedicate a few lines in their Memorial to this alleged irregularity, and it is not included in the "grave" violations put forth in their Memorial, Qatar considers it important to set the record straight about this scurrilous allegation. Contrary to Joint Appellants' claim, the fact that Mr. Augustin participated in the Article 54(n) proceedings as a member of ICAO's Legal and External Relations Bureau and later in the Article 84 proceedings as a member of Qatar's delegation does not pose any conflict of interest. *First*, Mr. Augustin gave notice of his resignation from ICAO on 5 October 2017, several weeks before Qatar submitted its Article 84 applications to the Council on 30 October 2017. *Letter* from John v. Augustin to Fang Liu, ICAO Secretary General (5 Oct. 2017) (**QCM (A) Vol. III, Annex 28**). Even though his resignation would only take effect in February 2018, he immediately took a leave of absence and did not perform any duties within ICAO from the day he gave notice of his resignation. Mr. Augustin was only appointed as advisor to Qatar's Permanent Mission to ICAO in March 2018, that is, after his employment with ICAO had officially ended. *Letter* from Essa Abdulla Al-Malki, Qatar's Permanent Representative to ICAO, to Fang Liu, ICAO Secretary General (12 Mar. 2018) (**QCM (A) Vol. III, Annex 30**). *Second*, Joint Appellants have not cited to any particular rule of ethics or provision prohibiting former ICAO staff from working for an ICAO Member State after the termination of their employment with ICAO. This is not an oversight—there is no such rule. ICAO's Secretariat, after consulting with other UN agencies, recently concluded that "[t]here is … no cooling off period preventing employees from joining any type of government service after their separation from UN services" and recommended ICAO not to impose post-employment restrictions because, in fact, "many staff members are released by their national administrations to join ICAO and these staff

1. The absence of open deliberations on the substantive issues in dispute and of reasons follows from the Council's decision to proceed with a vote by secret ballot as allowed under its rules

5.29 Joint Appellants accuse the ICAO Council of "fail[ing] to engage in any deliberations before proceeding to vote by secret ballot",[502] which resulted in no reasons being stated in the Decision rejecting their preliminary objections.[503] This is a disingenuous argument.[504] The absence of open deliberations and of reasons in the Decision are natural consequences of the Council's decision to vote by secret ballot.

5.30 There is no dispute that the applicable procedural framework expressly permits votes by secret ballot. In particular, Rule 50 of the Rules of Procedure for the ICAO Council provides:

> "Unless 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

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members may return to their administrations upon separation from the Organization to continue their career". ICAO Council, 215th Session, *Working Paper: Post-Employment Activities of ICAO Personnel*, ICAO Doc. HR-WP/56 (22 Aug. 2018), p. 2, paras. 2.1-2.2 (**QCM (A) Vol. III, Annex 37**). *Third*, Mr. Augustin participated in proceedings which Joint Appellants themselves suggest are of a different nature (*see* BESUM, paras. 6.69), and as a member of ICAO's Secretariat, which is a neutral party in any dispute or proceeding between the Parties. *Fourth*, Joint Appellants do not indicate any negative or adverse impact Mr. Augustin's participation in the Article 54(n) proceedings as ICAO staff may have had or had on the Article 84 proceedings. *Finally*, Joint Appellants never complained of Mr. Augustin's participation in the Article 84 proceedings even though they were amply aware of Mr. Augustin's new position in Qatar's Permanent Mission well before the Article 84 hearing. *See* Letter from President of ICAO Council to Representatives of the Council, ICAO Doc. PRES OBA/2771 (15 May 2018) (**QCM (A) Vol. III, Annex 35**).

[502] BESUM, para. 3.37.

[503] *Ibid*., para. 3.45.

[504] It is also misleading. The minutes of the hearing make it clear that there were deliberations after the disputing parties' closing arguments, just not on the substantive issues in dispute. ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, paras. 106-118 (**BESUM Vol. V, Annex 53**).

> Member of the Council, by one other Member, and, if made by the President, by two Members".[505]

5.31 Accordingly, provided a motion to that effect is supported by two Members of the Council, the Council "shall" vote by secret ballot unless a majority of the Council decides otherwise.

5.32 By contrast, a motion that the ICAO Council decide in any other way, including by a roll call with open vote, must be supported by the majority of the Council Members (that is, 19 Members).[506]

5.33 There can be no serious dispute that a decision to vote by secret ballot means that no open deliberations are held. At the hearing before the Council, the Dean of the Council, the Representative of Mexico,[507] proposed that the Council "proceed *directly* to a vote by secret ballot in order to take a decision on each of the [Joint Appellants'] preliminary objections …".[508] The Representative of Singapore, in his capacity as First Vice-President of the Council, supported Mexico's proposal.[509] The motion therefore carried.

