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

REJOINDER OF THE STATE OF QATAR

VOLUME I

29 JULY 2019

Table of Contents

GLOSSARY OF ACRONYMS, ABBREVIATIONS AND DEFINED TERMS

1972 *ICAO Council Appeal* case	*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*
The Court's 1972 Judgment	*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
BESUM	Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia, and the United Arab Emirates (27 Dec. 2018)
BESUR	Reply of the Kingdom of Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia, and the United Arab Emirates (27 May 2019)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
CERD	International Convention on the Elimination of All Forms of Racial Discrimination (1969)
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) and its Annexes, 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 the 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)	Counter-Memorial of the State of Qatar (25 February 2019)
QR (A)	Rejoinder of the State of Qatar (29 July 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 27 March 2019, the State of Qatar ("Qatar") respectfully submits this Rejoinder responding to the Reply 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") dated 27 May 2019.[1]

1.2 In its Counter-Memorial, Qatar showed that the Court previously rejected arguments that were substantially identical to those Joint Appellants now present in the form of their First and Second Grounds of Appeal. Specifically, in its Judgment in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* (the "1972 *ICAO Council Appeal* case"), the Court dismissed India's arguments that the Council's decision on jurisdiction was (1) vitiated by procedural irregularities,[2] and (2) substantively wrong because India presented a defence that raised issues outside the ambit of the Chicago Convention.[3]

1.3 With respect to the first argument, the Court held that the question before it was limited only to an "objective question of law" (i.e., whether or not the Council

[1] Reply of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia, and the United Arab Emirates (27 May 2019) (hereinafter "BESUR").

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

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

had jurisdiction), the answer to which "cannot depend on what occurred before the Council".[4] The procedural complaints India raised were therefore irrelevant.

1.4 With respect to the second argument, the Court ruled that "the 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".[5]

1.5 In their Memorial, Joint Appellants chose not to come to terms with the import of the Court's 1972 Judgment for their arguments in this case. The Reply is no different: it neither makes any serious effort to distinguish this case from that one, nor argues that the Court's decision in that case was somehow incorrect. The Court can therefore reject Joint Appellants' First and Second Grounds of Appeal for the same reasons it rejected India's identical arguments in the 1972 *ICAO Council Appeal* case.

1.6 Concerning the aspect of the Court's prior decision that is relevant to their First Ground of Appeal, Joint Appellants suggest that the Court rejected India's arguments about the alleged procedural irregularities only because those irregularities "did not 'prejudice in any fundamental way the requirements of a just procedure'".[6] That is not true, however. The primary basis of the Court's decision was, as stated, that the Court was required only to answer an objective question of law. The statement Joint Appellants cite was made only as an additional reason to reject India's argument. In any event, Joint Appellants overlook the fact that the

[4] *Ibid.*, para. 45.

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

[6] BESUR, para. 1.5(b) (quoting *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, paras. 44-45).

alleged procedural irregularities they raise are virtually identical to those India raised in the prior case. If those putative irregularities did not "prejudice in any fundamental way the requirements of a just procedure" there, they do not do so here either.

1.7 Instead of confronting the consequences of the Court's 1972 Judgment for their First Ground of Appeal, Joint Appellants present an irrelevant and largely repetitive narrative in which they attempt to impugn the conduct of the ICAO Council, and indeed the entire dispute resolution system under the Chicago Convention (to which they, of course, consented when they ratified the Convention). This narrative is irrelevant for the reasons already stated. Moreover, Qatar will show again in this Rejoinder that the Council did not in fact commit any procedural errors, let alone any errors that undermined in any way the requirements of a just procedure.

1.8 Concerning the aspect of the Court's 1972 Judgment that is relevant to their Second Ground of Appeal, Joint Appellants say only that "the *India v. Pakistan* case did not concern a question of countermeasures".[7] They do not, however, make any effort to show why this distinction makes a difference. It does not. The Court's 1972 ruling was not limited to the specific defence India presented in that case. Its holding was phrased in broad terms. Indeed, the Court's wording could scarcely have been any more categorical. It stated: "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

[7] BESUR, para. 4.27.

competence, which would be inadmissible".[8] This applies as much to Joint Appellants' countermeasures defence as any other.

1.9 Joint Appellants attempt to sustain their Second Ground of Appeal by rehashing the arguments from their Memorial. They contend that the "real issue" in dispute in this case relates to Qatar's alleged violations of its counter-terrorism and other obligations. According to Joint Appellants, the issues in dispute in this case cannot be severed from that other dispute. This argument not only runs afoul of the Court's Judgment in the 1972 *ICAO Council Appeal* case, it is also inconsistent with the Court's settled jurisprudence that the fact that a particular dispute arises in a broader context does not deprive the Court of jurisdiction (another subject on which the Reply is silent). The reality is that the one and only dispute before the Council, and now before the Court, concerns Joint Appellants' violations of the Chicago Convention and its Annexes.

1.10 Joint Appellants' arguments in support of their Third Ground of Appeal concerning the Chicago Convention's negotiation requirement are equally unconvincing. Qatar showed in its Memorial that Joint Appellants' stance on the subject of negotiations was clear and emphatic: they refused to talk at any time on any subject until Qatar capitulated to their so-called 13 Demands, which themselves were non-negotiable.

1.11 The Reply does not deny that Joint Appellants were at all times unwilling to negotiate. It argues instead that even in such circumstances, international law requires Qatar to have made a "genuine attempt" to negotiate with them which,

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

they say, it did not do. Joint Appellants are mistaken on the law and the facts. On the law, States are not required to make an attempt to negotiate in the face of an explicit, total refusal to talk *ab initio*. Nothing in the Court's case law dictates such a pointlessly formalistic approach. But in any event, on the facts, the record shows that Qatar not only made a genuine attempt to negotiate with Joint Appellants over the aviation dispute, it made many such attempts over a lengthy period of time and in multiple fora, including in ICAO. The Reply's efforts to question those facts and raise doubts about the extent to which Qatar's multi-faceted efforts to engage with Joint Appellants constituted a "genuine attempt" to negotiate are entirely unpersuasive.

1.12 For these reasons, as more fully elaborated in the remaining chapters of this Rejoinder, the Court should reject Joint Appellants' arguments, dismiss their appeal and find that the ICAO Council correctly determined that it has jurisdiction over the dispute Qatar submitted to it nearly two years ago.

1.13 As it did in its Counter-Memorial, Qatar will address Joint Appellants' grounds of appeal in a different order than they are presented in their pleadings. It will start with the two grounds challenging the ICAO Council's jurisdiction that Joint Appellants presented before the Council. That is, Qatar will first answer Joint Appellants' Second Ground of Appeal and then answer their Third Ground of Appeal. Qatar will deal with Joint Appellants' First Ground of Appeal relating to the alleged procedural irregularities last.

1.14 The main text of this Counter-Memorial consists of five chapters, followed by Qatar's Submissions. After this Introduction, **Chapter 2** briefly recalls the factual background to Joint Appellants' aviation prohibitions, the central element of this dispute under the Chicago Convention and its Annexes. In particular, the

Chapter addresses Joint Appellants' baseless assertions that the aviation prohibitions were imposed with notice, in cooperation with outside authorities and in a proportionate manner. Additionally, Chapter 2 demonstrates that Joint Appellants' false allegations concerning Qatar's alleged support for terrorism and other matters are a poorly disguised artifice for trying to avoid the jurisdiction of the ICAO Council.

1.15 **Chapter 3** addresses Joint Appellants' Second Ground of Appeal and demonstrates why the Reply's arguments that the ICAO Council lacks jurisdiction are unpersuasive. Consistent with the Court's *jurisprudence constante*, Chapter 3 first shows that the fact that the Parties have a dispute on other subjects does not mean that the real issue in dispute in this case concerns matters other than those that form the object of the claim Qatar submitted to the ICAO Council. The Chapter also explains the many reasons why the dispute falls squarely within the jurisdiction of the ICAO Council under the "real issue" test. In particular, it shows that the ICAO Council is competent to decide Joint Appellants' countermeasure defence, although the Council may well be able to decide this dispute without ever reaching the merits of that defence. Finally, Chapter 3 disposes of Joint Appellants' repurposed jurisdictional argument in the guise of an objection to the admissibility and makes clear that the adjudication of Qatar's claims by the ICAO Council is entirely consistent with judicial propriety.