5.34 None of Joint Appellants asked that open deliberations take place before proceeding to the vote or placed an objection on the record.[510] On the contrary,

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[505] ICAO Council, *Rules of Procedure for the Council*, ICAO Doc. 7559/10 (2014), Rule 50 (**QCM (A) Vol. II, Annex 15**) (emphasis added).

[506] *Ibid.*

[507] The longest-serving representative of the Council Members serves as the Dean of the Council.

[508] ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 106 (**BESUM Vol. V, Annex 53**) (emphasis added).

[509] *Ibid.*, paras. 106-107.

[510] By contrast, the Kingdom of Saudi Arabia, the United Arab Emirates, and Egypt objected to "the statement that 19 votes would constitute the voting majority required under Article 52 of the Chicago Convention". *Ibid.*, paras. 113, 116, 117; *see also ibid.*, paras. 129-130 (Saudi Arabia,

invoking "transparency in the process" and acting on behalf of all four Appellants Saudi Arabia only asked for a roll call[511]—reflecting Joint Appellants' recognition that open deliberations are in fact *not* essential for the Council to function in a collegial manner.

5.35 The Council's approach was entirely consistent with its most recent practice—a fact that Joint Appellants tellingly fail to address.[512] In its proposal to proceed directly to a vote by secret ballot, the Dean of the Council made express reference to "the Council's recent experience with the *Settlement of Differences: Brazil and the United States*",[513] in which the United States' preliminary objection was also decided after a vote by secret ballot. There as well there were no open deliberations before the vote.[514] Neither Brazil nor the United States objected to the Council's decision to proceed directly to a secret vote without deliberations, or complained of any procedural irregularity in this regard after the issuance of the decision in that case.

5.36 Indeed, it was actually *one of the Joint Appellants*, the UAE, that proposed a vote by secret ballot in that case.[515] The UAE did not then insist that in spite of

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speaking on behalf of Joint Appellants, complaining again only of "the super voting majority requirement").

[511] *Ibid*., para. 110. Saudi Arabia's proposal was declined by the Council. *Ibid.*

[512] Instead, Joint Appellants refer to the decision of the Council in *United States v. 15 European States*, which, however, as explained below, was adopted after a vote by *open* ballot. BESUM, para. 3.49.

[513] ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 106 (**BESUM Vol. V, Annex 53**).

[514] Decision of the ICAO Council on the Preliminary Objection of the United States in the Matter "Brazil v. United States", 23 June 2017 (**BESUM Vol. V, Annex 32**)

[515] *See* ICAO Preliminary Objections (A), Exhibit 2, ICAO Council – 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO document C-MIN 211/9, 5 July 2017, para.

its proposal, open deliberations should take place. Nor did it complain of any procedural irregularity in this regard after the fact.

5.37 Neither did the UAE, nor any of the disputing parties in that case, nor any other Council Member, complain about the fact that the Council's decision in *Brazil v. United States* did not state reasons. Notably, the Council Members deciding that case included, in addition to the UAE, Appellants Saudi Arabia and Egypt.[516]

5.38 In these circumstances, Joint Appellants' complaints ring hollow, if they are not outright waived.[517]

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97 (**BESUM Vol. III, Annex 24**). The UAE's motion to vote by secret ballot was adopted without opposition.

[516] *See* ICAO Preliminary Objections (A), Exhibit 2, ICAO Council – 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO document C-MIN 211/9, 5 July 2017, para. 98 (**BESUM Vol. III, Annex 24**); ICAO Council, 211th Session, *Tenth Meeting, Summary of Decisions* (23 June 2017), ICAO Doc. C-DEC 211/10, Attachment (**QCM (A) Vol. III, Annex 25**). Qatar acknowledges that the current Secretary-General of ICAO and Director of ICAO Legal and External Relations Bureau have taken the position that the requirement of reasons under Article 15(2) of the ICAO Rules applies to decisions of the Council taken pursuant to Article 5. Letter of 13 June 2018 from the President of the ICAO Council to the Appellants, attaching Working Paper in respect of Application (A), ICAO document C-WP/14778, 23 May 2018 (**BESUM Vol. V, Annex 50**); ICAO Presentation, "Informal briefing of the Council on the Settlement of Differences", by Dr. Jiefang Huang, Director of ICAO Legal and External Relations Bureau, 19 June 2018 (**BESUM Vol. V, Annex 51**). These views, however, are not binding on the Council. *Ibid*., Slide 13 ("… the role of the President of the Council, Secretary-General, and the Secretariat is to *provide guidance* to the Council on procedural aspects of the dispute. It is not their role to state the law, apply the law to the facts, provide legal opinions or express views on the substance of the merits of the dispute to the Council") (emphasis added). The Council is therefore free to disregard this requirement when it decides to proceed directly to a vote by secret ballot as it did in the present case and in *Brazil v. United States*. It is also free to adhere to this requirement when it decides to adopt its decision by a different method. Indeed, the Council's decision in *United States of America v. 15 European States*, which was adopted after a vote by *open* ballot, does contain—brief—reasons. *See* ICAO Preliminary Objections (A), Exhibit 1, *Summary Minutes of the Council, Sixth Meeting 161st Session*, ICAO Doc. C-MIN 161/6, 16 November 2000 (**BESUM Vol. III, Annex 24**).