1.16 **Chapter 4** explains why Joint Appellants' Third Ground of Appeal is equally without merit. Joint Appellants not only misunderstand the legal standard governing the negotiation requirement in Article 84 of the Chicago Convention, but they also misapply that standard to the facts of the case. The Chapter demonstrates how Qatar fulfilled the negotiation requirement by attempting to negotiate with Joint Appellants over the aviation prohibitions on multiple occasions

and in multiple fora, only to be rebuffed by Joint Appellants at every turn. Chapter 4 also refutes Joint Appellants' arguments that Qatar failed to fulfil the requirement set forth in Article 2(g) of the ICAO Rules for the Settlement of Differences.

1.17 **Chapter 5** addresses Joint Appellants' First Ground of Appeal. It first discusses Joint Appellants' complete failure to address the Court's Judgment in the 1972 *ICAO Council Appeal* case, in which it held that its task at this stage is only to rule on "an objective question of law", which "cannot depend on what occurred before the Council". Qatar then shows that the procedural irregularities that Joint Appellants allege in this case are virtually identical to the ones India alleged in the 1972 *ICAO Council Appeal* case. Accordingly, even if the Court were to address the merits of Joint Appellants' First Ground of Appeal, it would find that none of the alleged procedural irregularities prejudiced in any fundamental way the requirements of a just procedure in this case any more than they did in the 1972 *ICAO Council Appeal* case. Lastly, Chapter 5 demonstrates that the procedure adopted by the ICAO Council was entirely consistent with the applicable procedural framework and the practice of the Council. The alleged procedural irregularities Joint Appellants raise are therefore meritless.

1.18 This Rejoinder concludes with Qatar's Submissions.

CHAPTER 2

THE REAL ISSUE IN DISPUTE BEFORE THE COURT IS JOINT APPELLANTS' AVIATION PROHIBITIONS, NOT THEIR FALSE ACCUSATIONS OF BREACH OF THE RIYADH AGREEMENTS

2.1 This case concerns one subject: Joint Appellants' aviation prohibitions, imposed in violation of their obligations under the Chicago Convention and its Annexes. The only matter now before the Court concerns the ICAO Council's decision that it has jurisdiction to address the merits of those violations.

2.2 Hoping to divert attention away from their aviation prohibitions and reframe the dispute, Joint Appellants continue to press their false and irrelevant accusations that Qatar supports terrorism and extremism, and has interfered in their internal affairs. In their view, Qatar's categorical rejection of those accusations in its Counter-Memorial constitutes confirmation that "[t]he real dispute between the Parties concerns Qatar's violations of the Riyadh Agreements and other international law obligations".[9] Qatar disagrees. The fact that Qatar chose to expose Joint Appellants' baseless claims for what they are—a pretext designed to shield them from responsibility for the aviation prohibitions—does not change the nature of the dispute before the Council or the question before the Court.

2.3 The ICAO Council rightly ignored Joint Appellants' false accusations as irrelevant. Qatar trusts that the Court will do the same.

[9] *See, e.g.*, BESUR, Chapter II, Section 1.A heading; para. 2.3 ("Qatar has admitted that there does in fact exist a dispute between the Parties which goes well beyond civil aviation and relates to matters different from civil aviation".).

2.4 This Chapter proceeds as follows: **Section I** addresses Joint Appellants' response to the only facts that are relevant to the real issue in dispute between the Parties: Joint Appellants' violations of the Chicago Convention and its Annexes. It shows that far from being "proportionate countermeasures to Qatar's wrongful actions",[10] the manner in which Joint Appellants implemented the aviation prohibitions highlights their lack of good faith. The lack of good faith is made even more evident in light of the international praise Qatar has received for its efforts in the fight *against* terrorism and extremism, an inconvenient fact that Joint Appellants chose to ignore in favour of their false narrative. That evidence, Joint Appellants' key admissions in this regard, and their strained attempt to insist on their false accusations are addressed in **Section II**.

I. Joint Appellants' Aviation Prohibitions Violate the Chicago Convention and Its Annexes

2.5 Qatar explained in its Counter-Memorial how Joint Appellants implemented their sweeping, unprecedented aviation prohibitions and why they violate the Chicago Convention and its Annexes. Joint Appellants reply, correctly, that "the scope and legality of the airspace restrictions under the Chicago Convention are matters going to the merits … and thus are not for the Court to determine in the present proceedings in any case".[11] Yet in the same breath, they argue that the aviation prohibitions were imposed as "proportionate" countermeasures.[12]

[10] *Ibid.*, Chapter II, Section 2 heading.

[11] *Ibid.*, para. 2.3; *see also ibid.*, para. 2.35.

[12] *Ibid.*, Chapter II, Section 2 heading; *see also ibid*., para. 2.3.

2.6 It bears emphasis at the outset that Joint Appellants do not deny that to this day, Qatar-registered aircraft are prohibited from overflying their territories, and from taking off and landing at their airports.[13] Nor do they deny that they have forced Qatar-registered aircraft to utilise a limited number of contingency routes. All of these actions that have compromised the efficiency of civil aviation and led to the danger of congestion.[14]

2.7 Unable to deny the undeniable, Joint Appellants' Reply seeks instead to establish the alleged proportionality of their so-called "countermeasures" by claiming that they notified the aviation prohibitions in advance. They also congratulate themselves for their alleged cooperation in establishing contingency routes in the aftermath of the aviation prohibitions.[15] Joint Appellants' arguments only serve to underscore the lack of good faith underlying both their actions and their attempt to escape the ICAO Council's jurisdiction. While their arguments are irrelevant to the question before the Court, Qatar does not wish the allegations that they make to go unchallenged. Accordingly, the following paragraphs summarise the main points of Qatar's response.

2.8 Joint Appellants claim, for example, that the aviation prohibitions were "timely and proper" and adopted "in accordance with all relevant rules and safety requirements, and in full cooperation with all relevant authorities, including ICAO".[16] They do not, however, provide *any* evidence that *any* notice whatsoever was given, let alone that it was given at least seven days in advance (as the then-

[13] Counter-Memorial of the State of Qatar (25 Feb. 2019) (hereinafter "QCM (A)"), para. 2.20.

[14] *Ibid.*, para. 2.21.

[15] BESUR, para. 2.37.

[16] *Ibid.*, paras. 2.36-2.37.

applicable version of Annex 15 required[17]). They also provide *no* evidence of *any* cooperation with any outside authority, including ICAO, in imposing their aviation prohibitions. In fact, no such cooperation ever took place.

2.9 Nor can Joint Appellants reconcile their assertions with 1) the immediate, widespread disruption the aviation prohibitions caused,[18] and 2) the aviation safety incidents resulting from the back-dating of the NOTAMs that affected several aircraft *en route* in Yemen airspace on 5 June 2017.[19] These very real and indisputable consequences not only substantiate the fact that the prohibitions were issued without prior warning, but also highlight Joint Appellants' disregard for the effects of their prohibitions on ordinary civil aviation passengers around the world.[20]

2.10 Joint Appellants also claim that they "promptly adopted contingency measures in order to preserve the safety of civil aviation".[21] But the record

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[17] 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**).

[18] QCM (A), para. 2.11 ("Over 70 flights, scheduled by multiple carriers, were cancelled on 6 June. 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. 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".) (internal footnotes omitted).

[19] *Ibid.*, para. 2.12.

[20] Indeed, the "safe and orderly" development of civil aviation is one of the core purposes of the Chicago Convention, and the Convention's focus on the safety of civil aviation passengers is just one reason why provisions like Article 82 of the Convention establish the undertaking of ICAO Members "not to enter into any … obligations and understandings [inconsistent with the terms of the Chicago Convention]". Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (hereinafter "Chicago Convention"), Preamble and Art. 82 (**BESUM Vol. II, Annex 1**).