[517] *See Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, Separate opinion of Judge Jiménez de Aréchaga, I.C.J. Reports, para. 42 ("When the questions were put to the vote, no member of the Council (and India was one of them) raised an objection, or challenged the right of

5.39 In any event, the aforementioned statement by Mexico's Representative, in which he expressed the view that a vote by secret ballot would be the most "efficient way forward", was expressly based on "the views of the *many* Council Representatives who had been *consulted prior to the present meeting*".[518] This is sufficient to satisfy any requirement for collegiality in the Council's decision-making process.

5.40 Joint Appellants are left to speculate that the fact that a decision was taken in such a "complex" and "novel" case "immediately after hearing the Parties and without any deliberations at all" suggests that the result had been prejudged "possibly because the ICAO Council representatives were acting on instructions from their governments rather than exercising a judicial function".[519] However, as explained above, this was not the first time that a party to a dispute before the Council sought to escape its jurisdiction by invoking considerations extraneous to the framework of the Chicago Convention—far from it.[520] Moreover, Joint Appellants have presented no evidence that Council Members voted against their preliminary objection on instructions from their governments.[521] More importantly, even if they did, Qatar fails to see how it could mean that "there was no judicial process to speak of".[522] Council Member representatives are not appointed to the

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the President to act as he did. Therefore, the decisions adopted by the Council on the basis of such propositions cannot be challenged now by the appellant on these grounds").

[518] ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, paras. 106-107 (**BESUM Vol. V, Annex 53**) (emphasis added).

[519] BESUM, para. 3.44.

[520] *See supra*, paras. 3.24-3.26.

[521] Unlike the minutes of the hearing in *Pakistan v. India* cited by Joint Appellants (*see ibid*., para. 3.44, fn. 215), the minutes of the hearing in this case do not record any intention of Council Representatives to seek instructions from their governments.

[522] BESUM, para. 3.34(a).

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

5.41 In sum, Joint Appellants cannot impugn the Decision on the basis of the alleged absence of deliberations prior to the vote. As the previous practice of the ICAO Council shows, open deliberations on the substantive issues in dispute do not take place when its decision is adopted by secret ballot. Nor can reasons be stated in such cases. Joint Appellants are fully aware of this practice, having themselves contributed to it. A decision taken by a method established in the Rules of Procedure and agreed to by the majority of the Council Members at the hearing simply cannot be deemed procedurally defective.

2. Joint Appellants were allocated sufficient time to present their case before the Council

5.42 Joint Appellants next argue that they were allocated "insufficient time … to present their case to the ICAO Council".[523] As explained above, however, the Council granted them *two* opportunities to brief the issue of jurisdiction, while Qatar only had *one*.[524] It also afforded them an opportunity to present oral arguments. Tellingly, Joint Appellants never explain how or why all these opportunities to present their arguments were not enough or what prejudice they suffered from not having more.[525]

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[523] *Ibid*., para. 3.2(a).

[524] *See supra*, para. 5.18. The Council also extended the original time-limit for the submission of Joint Appellants' Counter Memorial. *See supra*, para. 5.15.

[525] In support of their allegation that the ICAO Council did not give them an opportunity to be heard, Joint Appellants contrast the duration of the hearing in this case with the duration of the hearing in

5.43 Joint Appellants complain that at the hearing, "collectively, [they] were given the same length of time as Qatar, although each of [them] was appearing as a respondent party in its own right".[526] This was not a breach of due process. In fact, it was what due process required in the circumstances: that each side be treated equally.