[21] BESUR, para. 2.37.

demonstrates that they only agreed to five out of the seven contingency routes in effect after significant delay and only after the intervention of the ICAO Council, including at its extraordinary session of 31 July 2017.[22] A comparison of Figure 1 and Figure 3 from Qatar's Counter-Memorial clearly shows the reduction in routes available to Qatar-registered aircraft.[23]

2.11 Joint Appellants also do not deny that there are substantially fewer routes available for Qatar-registered aircraft now than before the aviation prohibitions, a circumstance that has seriously compromised the safety, security, regularity and economy of civil aviation.[24] For example, whereas Qatar-registered aircraft had five different air traffic routes through the UAE FIR available before the prohibitions, they now have only one.[25] The aviation prohibitions have also caused

[22] QCM (A), para. 2.19. Joint Appellants self-servingly misconstrue praise for region-wide "improvements of the implemented contingency plan" as praise for their own actions. BESUR, para. 2.39, fn. 144 (citing ICAO Council, Third ATM Contingency Coordination Meeting for Qatar, Summary of Discussions, ICAO Doc. ACCM/3 (5-6 Sept. 2017), para. 6.2 (**QCM (A) Vol. III, Annex 27**). The efforts of the ICAO Council and ICAO's Middle East Regional Office in fact prove Qatar's point that it was only after ICAO's intervention that most of the contingency routes were ultimately approved, though it took quite some time for several such routes. *See* QCM (A), paras. 2.16-2.19.

[23] *See* QCM (A), paras. 2.14, 2.20.

[24] *Ibid.*, para. 2.21. *See also* Qatar Civil Aviation Authority, Air Navigation Department, *Reply to Conclusion 17/19 MIDANPIRG/17, Assessment of Contingency Routes* (7 July 2019), p. 2: "The present contingency arrangements do not support current operating traffic levels and therefore do not support predicted traffic growth within the Region. Routinely, and particularly with regard to inbound traffic peak periods to Doha, it is obvious that existing contingency routes are 'not fit for purpose'[,] result in regular overload situations (inbound) and significant delays to outbound traffic from Doha. This, in addition to managing the traffic with increased coordination outside of the current Letters of Agreement (LOAs)[,] poses a **Significant Safety Concern**" (**QR (A) Vol. II, Annex 6**) (emphasis in original).

[25] QCM (A), para. 2.19. And while there is still a lot to be said regarding the contingency routes Joint Appellants eventually agreed to, it is the on-going violations of the Chicago Convention that are at issue here—it is because of these violations that contingency routes became even necessary to access the high seas or the airspace of third countries.

an increased number of incidents involving military traffic in close proximity to Qatar-registered civilian aircraft.[26]

2.12 In sum, Joint Appellants' aviation prohibitions constitute serious, flagrant and ongoing violations of the Chicago Convention and its Annexes that threaten the safety, security, regularity and economy of civil aviation to this day. It is *that* dispute that the ICAO Council has affirmed its jurisdiction to adjudicate.

II. Joint Appellants' "Real Issue in Dispute" Theory Is Transparently Pretextual

2.13 In its Counter-Memorial, Qatar exposed Joint Appellants' allegations about Qatar's "support for extremism and terrorism, and its interference in the affairs of other States"[27] for what they are: a false pretext for avoiding the jurisdiction of the Council to decide upon their violations of the Chicago Convention and its Annexes.

2.14 Joint Appellants' Reply largely ignores Qatar's showing of the pretextual nature of their allegations. Joint Appellants do not deny their media campaign against Qatar—described by the United Nations Office of the High Commissioner

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[26] *See Letter* from Abdulla Nasser Turki Al-Subaey, President of Qatar Civil Aviation Authority, to Dr. Olumuyiwa Benard Aliu, President of ICAO Council (20 Feb. 2019) (**QR (A) Vol. II, Annex 5**). Appellant Bahrain also denies that immediately after the imposition of the aviation prohibitions, it informed Qatar of its intention to intercept militarily any Qatar-registered aircraft operating in its FIR. BESUR, para. 2.46. This threat, which was noted in Qatar's Memorial before the ICAO Council (Memorial appended to Application (A) of the State of Qatar; Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago, 1944) and its Annexes, 30 October 2017, Section (c) (**BESUM Vol. III, Annex 23**)), was reported by letter to ICAO. ICAO Response to the 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), [PDF] p. 970 (**BESUM Vol. IV, Annex 25**). Qatar will be pleased to submit further information regarding this threat at the appropriate phase of the proceedings before the ICAO Council.

[27] *See, e.g.*, BESUR, para. 2.4.

for Human Rights as a "widespread defamation and hatred campaign against Qatar"[28]—which began with the illegal hacking of the Qatar News Agency ("QNA") website on 24 May 2017, as established through an investigation by international experts.[29]

2.15 Joint Appellants also do not deny the fact that Qatar continues to cooperate with them on counter-terrorism measures under the auspices of the Terrorist Financing Targeting Center ("TFTC"). That cooperation pre-dates the adoption of the aviation prohibitions and continues to this day.[30] In fact, Joint Appellants say nothing at all about the voluminous evidence demonstrating Qatar's leading role in international and multilateral counter-terrorism efforts.[31]

2.16 Instead, Joint Appellants misconstrue Qatar's position on the Muslim Brotherhood in the Counter-Memorial. Qatar did *not* state that the Muslim Brotherhood is a "legitimate political organization" as Joint Appellants appear to suggest.[32] Rather, Qatar pointed out the fact that the Muslim Brotherhood is not a UN-designated terrorist organisation, or listed as such in the GCC terrorist

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[28] ICAO Response to the 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**).

[29] QCM (A), para. 2.57; 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), p. [PDF] 1346 (noting cooperation of FBI and British National Crime Agency in hacking investigation) (**BESUM Vol. IV, Annex 25**); *Letter* from Muhammad Bin Abdul Rahman Al Thani, Minister of Foreign Affairs of the State of Qatar, to Abdullatif Bin Rashid Al Zayani, GCC Secretary General (7 Aug. 2017) (**QCM (A) Vol. III, Annex 39**).

[30] QCM (A), para. 2.32.

[31] *Ibid.*, paras. 2.33 (describing Qatar's leading role in the Global Counterterrorism Task Force), 2.41, fn. 112 (discussing Qatar's efforts with the Community Engagement and Resilience Fund, where it is the only GCC-member contributing country; the UN Security Council's Counter Terrorism Committee; and the Global Coalition against ISIS, for which Qatar hosts the coalition's central command, among other international efforts).

[32] BESUR, para. 2.8.

organisations list, facts that Joint Appellants do not deny.[33] Nor did Qatar argue that the Muslim Brotherhood is "unobjectionable because Bahrain has not banned it as an organization".[34] Instead, Qatar merely highlighted Joint Appellants' hypocrisy in seeking to justify their aviation prohibitions over Qatar's alleged support for the Muslim Brotherhood when several other States, including Appellant Bahrain, allow members of that group to serve in elected government.[35]

2.17 Finally, Joint Appellants do not deny their own records of supporting terrorism and extremist groups.[36] They say only that their records are "wholly irrelevant" to the issues before the Court.[37] On that point at least, Qatar agrees—none of these accusations, including those made by Joint Appellants against Qatar, are relevant to this case, and they should be ignored by the Court. However, since the false allegations against Qatar are the centrepiece of their contrived jurisdictional objection, Qatar has raised Joint Appellants' records on these issues,

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[33] *Ibid.*, para. 2.21.

[34] *Ibid.*, para. 2.25.

[35] Qatar also pointed out that:

> "because there are Muslim Brotherhood-affiliated political parties and societies in countries across the Middle East and North Africa, including members of parliament and government officials, 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".

QCM (A), para. 2.55. In truth, Joint Appellants have not taken issue with either of these statements.

[36] Joint Appellants' record of support for terrorism and extremism includes: involvement of their nationals and jurisdictions in the 11 September 2001 attacks against the United States of America (*Ibid.*, para. 2.28); involvement in terrorist financing for South-Asia-based terrorist organisations (*Ibid.*, para. 2.34); Saudi Arabia's failing record on counter-terrorism financing according to the Financial Action Task Force and the EU (*Ibid.*, paras. 2.35-2.36); Joint Appellants' status as top sources of foreign terrorist fighters (*Ibid.*, para. 2.49); and Saudi Arabia and the UAE's record of supplying arms to ISIS and Al-Qaida (*Ibid.*, para 2.49).

[37] BESUR, paras. 1.12, 2.2.

and their refusal to acknowledge them, to further demonstrate the pretextual nature of their "accusations in a mirror"[38] and their "real issue" in dispute defence.

2.18 Rather than deny any of the above, Joint Appellants use their Reply to reiterate many of the same false accusations stated in their Memorial, accusations that Qatar continues to deny categorically. Those accusations remain as baseless—and irrelevant—today as they were then, and generally do not merit further response beyond that set forth in Qatar's Counter-Memorial.[39] A few matters, however, are noteworthy.

2.19 Joint Appellants waste a great deal of energy unnecessarily discussing and interpreting the provisions of the Riyadh Agreements and the circumstances in which they were concluded.[40] This is part of their effort to maintain their baseless "real issue in dispute" argument. To that end, they even reiterate the view that Qatar effectively repudiated the Riyadh Agreements,[41] seemingly undeterred by Qatar's unambiguous statement that it "continues to consider [them] binding".[42]

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[38] "Accusations in a mirror" is "a rhetorical practice in which one falsely accuses one's enemies of conducting, plotting, or desiring to commit precisely the same transgressions that one [commits or] plans to commit against them". Kenneth L. Marcus, "Accusations in a Mirror", *Loyola University Chicago Law Journal*, Vol. 43 (2012), p. 359 (**QR (A) Vol. II, Annex 15**).

[39] QCM (A), paras. 2.25-2.60.

[40] *See* BESUR, paras. 2.5-2.14. Because the Riyadh Agreements are not relevant to the jurisdiction of the ICAO Council to adjudicate the instant dispute regarding the interpretation or application of the Chicago Convention and its Annexes, Qatar will not engage in a substantial textual analysis of them, and reserves all relevant rights for the merits stage of this dispute, where any potential countermeasures defence, however baseless, is more appropriately considered.

[41] *Ibid.*, para. 2.8.

[42] QCM (A), para. 2.52, fn. 144. Qatar notes that Joint Appellants now accept the proper revised translation of the 19 February 2017 letter submitted with Qatar's Counter-Memorial. BESUR, fn. 50.

2.20 They also continue to cite to their *own* officials' statements at implementation meetings of the Riyadh Agreements,[43] *without once* acknowledging Qatar's comprehensive rebuttals or the concerns Qatar expressed about Joint Appellants' conduct in the very same meetings[44] and other contexts.[45] In any event, no matter how many pages Joint Appellants devote to the Riyadh Agreements and their self-serving arguments based on them, they remain irrelevant to the civil aviation dispute at issue here, and the ICAO Council's jurisdiction over it.

2.21 Additionally, Joint Appellants continue to maintain falsely that Qatar is in breach of its obligations under the Riyadh Agreements and other rules of international law. They allege, for example, that Qatar has failed to prosecute or extradite Mr. Yusuf Al-Qaradawi, a "designated terrorist[] living in and operating from Qatar".[46] Mr. Qaradawi is not, however, on any UN terrorist designation list, and Interpol rescinded the warrant by which Egypt sought his arrest (a fact Joint Appellants were forced to admit).[47] They chafe at Qatar describing him as a "Sunni

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[43] *See, e.g.*, BESUR, paras. 2.9-2.10.

[44] *See* Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014, [PDF] pp. 1815, 1819 (noting the failure of the UAE to act on individuals interfering in Qatar's internal affairs and on media offences against Qatar) (**BESUM Vol. V, Annex 64**); Summary of Discussions in the Sixth Meeting of their Highnesses and Excellencies the Ministers of Foreign Affairs, Jeddah, 30 August 2014, [PDF] p. 1833 (**BESUM Vol. V, Annex 65**).

[45] QCM (A), paras. 2.44-2.45.

[46] BESUR, para. 2.13.

[47] QCM (A) para. 2.46; BESUR para. 2.22, fn. 94. Joint Appellants respond in a footnote to the unlawful arrest, detention and imprisonment of Mr. Al-Qaradawi's daughter and her husband in Egypt by citing to the very same charges which the UN Human Rights Council's Working Group on Arbitrary Detentions found to "lack a legal basis" and to be "arbitrary". 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/2018/26 (17-26 Apr. 2018), para. 59.

theologian", in spite of the awards and praise that Joint Appellants themselves previously bestowed upon him for his scholarship.[48]

2.22 Joint Appellants' other allegations about Qatar's ostensible support for terrorism and extremism, and interference in their internal affairs likewise do not withstand scrutiny. Citing decisions of Egypt's courts,[49] Joint Appellants accuse Qatar of having "supported openly the Muslim Brotherhood and undermined Egypt's stability".[50] But they studiously ignore the evidence of politicisation and lack of independence of Egypt's courts,[51] a long-standing and internationally-recognised problem that renders any decisions or evidence cited from them unreliable.[52]

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[48] QCM (A) para. 2.46 (noting the UAE's awarding Mr. Al-Qaradawi the 2012 "international figure of the year prize" awarded by UAE Vice President and Prime Minister Sheikh Mohammed bin Rashid Al Maktoum, and Saudi Arabia awarding him the King Faisal Prize for Islamic Studies); *see also* "Custodian of the Two Holy Mosques welcomes Islamic personalities and heads of Hajj delegations at the annual reception in Mina", *Al Riyadh* (28 Oct. 2012) (depicting a picture of Saudi King Abdullah greeting and welcoming Mr. Al-Qaradawi) (**QR (A) Vol. II, Annex 7**).

[49] *See* BESUR, para. 2.13, fn. 71; *see also ibid.*, para. 2.23.

[50] *Ibid.*, para. 2.13.

[51] QCM (A) para. 2.50.

[52] *See*, *e.g.*, International Commission of Jurists, *Egypt's Judiciary: A Tool of Repression* (Sept. 2016), p. 7: "Egypt's judiciary has frequently failed to fulfil its essential role in upholding the rule of law and safeguarding human rights throughout the transition period. … Egypt's judges and prosecutors have become to be seen as a primary tool in the repression of political opponents, journalists and human rights defenders. Furthermore, an examination of individual cases demonstrates that criminal proceedings against political opponents, journalists and human rights defenders have been marred by a litany of violations of internationally recognised rights" (**QR (A) Vol. II, Annex 17**).

See also United Nations Office of the High Commissioner for Human Rights, *Egypt: Justice and reconciliation increasingly failing after second wave of mass death sentences* (15 May 2014) ("Egypt's legal system is in critical need of being reformed, in line with international and regional standards") (**QR (A) Vol. II, Annex 18**); African Commission on Human and Peoples' Rights, 16th Extraordinary Session, *Resolution on Human Rights Abuses in Egypt*, ACHPR Res. 287 (EXT.OS/XVI) (20-29 July 2014) ("Deploring the blatant disregard for the most basic guarantees

2.23 Joint Appellants also repeatedly attempt to portray media coverage of the Muslim Brotherhood with which they disagree as official Qatari State policy in violation of the Riyadh Agreements.[53] These accusations are based solely on their own flawed and internationally condemned[54] understanding of freedom of the press,[55] statements by a discredited former Al Jazeera journalist[56] and other outright

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of fair trial and due process by courts and tribunals as well as the lack of independence of the judiciary".) (**QR (A) Vol. II, Annex 16**).