5.44 Joint Appellants themselves acted "collectively" on numerous occasions before the ICAO Council (as they do now before the Court). They should therefore not be heard to complain that the Council treated them in the exact same manner for purposes of allocating time at the hearing. The instances in which Joint Appellants acted as a single party before the Council include:

- When Egypt requested an extension of time to file the Counter-Memorial on behalf of all Joint Appellants;[527]

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the *Pakistan v. India* case of 1971. In the latter, as Joint Appellants state, "the ICAO Council held five meetings (from 27 to 29 July 1971) to hear the Parties, deliberate, and decide on a single preliminary objection lodged by India". BESUM, para. 3.28. There are, however, at least two reasons why the hearing in *Pakistan v. India* case took longer. *First*, there was only one round of written pleadings for the preliminary objection. *See* ICAO Council, 74th Session, *Minutes of the Second Meeting*, ICAO Doc. 8956-C/1001 (27 July 1971), para. 2 (**QCM (A) Vol. II, Annex 4**). In this case, however, and as explained above, the ICAO Council allowed Joint Appellants to present two pleadings: a statement of preliminary objections and a rejoinder. *Second*, in the *Pakistan v. India* case, the Council addressed Pakistan's application under the Chicago Convention (Case No. 1) and Pakistan's complaint under the Transit Agreement (Case No. 2) *separately*. *See ibid.*, para. 3 (**QCM (A) Vol. II, Annex 4**); ICAO Council, 74th Session, *Minutes of the Fifth Meeting*, ICAO Doc. 8956-C/1001 (28 July 1971), para. 34 (**QCM (A) Vol. II, Annex 7**). Here, Joint Appellants agreed to address Applications A and B *concurrently*. ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 2 (**BESUM Vol. V, Annex 53**).

[526] BESUM, para. 3.2(a).

[527] *See Lette*r from President of the ICAO Council to Representatives of the ICAO Council, ICAO Doc. PRES OBA/273 (9 Feb. 2018) (**QCM (A) Vol. III, Annex 29**).

- When the UAE filed a statement of preliminary objections on behalf of all Joint Appellants;[528]

- When Egypt requested authorisation to file a "rejoinder" on behalf of all Joint Appellants;[529]

- When Egypt filed the rejoinder on behalf of all Joint Appellants;[530]

- When, at the hearing before the ICAO Council, Saudi Arabia requested a vote by open ballot on behalf of all Joint Appellants;[531] and

- When, at the hearing before the ICAO Council, Bahrain asked the President of the ICAO Council to word the question put to vote differently on behalf of all Joint Appellants.[532]

5.45 In the previous multi-party case before it, *US v. 15 EU States*, the ICAO Council heard from the 15 E.U. respondent States as a single party, not from each

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[528] *Letter* from Representative of UAE to Fang Liu, ICAO Secretary General, UAE-DEL/L-13-2018 (19 Mar. 2018) (**QCM (A) Vol. III, Annex 31**).

[529] *See* Letter of 28 May 2018 from the Secretary-General of ICAO to the Appellants (**BESUM, Vol. V, Annex 49**).

[530] *Letter* from Ahmed H. Mostafa Khedr, Representative of the Arab Republic of Egypt before ICAO, to Fang Liu, ICAO Secretary General (12 June 2018) (transmitting the Rejoinder to Qatar's Response to the Preliminary objections, on behalf of Egypt, Bahrain, Saudi Arabia and the UAE) (**QCM (A) Vol. III, Annex 36**).

[531] ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 110 (**BESUM Vol. V, Annex 53**).

[532] *Ibid*., para. 122 (**BESUM Vol. V, Annex 53**).

individually.[533] Consistent with the requirements of the ICAO Rules, doing so avoided "any possible delays"[534] because the legal issues involved were identical as to all of the respondent States. None of them objected.

5.46 Similarly, here, there can be no question that the legal issues in dispute are identical as to all four Appellants. The ICAO Council was therefore right to hear from them collectively.[535]

5.47 It should also be recalled that Article 28(1) of the ICAO Rules provides that the Council shall fix time-limits so "as to … ensure *fair treatment* of the party or parties concerned".[536] Because Joint Appellants were acting as a single party throughout the ICAO proceedings, it lies ill in their mouth now to fault the Council for allocating them the same amount of time at the hearing as Qatar. Indeed, had

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[533] *See* ICAO Council, 161st Session, *Summary of the Fourth Meeting*, ICAO Doc. C-MIN 161/4 (15 Nov. 2000) (**QCM (A) Vol. II, Annex 13**).

[534] ICAO Rules, Art. 28(1) (**BESUM Vol. II, Annex 6**).