[53] *See, e.g.*, BESUR paras. 2.21, 2.24-2.25, 2.27-2.29, 2.32-2.34. It is telling that Joint Appellants' purported evidence of offensive broadcasting on Al Jazeera is astonishingly dated—six new sources that they annex to their Reply and two other sources from their Memorial that they cite in their Reply, pre-date the First Riyadh Agreement of November 2013, making those alleged pieces of evidence completely irrelevant to their already-irrelevant claims of Qatari violation of Riyadh Agreement obligations. *See Ibid.*, fns. 72, 117, 118, 120, 123, 124. To be clear, Qatar had no role in the selection of these speakers or their content, and Qatar rejects hateful and offensive speech no matter the speaker. But censorship of such speech requires a legal process that includes meeting certain legal and evidentiary thresholds that must balance the right to freedom of expression consistent with Qatar's obligations under the International Covenant on Civil and Political Rights.

[54] QCM (A), para. 2.56; Committee to Protect Journalists, *Data & Research* (2018) (**QCM (A) Vol. IV, Annex 124**). *See also* United Nations Human Rights Council, *Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi*, UN Doc. A/HRC/41/CRP.1 (19 June 2019), paras. 1, 2 (the report concluded that the murder of Saudi journalist Jamal Khashoggi "constituted an extrajudicial killing for which the State of the Kingdom of Saudi Arabia is responsible").

[55] Tellingly, Joint Appellants construe Article 3(d) of the Supplementary Riyadh Agreement as proof of Qatar's control over Al Jazeera (*see* BESUR, paras. 2.8, 2.31), without understanding that such obligations are not inconsistent with the existence of a free and independent press when those obligations are enforced through application of neutral, generally applicable laws regarding incitement, consistent with Qatar's international obligations. Similarly, Al-Jazeera's ownership by Qatar is entirely consistent with the concept of editorial independence. Like the British Broadcasting Corporation ("BBC"), which maintains editorial independence regardless of the fact that it was established by a UK Royal Charter and is funded by a tax administered by the UK Government, Al Jazeera too retains editorial independence despite being State-owned and receiving partial funding from the State of Qatar. QCM (A), para. 2.55; BBC, *About the BBC* (last accessed: 8 July 2019) (**QR (A) Vol. II, Annex 12**); Al Jazeera, *About Us* (last accessed: 8 July 2019) (**QR (A) Vol. II, Annex 13**).

[56] BESUR, paras. 2.27, 2.33 (citing M. Fahmy, "The Price of Aljazeera's Politics", *The Washington Institute for Near East Policy*, 26 June 2015 (**BESUR Vol. II, Annex 34**); "How Qatar Used and Abused Its Al Jazeera Journalists", *The New York Times*, 2 June 2015 (**BESUR Vol. II, Annex 33**)). Joint Appellants, however, fail to disclose that Mr. Fahmy has publicly lied about his collaboration with Joint Appellants and that he has received at least $250,000 in support from the UAE to pursue a public and legal effort to malign Al Jazeera and Qatar after his release from an Egyptian jail. David D. Kirkpatrick, "Journalist Joins His Jailer's Side in a Bizarre Persian Gulf Feud", *The New York Times* (1 July 2017) (**QR (A) Vol. II, Annex 8**).

falsehoods.[57] They go so far as to allege that Al Jazeera's fact-based coverage of the massacre of over 800 protesters in Raba'a Square in Egypt on 14 August 2013 constitutes evidence of Qatar's support for the Muslim Brotherhood.[58] In fact, the international community roundly condemned Egypt for that atrocity.[59]

2.24 Finally, Joint Appellants cite to some new materials in an attempt to justify their accusations about Qatar's support for extremist groups.[60] They claim, for example, that funds raised by Qatari-based charities may have been distributed to extremist groups. Their five year-old source is not only badly dated, it also cites only the speculative fears of analysts, no hard facts.[61] Nowhere do Joint Appellants acknowledge or rebut the various sources cited in Qatar's Counter-Memorial that detail its robust counter-terror financing efforts,[62] which have "leapfrogged" those of Joint Appellants,[63] one of which has been singled out for criticism on terrorist financing by entities such as the Financial Action Task Force and the EU.[64]

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[57] For example, Joint Appellants refer to the results of an online *Al Jazeera* poll in 2015, whereby respondents indicated that "they supported ISIL", presumably as an example of Al Jazeera's "promot[ion] [of] hatred and violence", conveniently overlooking the fact that the document they cite to substantiate their allegation expressly states that "[t]he voting results do not represent the opinion of Al-Jazeera". BESUR, para. 2.27; "Voting", *Al Jazeera*, 28 May 2015 (**BESUR Vol. II, Annex 32**).

[58] BESUR, para. 2.24.

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

[60] BESUR, paras. 2.17-2.18.

[61] *Ibid.*, para 2.17, fn. 79.

[62] QCM (A), paras. 2.30-2.31.

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

[64] 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)**

2.25 The more Joint Appellants' repeat false allegations like these, the clearer their desperate "accusations in a mirror" strategy becomes.

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2.26 The dispute Qatar presented to the ICAO Council is a straightforward dispute concerning Joint Appellants' 5 June 2017 aviation prohibitions, which were imposed in violation of the Chicago Convention and its Annexes. Those prohibitions exist to this day and continue to pose safety risks to civil aviation. Joint Appellants go to great lengths to manufacture an artificial jurisdictional defence, asserting that the existence of other disputes relating to their false allegations about Qatar's support for terrorism and extremism, and interference in their internal affairs somehow subsumes this very real and discrete dispute under the Chicago Convention and its Annexes. But, as discussed in detail in the following Chapters of this Rejoinder, this transparent attempt to deprive the ICAO Council of its jurisdiction over the merits of this dispute fails on all counts.

Vol. IV, Annex 120); S. Kalin & F. Guarascio, "EU adds Saudi Arabia to draft terrorism financing list: sources", *Reuters* (25 Jan. 2019) (**QCM (A) Vol. IV, Annex 104**).

CHAPTER 3

THE COURT SHOULD DENY JOINT APPELLANTS' SECOND GROUND OF APPEAL

3.1 Joint Appellants' Second Ground of Appeal is that this case falls outside the ICAO Council's jurisdiction *ratione materiae* because the "real issue in dispute between the Parties does not relate to the interpretation or application of the Chicago Convention".[65] Joint Appellants claim instead that it relates to Qatar's alleged "support of terrorism and its other internationally wrongful acts, which gave rise to the countermeasures imposed by the Appellants".[66] Joint Appellants also argue that even if their "real issue" argument fails, the dispute is not "as a matter of judicial propriety and fairness, capable of being decided by the ICAO Council without deciding the disputed issues relating to Qatar's support for terrorism and its interference in other States' internal affairs and the countermeasures relied upon by the Appellants".[67]

3.2 Qatar already showed all the reasons why these arguments fail in its Counter-Memorial. Joint Appellants' "jurisdictional objection" is inconsistent with the plain text of Article 84 of the Chicago Convention, its interpretation or application by the Court in the 1972 *ICAO Council Appeal* case and the jurisprudence of the Court on the characterisation of international disputes.[68] Accepting it would also pose grave dangers to the international adjudicatory

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[65] BESUR, para. 4.1.

[66] *Ibid.*, para. 4.7(a).

[67] *Ibid.*, para. 4.7(b). Joint Appellants raise their objection under the Second Ground of Appeal "both as a matter of jurisdiction and as a matter of admissibility" of Qatar's application to the ICAO Council. *Ibid*., para. 4.1. As explained in Qatar's Counter-Memorial and further below, this dual nature of their objection makes no difference whatsoever. QCM (A), para. 3.72; *infra*, paras. 3.56-3.58.

[68] *See* QCM (A), paras. 3.6-3.15.

system: respondent States could always avoid compulsory dispute settlement brought pursuant to a treaty compromissory clause merely by self-servingly asserting a "lawful" countermeasures defence.[69] The Council's jurisdiction under Article 84 plainly includes the jurisdiction to decide Joint Appellants' countermeasures defence on the merits. Joint Appellants' repurposing of the very same arguments in the guise of their "admissibility objection", resting as they do on the assumption that Article 84 does not give the Council competence to pass judgment on the "substantive justification"[70] of their countermeasures defence, cannot deny the Council's jurisdiction to decide the merits of their violations.