[535] The Court's practice reflects the same approach. It has accorded States acting "in concert" or "in the same interest" the procedural rights of a single litigant. In the *South West Africa* cases, for example, the Court held that applicants Ethiopia and Liberia had to choose a single judge *ad hoc* because they were acting "in concert". *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, p. 7. Like Joint Appellants in the proceedings before the Council, Ethiopia and Liberia submitted a single Memorial (and later in the proceedings, a single set of observations to South Africa's preliminary objections). *See I.C.J. Pleadings, Volume I, South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Memorial Submitted by the Government of Liberia (15 April 1961), p. 211; Observations of the Governments of Ethiopia and Liberia (1 Mar. 1962), p. 417. Moreover, at the oral proceedings on jurisdiction and admissibility, the Agents of Ethiopia and Liberia appeared collectively on behalf of both applicant States, not as individual litigants. *I.C.J. Pleadings, Volume VII, South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (1966), Minutes of the Public Hearings held at the Peace Palace, The Hague, from 2 to 22 October and on 21 December 1962, pp. ix-xi. In these appeal proceedings, Joint Appellants filed what they themselves labelled a "Joint Application", in which they indicated their intention to appoint a single judge *ad hoc*. ICJ Application (A), p. 1, para. 33. They also filed a joint Memorial. Joint Appellants thus acted "in concert" as a single party in the proceedings before the ICAO Council and continue to do the same before the Court.

[536] ICAO Rules, Art. 28(1) (**BESUM Vol. II, Annex 6**) (emphasis added).

they been allocated more time, Joint Appellants would have gained a further procedural advantage, on top of the fact that theirs was the last written word before the hearing,[537] which would indeed be in violation of the principle of equality of arms codified in Article 28 of the ICAO Rules.[538]

5.48 Joint Appellants finally complain that they were required to address Applications (A) and (B) together, although Saudi Arabia was not a party in the proceedings concerning Application (B).[539] Once again, Joint Appellants omit a key fact: all of them, *including Saudi Arabia*, expressly agreed to proceed in this way. This agreement is recorded in the minutes of the hearing:

> "The Parties and the Council agreed to the proposal of the President for the *concurrent* presentation and consideration of the two above-mentioned items, on the understanding that the Council would take separate decisions thereon given that Application (A) and Application (B) related to two different international air law instruments … and that there were different Respondents thereto".[540]

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[537] Letter of 28 May 2018 from the Secretary-General of ICAO to the Appellants, attaching Email of 25 May 2018 from the Delegation of Qatar to the Secretary-General of ICAO (**BESUM Vol. V, Annex 48)**

[538] ICAO Rules, Art. 28(1) (**BESUM Vol. II, Annex 6**). At a minimum, the principle of equality of arms does not mean mathematical equality. As the International Criminal Tribunal for the Former Yugoslavia held in *the Orić* case, the question is whether the amount of time granted to a party to present its case is "objectively adequate". *See Prosecutor v. Naser Orić*, Case IT-03-68-AR73.2, Interlocutory Decision on Length of Defense Case (20 July 2005), para. 8. Nothing in the minutes of the meeting of the Council, recording the great degree of similarity of the Parties' oral arguments to their written pleadings, or indeed Joint Appellants' Memorial, suggests that the Joint Appellants were deprived of an opportunity to present their case adequately.

[539] BESUM, para. 3.58.

[540] ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 2 (**BESUM Vol. V, Annex 53**) (italics added; underlining in original).

5.49 To conclude, Joint Appellants' complaint that they had less time to present their case is baseless. The Council did not violate any procedural norms, let alone "fundamental" norms, in treating them as a single party and allocating them the same amount of time at the oral hearing as Qatar.

3. The Council required the correct number of votes to decide the preliminary objections

5.50 Joint Appellants also challenge the ICAO Council's Decision arguing that the Council "incorrectly required 19 votes to uphold the Preliminary Objections, out of 33 members entitled to participate in the vote, even though Article 52 of the Chicago Convention provides only that a mere 'majority' is needed".[541] In Joint Appellants' view, the ICAO Council should have required 17 votes.[542]

5.51 This is not an issue the Court need even consider. Even if Joint Appellants were right (which they are not, as shown below), it would make no practical difference in this case. As stated, the ICAO Council's Decision on Appellants' preliminary objections was adopted by a vote of 23 to four (with six abstentions), *13* votes short of the lesser majority Appellants now argue the Council should have required. Put simply, even if the Council erred, that error was entirely harmless.

5.52 In any event, Joint Appellants' argument is defeated by the text of the Chicago Convention and previous Council practice. Article 52 of the Convention provides that "[d]ecisions of the Council shall require approval by majority of its

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[541] BESUM, para. 3.65(a).

[542] ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 111 (**BESUM Vol. V, Annex 53**). *See also* BESUM, para. 3.2(c).

members".[543] Under Article 53, "[n]o member of the Council shall vote in the consideration by the Council of a dispute to which it is a party".[544]

5.53 Construing the plain terms of Article 52, which refer to the majority of the *Council* members, not *voting* members, the ICAO Legal Bureau concluded in a 1971 working paper that "a member of the Council does not cease to be a member of that body solely because its voting power is taken away for some particular occasion by a provision of the Convention".[545] In other words, even if a member of the ICAO Council is not entitled to vote, it is still deemed a "member" for purposes of calculating the number of votes required to constitute a majority under Article 52.