3.3 Joint Appellants' Reply does not meaningfully engage with these arguments. Instead, when Joint Appellants respond at all, they mischaracterise Qatar's position and ignore the Court's consistent case law. None of the arguments they present in their Reply can change the outcome here. The one and only object of the claim Qatar submitted to the ICAO Council concerns Joint Appellants' violations of the Chicago Convention, nothing else. And it would be entirely consistent with judicial propriety and fairness for the ICAO Council to adjudicate this claim. Joint Appellants' Second Ground of Appeal must therefore be rejected.

3.4 The remainder of this Chapter is structured as follows: **Section I** shows that, consistent with established Court jurisprudence, the fact that the Parties have a dispute about other matters does not mean that the real issue in the proceedings before the ICAO Council is something other than what is asserted in Qatar's Application. **Section II** clarifies the Parties' agreement that the "real issue" test relies upon the objective identification of the "object of the claim". **Section III**

[69] *See ibid*., paras. 3.4, 3.19-3.28.

[70] BESUR, para. 4.53.

explains the many reasons why the dispute falls squarely within the jurisdiction of the ICAO Council under the "real issue" test. Finally, **Section IV** disposes of Joint Appellants' repurposed jurisdictional argument under the guise of an objection to the admissibility of Qatar's claims.

I. The Fact that the Parties Have a Dispute About Other Matters Does Not Change the Real Issue in Dispute in This Case

3.5 Chapter IV of Joint Appellants' Reply opens with a red herring. Joint Appellants try to make it seem as if Qatar's Counter-Memorial contains an important concession. They assert: "Qatar's Counter-Memorial significantly narrows the issues between the Parties" because Qatar supposedly "now accepts that there is a dispute between the Parties arising out of its own conduct and the countermeasures adopted by the Appellants in response".[71] In their view, this somehow establishes the "inexorable conclusion" that the "real issue" in dispute "does not concern the Chicago Convention".[72]

3.6 Joint Appellants are so eager to press this point that they mischaracterise Qatar's position. Qatar has *always* accepted that there is a dispute between the Parties concerning Qatar's compliance with its counter-terrorism and non-interference obligations under international law. It made that clear in its pleadings before the ICAO Council[73] and again in its Counter-Memorial.[74] The existence of

[71] *Ibid.*, para. 4.2.

[72] *Ibid.*, para. 4.13.

[73] *See* 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, paras. 75-77, 82 (**BESUM Vol. IV, Annex 25**).

[74] *See* QCM (A), Chapter 2, Section II.B.1, para. 3.37.

that dispute is notorious and indisputable. That fact does not have the consequences that Joint Appellants suggest, however. Just because there is another, "broader"[75] dispute between the Parties does *not* mean, as Joint Appellants claim, that the issues in dispute *in this case* "cannot be severed from the broader dispute".[76] In fact, they can, and must, be.

3.7 Whatever the state of affairs before 5 June 2017, when Joint Appellants adopted the aviation prohibitions they created a new dispute between the Parties under the Chicago Convention that did not previously exist. The mere fact that those prohibitions were allegedly imposed in the context of the broader dispute does not deprive that new dispute of its separate existence as a matter of law. The Court's jurisprudence could not be clearer in that regard.

3.8 In *Certain Iranian Assets*, for example, the United States, much like Joint Appellants here, argued that Iran was "not seeking the settlement of a legal dispute concerning the provisions of the Treaty [of Amity], but [was] attempting to embroil the Court in '*a broader strategic dispute*'".[77] The U.S. further argued that the "actions of which Iran complains *cannot be separated from their context*, namely Iran's long-standing violations of international law …".[78]

3.9 The Court disagreed. In its February 2019 Judgment on Preliminary Objections, the Court stated that "applications that are submitted to it *often present a particular dispute that arises in the context of a broader disagreement between*

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[75] BESUR, para. 4.14(b).

[76] *Ibid.*, p. 84, Section 2 heading.

[77] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, I.C.J. Judgment of 13 February 2019, para. 34 (emphasis added).

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

parties".[79] According to the Court, the only relevant questions were (1) "whether the acts of which [Applicant] complains fall within the provisions of" the treaty in question (there, the 1955 Treaty of Amity), and (2) "whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain" under that treaty's compromissory clause.[80]

3.10 Joint Appellants nowhere argue that the acts about which Qatar complains do not fall within the provisions of the Chicago Convention and its Annexes. Neither in their pleadings before the Council or before the Court do Joint Appellants argue that the aviation prohibitions do not implicate those provisions or that there is not a dispute over them.[81] The consequence is inescapable: the dispute is one which the Council "has jurisdiction *ratione materiae* to entertain".

3.11 Joint Appellants' Reply makes no effort to reconcile their position with this aspect of the Court's Judgment in *Certain Iranian Assets*. Indeed, they do not address it at all.

3.12 Nor do they make any effort to come to terms with the Court's virtually identical holding in *Bolivia v. Chile*. There, the Court had no difficulty rejecting 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 Ocean".[82] In its 2015 Judgment on Preliminary Objections, the Court stressed that "applications that are submitted to the Court *often present a particular*

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[79] *Ibid*., para. 36 (emphasis added).

[80] *Ibid*.

[81] *See, e.g.*, BESUR, paras. 4.7(a), 4.14.

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

dispute that arises in the context of a broader disagreement between parties".[83] The mere fact that they do so does not convert the real issue in dispute in a particular case into the subject of the broader disagreement.[84]

3.13 Other similar cases on which Joint Appellants maintain a studied silence include:

- *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*;[85]
- *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*;[86]
- *Border and Transborder Armed Actions (Nicaragua v. Honduras)*[87] and;

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

[84] *Ibid.*: "The Court considers 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 the Court to adjudge and declare that Bolivia has a right to sovereign access".

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

[86] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States),* Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, para. 96 ("…the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force".).

[87] *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)*.[88]

3.14 Joint Appellants' demurral in the face of this long, unbroken chain of case law is as striking as it is telling. It also makes their assertion that it is Qatar that "seeks to distance itself from the well-established practice of the Court"[89] all the more curious. Joint Appellants' Reply cites only two cases to support its "real issue" argument: the *Aegean Sea* case and the *Chagos Islands* arbitration.[90] Neither supports their position, however. In fact, for the reasons Qatar will explain in the next subsection, both cases only underscore the strength of Qatar's argument.

> "There is no doubt that the issues of which the Court has been seised may be regarded as part of a wider regional problem. The Court is not unaware of the difficulties that may arise where particular aspects of a complex general situation are brought before a Court for separate decision. Nevertheless, as the Court observed in the case concerning *United States Diplomatic and Consular Staff in Tehran*, 'no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important …'".

[88] *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 ("One situation may contain disputes which relate to more than one body of law and which are subject to different dispute settlement procedures") (also citing *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, I.C.J. Reports 1980, paras. 36-37; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, para. 54). The only thing that Joint Appellants say with respect to those cases is that "many" of them "involved variations on the political question doctrine". BESUR, para. 4.16. Qatar fails to see how this discounts their relevance to the application of the "real issue" test nor do Joint Appellants offer any explanation to that effect. But even if Joint Appellants are correct, *quod non*, as a matter of fact most of those cases clearly involved parallel *legal* disputes, either extant or possible. *See, e.g.*, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian* Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, para. 32; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, para. 32; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, paras. 94, 96.

[89] BESUR, para. 4.12.

[90] *Ibid.*, paras. 4.16-4.17.

3.15 Joint Appellants' mere invocation of a broader dispute between the Parties therefore cannot change the nature of the issue in dispute *in this case*. Indeed, Qatar cannot help but note that at least one of the Joint Appellants, the UAE, itself appears not to believe the "real issue" argument.