5.54 Given that it has 36 members, the Council properly decided that the "majority" required under Article 52 was 19 members.[546]

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[543] Chicago Convention, Art. 52 (**BESUM Vol. II, Annex 1**) (emphasis added). The Rules of Procedure for the Council define "Majority of the Members of the Council" as "more than half of the total membership of the Council". *See* Rules of Procedure for the Council, Preliminary Section, Definitions.

[544] *Ibid*., Art. 53.

[545] ICAO Council, 74th Session, *Working Paper: Voting in the Council on Disagreements and Complaints brought under the Rules on Settlement*, ICAO Doc. C-WP/5465 (21 Oct. 1971), pp. 2-3 (**QCM (A) Vol. II, Annex 9**). *See also* the response by the President of the ICAO Council during the Council's deliberations in the *India v. Pakistan* dispute stating that the statutory majority required for a vote remains invariable regardless of who is entitled to vote in ICAO Council (ICAO Council, 74th Session, *Minutes of the Sixth Meeting*, ICAO Doc. 8956-C/1001 (29 July 1979), para. 141 (**QCM (A) Vol. II, Annex 8**)).

[546] The representative of the UAE at the hearing, H.E. Al Mansoori, requested that the Council reconsider the requirement of a majority of 19 positive votes for the approval of the preliminary objections. The Council rejected the request, noting the "absence of any desire … to determine what constituted the voting majority other than the relevant provisions of the Chicago Convention". *See* ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, paras. 9, 113, 116-118 (**BESUM Vol. V, Annex 53**).

5.55 The ICAO Council's decision is consistent with its previous practice. The *India v. Pakistan* case is one example, decided at a time when the Council had only 27 members. The Council deemed the majority in terms of Article 52 of the Chicago Convention to comprise of 14 Members, even though India was not entitled to vote due to its status as party to the dispute.[547] Another, more recent, example is the *Brazil v. United States* case, where the ICAO Council similarly required a majority of 19 votes even though only 34 Council Members were eligible to vote.[548] Neither party complained of any procedural irregularity. Nor did Egypt, Saudi Arabia, or the UAE, all of which participated in the vote, raise any such complaint.

5.56 In response to a request for clarification by Joint Appellants during the hearing, the Director of Legal Affairs and External Relations Bureau stated that his office "had examined the historical records of previous ICAO proceedings…and that it had been *the consistent and unanimous practice of the Council* to require approval of its decisions by a majority of its Members, which currently stood at 19".[549] Joint Appellants misrepresent this exchange to suggest that the ICAO Council abdicated its duty to interpret the Chicago Convention by deferring to the Legal Director.[550] They are wrong. As the Director of Legal Affairs himself explained during the meeting, he simply "read the text of Article 52 of the Chicago Convention and recited to the Council the factual historical records of previous

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[547] ICAO Council, 74th Session, *Minutes of the Sixth Meeting*, ICAO Doc. 8956-C/1001 (29 July 1979), para. 60 (**QCM (A) Vol. II, Annex 8**).

[548] *See* ICAO Preliminary Objections (A), Exhibit 2, ICAO Council – 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO document C-MIN 211/9, 5 July 2017, paras. 97-98 (**BESUM Vol. III, Annex 24**)

[549] ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 112 (**BESUM Vol. V, Annex 53**) (emphasis added).

[550] BESUM, para. 3.58.

Council decisions, no more, no less".[551] He did not "interpret" anything, as Joint Appellants wrongly contend. It is therefore not true that ICAO Council abdicated its judicial function to the Director of Legal Affairs.

5.57 Joint Appellants finally argue that the Council's interpretation of Article 52 would mean that "the ICAO Council might find itself unable to render a decision in circumstances where fewer than 19 States were eligible to vote", and that "[i]n such circumstances, Article 52 of the Chicago Convention would have no *effet utile*; in fact the provision would be deprived of any *effet* at all".[552]

5.58 Such a circumstance is purely hypothetical. It has never happened in the 71-year history of ICAO. Moreover, the fact that the Council's interpretation of Article 52 may not produce *effet* in one exceptional circumstance—and the circumstance Joint Appellants mention would be exceptional, to say the least—does not mean that it violates the principle of *effet utile*. To use the words of the Court and of its predecessor in the cases Joint Appellants themselves cite, the principle of *effet utile* would be violated only if it could be shown that under the Council's interpretation, Article 52 "could *never* be applied in practice";[553] or that it would be deprived of "*all* practical effect"[554] or of "*any* significance".[555] That is

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

[552] BESUM, para. 3.61.

[553] *Lighthouses Case between France and Greece*, Judgment, 1934, P.C.I.J., Series A/B, No 62, p. 27 (emphasis added).

[554] *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, para. 66 (emphasis added).

[555] *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, para. 52 (emphasis added); *see also Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, para. 51.

plainly not the case here, as the practice of the Council over the last 71 years demonstrates.

5.59 For all these reasons, Joint Appellants' complaint that the Council erred in requiring 19 votes to uphold the preliminary objections is baseless.

4. The Council properly rejected both of Joint Appellants' preliminary objections

5.60 Finally, Joint Appellants contend that the Decision is "vitiated at its foundation" because the question that the President of the Council ultimately put to vote "was neither introduced nor seconded by a Member of the ICAO Council as required by the [Rules of Procedure for the Council]".[556] This is another unfortunate misrepresentation of what happened at the hearing. The original motion made by the Dean of the Council, Mexico's Representative, and seconded by the First Vice-President of the Council, Singapore's Representative, to vote by secret ballot on "each of the [Joint Appellants] preliminary objections with respect to Application (A) and Application (B)" was never changed or modified.[557] Bahrain intervened to suggest a different wording to the question but did not make a formal motion to that effect.[558]

5.61 The President of the Council did not think it necessary to change the wording of the question. He considered it clear that "for each of Qatar's Application (A) and Application (B) the Respondents had a preliminary objection

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[556] BESUM, para. 3.65(c).

[557] ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 107 (**BESUM Vol. V, Annex 53**).

[558] *Ibid*., para. 121 (**BESUM Vol. V, Annex 53**) (emphasis added).

for which they provided *two justifications*".[559] The minutes of the session also record that the President "took the point made by [Bahrain's Legal Advisor] that the voting on each preliminary objection applied to *both* of the justifications provided therefor".[560]

5.62 All of the Council's voting Members were present during these exchanges. All were therefore aware that Joint Appellants had provided "two justifications" for their challenge to the Council's jurisdiction. There was no confusion about the way the question put to vote was phrased. And even if it could be said, for the sake of argument, that the President of the Council improperly conflated the two preliminary objections, Joint Appellants failed to appeal the President's determination under Article 36 of the Rules of Procedure for the Council and therefore waived their right to complain now.[561]

5.63 For all these reasons, Joint Appellants' claim that the procedures adopted by the Council were "manifestly flawed" is entirely unfounded and must be rejected.

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[559] *Ibid*., para. 123 (emphasis added).

[560] *Ibid*. (emphasis added).

[561] *See* ICAO Council, *Rules of Procedure for the Council*, ICAO Doc. 7559/10 (2014), Rule 36 (**QCM (A) Vol. II, Annex 15**). *See also Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, Separate opinion of Judge Jiménez de Aréchaga, I.C.J. Reports, para. 42 ("When the questions were put to the vote, no member of the Council (and India was one of them) raised an objection, or challenged the right of the President to act as he did. Therefore, the decisions adopted by the Council on the basis of such propositions cannot be challenged now by the appellant on these grounds").

III. The Alleged Procedural Irregularities Did Not Prejudice "in Any Fundamental Way" the "Requirements of a Just Procedure"

5.64 As stated, the Court in the 1972 *ICAO Council Appeal* case considered India's allegations of procedural irregularities before the ICAO Council irrelevant to the "objective question of law" before it; namely, whether or not the ICAO Council correctly decided that it had jurisdiction.[562] The Court also held that there was an additional, equally compelling reason to reject India's argument: even accepting they happened, the irregularities alleged "[did] not prejudice in any fundamental way the requirements of a just procedure".[563]

5.65 The Court did not explain in its Judgment in the 1972 *ICAO Council Appeal* case what the "requirements of just procedure" are. At a minimum, they include a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[564] Nothing in the record before the ICAO Council suggests that Joint Appellants were deprived of these basic guarantees in any way. As the President of the Council reminded all the Members at the beginning of the hearing, "the Council was sitting as a judicial body under article 84 of the Chicago Convention, taking its decisions on the basis of the submission of written documents by the Parties, as well on the basis of oral arguments".[565] Moreover, every procedural decision by the ICAO Council leading to its ultimate Decision

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[562] Chapter 2, Section II.A *supra*.

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

[564] Charles T. Kotuby Jr & Luke Sobota, *General Principles of Law and International Due Process* (2018), p. 59 (**QCM (A) Vol. IV, Annex 118**).