3.16 The Court is aware that there is a separate case pending between Qatar and the UAE relating to the latter's violations of the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). That case, like this one, relates to certain measures the UAE took on 5 June 2017, allegedly in response to Qatar's violations of, among other things, the Riyadh Agreements. But the UAE has *not* argued in that case that the Court lacks jurisdiction because the "real issue" in dispute is something other than the UAE's violations of CERD. If the UAE truly considered that its "real issue" argument had merit in this case, it surely would have made it in that case too. Qatar considers the fact that it has not revealing.

II. The Real Issue Test Calls for an Objective Identification of the "Object of the Claim"

3.17 The Parties agree on one thing: the "proper characterization of a dispute 'is a matter for objective assessment'".[91] They appear to disagree, however, on the manner for determining exactly what the "real issue" in dispute in a particular case is.

3.18 Relying on the extensive jurisprudence on this issue, Qatar's Counter-Memorial explained that the Court will determine the proper characterisation of the

[91] *Ibid.*, para. 4.10.

dispute by "identifying the object of the claim" before the ICAO Council.[92] Joint Appellants take this to mean that Qatar is suggesting that "only an applicant's pleadings are to be taken into account in determining the real issue in dispute".[93] However, it is not, and has never been, Qatar's position that in conducting its assessment the Court may only take account of Qatar's pleadings before the ICAO Council. Qatar happily accepts that the Court may look beyond those pleadings to the written and oral pleadings of Joint Appellants, as well as other surrounding materials. That said, the essential point remains that the purpose of examining all the relevant materials is to identify "the real subject of the dispute", "the exact nature" of the claims submitted to international adjudication.[94]

3.19 The relevant "claim" is, of course, the applicant's claim. The focus of the inquiry is thus an objective assessment of what Qatar is seeking from the ICAO Council. The Court has been clear that it will give "particular attention to the formulation of the dispute chosen by the applicant" and "take[] account of the facts that the applicant presents as the basis for its claim".[95]

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[92] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, I.C.J. Judgment of 6 June 2018, para. 48; QCM (A), paras. 3.44-3.50 (citing *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, paras. 12, 83; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015, paras. 22, 32-33; *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; *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), paras. 209, 211-212).

[93] BESUR, para. 4.10.

[94] 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"), para. 5.54 (quoting *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, para. 29)

[95] *See, e.g.*, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, I.C.J. Judgment of 6 June 2018, para. 48; *Fisheries Jurisdiction (Spain v. Canada)*,

3.20 The two cases where an international court or tribunal has determined that it was without jurisdiction as a result of the "real issue" test, cited in the Reply,[96] confirm Qatar's point. Tellingly, Joint Appellants do not take the trouble to explain why they think the first such case, *Aegean Sea Continental Shelf*, helps them. It does not. As explained in Qatar's Counter-Memorial, the Court rejected Greece's claim in that case because its object, as stated in Greece's first submission, necessarily required the adjudication of a matter that was outside of the parties' consent as a result of Greece's reservation to the applicable title of jurisdiction.[97]

3.21 The second case, *Chagos Islands*, which Joint Appellants claim is "closely analogous" to the instant case given that "the aviation countermeasures are merely one, incidental aspect, of a broader dispute which involves a bloc of countermeasures",[98] is no different. As explained in Qatar's Counter-Memorial,[99] a faithful reading of the *Chagos Islands* Award shows that the arbitral tribunal declined jurisdiction over one of Mauritius's submissions (the first) not just because it was part of a "broader dispute", as Joint Appellants claim.[100] It did so because Mauritius was actually looking for a judicial pronouncement that would "state that Mauritius is the 'coastal State' in relation to the Chagos Archipelago".[101] In other words, the object of Mauritius's claim was actually a determination the

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Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, para. 30; *Territorial and Maritime Dispute (Nicaragua v. Colombia*), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II), para. 38.

[96] BESUR, para. 4.16.

[97] *See* QCM (A), para. 3.45.

[98] BESUR, para. 4.17.

[99] QCM (A), paras. 3.50-3.51.

[100] BESUR, para. 4.17.

[101] *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. 211.

United Kingdom did not have sovereignty over the Chagos Archipelago, a matter plainly outside the scope of U.N. Convention on the Law of the Sea ("UNCLOS").

3.22 It bears mention that notwithstanding the decision that it lacked jurisdiction over Mauritius's first submission, the tribunal did *not* come to the same conclusion with respect to another of Mauritius's submissions (the fourth), which concerned "the manner in which the [marine protected area] was declared" by the United Kingdom.[102] The tribunal considered that issue "*distinct* from the matter of sovereignty" and thus within its jurisdiction.[103] The mere existence of a "larger dispute"[104] was therefore not a sufficient reason to deny jurisdiction over any and all of Mauritius's claims.

III. This Dispute Falls Squarely Within the Jurisdiction of the ICAO Council Under the "Real Issue" Test

3.23 Joint Appellants do not seriously dispute that in determining the proper characterisation of the dispute before the ICAO Council, the Court is guided by the true object of Qatar's claim. Here, the unmistakable object of Qatar's claim before the Council is to secure a decision that the aviation prohibitions violate the provisions of the Chicago Convention and its Annexes, including Articles 2, 3*bis*, 4, 5, 6, 9, 12, 37 and 89 of the Convention.[105] In its Application, Qatar asked the Council:

> "- To determine that the Respondents violated by their actions against the State of Qatar their

[102] *Ibid.*, para. 210.

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

[104] *Ibid.*, para. 212. The "larger dispute" was about "land sovereignty over the Chagos Archipelago".

[105] *See* QCM (A), paras. 2.22, 3.31-3.35.

> obligations under the Chicago Convention, its Annexes and other rules of international law,
>
> - 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".[106]

3.24 Just like their argument about the existence of a broader dispute between the Parties,[107] Joint Appellants' assertion of a countermeasures defence does not, and cannot, change the object of Qatar's claim before the Council. The Court's decision in the 1972 *ICAO Council Appeal* case—the only prior case to come to it on appeal from a Council decision—is unambiguous in that respect. Faced with an argument from India that was very similar to the one Joint Appellants now make,[108] the Court rejected it in emphatic terms:

> *"[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*

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[106] 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, [PDF] pp. 592-593 (**BESUM Vol. III, Annex 23**).

[107] *See supra* Section I.

[108] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, paras. 27, 31; *see also* QCM (A), para. 3.24.

> *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 merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled"*.[109]

3.25 The Court continued in the next paragraph:

> "[T]he 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*".[110]

3.26 Qatar made these points in its Counter-Memorial.[111] Joint Appellants have little to say in reply. The *only* time Joint Appellants mention the Court's 1972 Judgment in Chapter IV of the Reply is to state simply: "The Appellants recall that the *India v. Pakistan* case did not concern a question of countermeasures".[112] But

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

[110] *Ibid.*, para. 28 (emphasis added).

[111] QCM (A), paras. 3.19-3.28.

[112] BESUR, para. 4.27.

they never explain why this alleged distinction should make a difference. It does not.

3.27 As explained in Qatar's Counter-Memorial, the Court's holding in the 1972 *ICAO Council Appeal* case was stated in general terms; it did not turn on the particular defence that India asserted in that case.[113] Here, like there, "[t]he fact that a defence on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned,—otherwise parties would be in a position themselves to control that competence, which would be inadmissible".[114]

3.28 Joint Appellants invocation of a countermeasures defence therefore cannot change the real issue in dispute before the Council. Nor does the object of Qatar's claim involve the adjudication of issues falling outside the scope of the Parties' consent, as shown in the two sections that follow.

A. THE ICAO COUNCIL IS COMPETENT TO DECIDE JOINT APPELLANTS' COUNTERMEASURES DEFENCE

3.29 The Parties' consent to the jurisdiction of the ICAO Council is not as narrow as Joint Appellants make it out to be.[115]

3.30 A dispute between two or more contracting States to the Chicago Convention may call for the ICAO Council, under the supervision of the Court, to pass judgment on State actions taken "for reasons of military necessity or public

[113] QCM (A), para. 3.25.