[565] *Ibid*., para. 6.

was properly justified under the Rules for the Settlement of Differences,[566] by reference to the practice of the ICAO Council,[567] and in consultation with ICAO's Director of Legal Affairs.[568]

5.66 The Court will recall that in the 1972 *ICAO Council Appeal* case India complained in essence of four alleged procedural irregularities: (1) the ICAO Council failed to state reasons in its decision;[569] (2) the decision of the ICAO Council was vitiated by the fact that the questions were framed in the wrong manner;[570] (3) the Council's decision on Pakistan's Complaint was not supported by a statutory majority;[571] and (4) some members of the Council were not able to participate in the deliberations and in the final decision of the Council.[572]

5.67 In this case, the putative procedural irregularities Joint Appellants identify closely resemble India's. According to Joint Appellants:

1. The ICAO Council failed to state reasons in its decision (this closely resembles India's first alleged procedural irregularity);[573]

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[566] *See, e.g.*, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 122 (**BESUM Vol. V, Annex 53**).

[567] *See, e.g., ibid*., para. 106.

[568] *See, e.g., ibid*., para. 112.

[569] *I.C.J. Oral Arguments, Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Minutes of the public sitting held at the Peace Palace, The Hague, from 19 June to 3 July, and on 18 August 1972, p. 607.

[570] *I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Memorial submitted by the Government of India (22 Dec. 1971), para. 93(1).

[571] *Ibid*., para. 93(2).

[572] *Ibid*., para. 93(3).

[573] BESUM, para. 3.2 (e).

2. The question submitted for vote was improperly framed, which resulted in the ICAO Council voting on the wrong premise that there was only one objection to be decided[574] (this closely resembles India's second alleged procedural irregularity);

3. The ICAO Council incorrectly required 19 votes to uphold the preliminary objections, out of 33 members entitled to vote[575] (this closely resembles India's third alleged procedural irregularity); and

4. The Council took its decision without any deliberation[576] (this closely resembles India's fourth alleged procedural irregularity).

5.68 The Court did not consider that the substantially identical irregularities India alleged would have prejudiced in any "fundamental way the requirements of a just procedure" in the 1972 *ICAO Council Appeal* case. The same is equally true here.

5.69 The remaining procedural complaints Joint Appellants raise are that:

1. They were allocated the same amount of time as Qatar although each of them was appearing as a respondent in its own right;

2. The decision was taken by secret ballot despite the request by Joint Appellants for a roll call with open vote.

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[574] *Ibid*., para. 3.30.

[575] *Ibid*., para. 3.65 (a).

[576] *Ibid*., para. 3.37.

5.70 For the reasons already explained, neither of these prejudiced the requirements of a just procedure, still less in a fundamental way.

5.71 The fact that the ICAO Council allocated Joint Appellants the same amount of time as Qatar does not mean they were not granted an adequate opportunity to present their case. As the Court's jurisprudence makes clear, the principle of procedural equality is met when the parties "have had adequate and in large measure equal opportunities to present their case …".[577] Joint Appellants have failed to show that the time allocated to them was inadequate to present their case to the Council, or that the time they had was insufficient compared to the time Qatar had. In the end, Joint Appellants enjoyed ample opportunities to present their case through written and oral submissions.[578]

5.72 Joint Appellants' complaint that the vote was taken by secret ballot is equally unavailing. In their view, the voting method was irregular since there was a request by Saudi Arabia for a roll call.[579] But as shown above, the vote was entirely consistent with the ICAO Council's Rules of Procedure and practice.[580] Not only that, but in the one previous decision of the ICAO Council adopted in this

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[577] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, I.C.J. Reports 2012, para. 47.

[578] *See supra*, paras. 5.16-5.20.

[579] BESUM, para. 1.12.

[580] *See supra*, paras. 5.29-5.34.

manner, it was one of the Joint Appellants, the UAE, that proposed a vote by secret ballot to the Council.[581]

5.73 In sum, even if they occurred (*quod non*), none of the procedural irregularities Joint Appellants complain of can be said to have deprived them of a just procedure before the ICAO Council.

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5.74 For all the reasons set forth above, Qatar respectfully requests the Court to reject Joint Appellants' First Ground of Appeal.

[581] *See* ICAO Preliminary Objections (A), Exhibit 2, ICAO Council – 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO document C-MIN 211/9, 5 July 2017, para. 97 (**BESUM Vol. III, Annex 24**).

SUBMISSIONS

On the basis of the facts and law set forth in this Counter-Memorial, Qatar respectfully requests the Court to reject Joint Appellants' appeal and affirm the ICAO Council's Decision of 29 June 2018 dismissing Joint Appellants' preliminary objection to the Council's jurisdiction and competence to adjudicate Qatar's Application (A) of 30 October 2017.

Respectfully submitted,

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Dr. Mohammed Abdulaziz Al-Khulaifi
AGENT OF THE STATE OF QATAR
25 February 2019

CERTIFICATION

I certify that all Annexes are true copies of the documents referred to and that the translations provided are accurate.

_____

Dr. Mohammed Abdulaziz Al-Khulaifi
AGENT OF THE STATE OF QATAR
25 February 2019

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