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

[115] *See, e.g.*, BESUR, para. 4.27.

safety";[116] "in exceptional circumstances or during a period of emergency, or in the interest of public safety";[117] in a situation of "war" or "national emergency".[118] All these determinations may involve factual matters and international obligations going beyond civil aviation that "in some manner derogate[] from, provide[] an exception to, or otherwise qualif[y] the scope of the principal substantive obligations".[119] On Joint Appellants' own case, there can be no question that such matters "form[] an integral part of the material scope of the Court's jurisdiction as to the 'interpretation or application' of the Treaty".[120]

3.31 Nor can it be disputed that, aside from these concepts in the Chicago Convention, the ICAO Council may also take into account "any relevant rules of international law applicable in the relations between the parties"[121] when interpreting the provisions of the Convention. In neither circumstance can it be said that the consideration of obligations lying outside the Chicago Convention by the Council amounts to an improper expansion of its jurisdiction. Despite Joint Appellants' obfuscation, it is just the same with Joint Appellants' countermeasures defence.

3.32 It is also undisputed between the Parties that, in principle, the ICAO Council has jurisdiction to apply the rules on the international responsibility of

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[116] Chicago Convention, Art. 9(a) (**BESUM Vol. II, Annex 1**).

[117] *Ibid.*, Art. 9(b).

[118] *Ibid.*, Art. 89.

[119] BESUR, para. 4.43.

[120] *Ibid.*, fn. 300 (citing *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Islamic Republic of Iran v. United States of America)*, Request for the Indication of Provisional Measures, Order of 3 October 2018, para. 42).

[121] Vienna Convention on the Law of Treaties (adopted 22 May 1969), 1155 U.N.T.S. 331, Art. 31(3)(c); *see also Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, paras. 39-42.

States for internationally wrongful acts.[122] One such rule provides basis for Joint Appellants' assertion of Qatar's alleged violations of obligations lying outside the Chicago Convention as a circumstance precluding the wrongfulness of their aviation prohibitions. Under Article 22 of the International Law Commission's ("ILC") Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA"),

> "[t]he wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three".[123]

3.33 In this context, the ICAO Council also has jurisdiction to determine whether a Member State must be deemed an "injured State";[124] that is, a State entitled to react to an internationally wrongful act by the taking of countermeasures in breach of the Chicago Convention, for purposes of adjudicating its responsibility under international law.

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[122] *See, e.g.*, *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on the Merits (14 Aug. 2015), para. 190 ("In order properly to interpret and apply particular provisions of the Convention, it may be necessary for a tribunal to resort to foundational or secondary rules of general international law such as the law of treaties or the rules of State responsibility".) (internal footnotes omitted). Indeed, Joint Appellants nowhere suggest, for example, that the Council lacks competence to adjudicate a "reciprocal countermeasures" defence.

[123] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), in *Report of the International Law Commission on the Work of its Fifty-third Session* (2001), document A/56/10, Chapter V, reproduced in *ILC Yearbook* 2001, Vol. II(2) (hereinafter "International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)"), Art. 22 (**BESUM Vol. II, Annex 13**). Chapter II of Part III of the Articles sets out the objects and limits of countermeasures (Article 49), obligations not affected by countermeasures (Article 50), the fundamental principle of proportionality governing their operation and invocability (Article 51), conditions relating to resort to countermeasures (Article 52) and the termination of countermeasures (Article 53).

[124] *Ibid.*, Arts. 42, 49.

3.34 Joint Appellants are unable to point to a single limitation on the scope of the body of rules of international law that the Council has jurisdiction to apply: they point to no support for their assertion that the Council cannot address their non-reciprocal countermeasures defence. They therefore urge the Court to read such a limitation into the terms "relating to the interpretation [or] application of [the] Convention]" in Article 84.[125] Joint Appellants allege that Qatar, by suggesting that the Council has jurisdiction to address their countermeasures defence, is proposing an "expansive interpretation" of these terms.[126] As they see it, Qatar's response "go[es] against the practice of the Court, which has consistently interpreted compromissory clauses in accordance with the ordinary rules of treaty interpretation".[127] Joint Appellants are mistaken.

3.35 Qatar is not proposing an "expansive" interpretation of Article 84. Nor is it proposing that Article 84 be interpreted other than in accordance with the ordinary rules of treaty interpretation. To the contrary, Qatar proposes only that it be interpreted in a manner consistent with the many other compromissory clauses just like it.

3.36 Article 84 is unremarkable; it is a garden-variety compromissory clause. If a dispute in which an applicant alleges violations of the Chicago Convention ceased to concern the "interpretation or application" of the Convention merely because the respondent asserted a non-reciprocal countermeasures defence, the same would be true for other treaties that contain materially identical compromissory clauses.

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[125] *See, e.g.*, BESUR, paras. 4.19-4.20.

[126] *Ibid.*, para. 4.19.

[127] *Ibid.*, para. 4.22.

3.37 For example, much like Article 84 of the Chicago Convention, Article 286 of UNCLOS provides: "Any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under [Section 2 of Part XV]".[128]

3.38 On Joint Applicants' theory, a respondent State could void the jurisdiction of the relevant court or tribunal—frequently this Court—over a dispute concerning alleged violations of UNCLOS merely by interposing a defence of non-reciprocal countermeasures. Such a result would not only be absurd, it would seriously undermine the entire system of inter-State adjudication.

3.39 Joint Appellants appear mindful of the uncomfortable consequences of their position. They therefore try to make it seem that the problem is not a serious one. They argue that the danger Qatar points to does not arise because Qatar's argument supposedly

> "rests on a critical and unstated assumption that the Parties' dispute is to be characterized solely by reference to the narrow manner in which Qatar has now sought to formulate its claim. Given that the real issue in dispute between the Parties does *not* concern matters cognisable under the Chicago Convention, Qatar's reasoning breaks down".[129]

3.40 This argument, of course, assumes its own conclusion. In other words, Joint Appellants argument would only have traction if they were correct that the "real issue" in dispute is what they say it is. But they are not correct for all the reasons

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[128] United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, 1833 *UNTS* 3, Art. 286 (**BESUM Vol. II, Annex 9**).

[129] BESUR, para. 4.26.

Qatar has already explained. Their attempt to minimise the systemic dangers of their argument therefore fails.

3.41 Joint Appellants also argue that the danger Qatar highlights "would only be a concern if respondent States abusively invoked countermeasures in bad faith, in circumstances lacking any foundation in fact".[130] This is no answer. On Joint Appellants' theory of the case, the ICAO Council would not have jurisdiction to consider a countermeasures defence and therefore would have no ability to even reach the issue of bad faith. There would thus be no check against abuse.

3.42 Moreover, in Qatar's view, the possibility that Joint Appellants point to is exactly what is happening in this case. Contrary to their pretensions,[131] Joint Appellants' countermeasures defence is *not* presented in good faith. The purpose of Chapter 2 of Qatar's Counter-Memorial, and of the present Rejoinder, is precisely to show that Joint Appellants' countermeasures defence is "lacking any foundation in fact".[132] In those chapters, Qatar showed that their allegations concerning Qatar's supposed support for terrorism and interference in their internal affairs crumble upon even cursory analysis. Their countermeasures defence is entirely pretextual in nature and therefore should not be allowed to operate as a bar to the Council's jurisdiction under the artifice of the "real issue" test.

[130] *Ibid.*, para. 4.27.

[131] *Ibid.*

[132] *Ibid.*

B. THE ICAO COUNCIL COULD DECIDE THIS DISPUTE WITHOUT REACHING THE MERITS OF JOINT APPELLANTS' COUNTERMEASURES DEFENCE

3.43 As Qatar explained in its Counter-Memorial, there are several ways in which the ICAO Council might decide the dispute submitted to it *without* ever having to enter into a discussion of the "substantive justification"[133] of Joint Appellants' countermeasures defence.[134] That being the case, it would be anomalous to find that the Council lacks jurisdiction under Article 84 based on a notional eventuality that, while theoretically possible, may never come to pass.

3.44 As they do with so many other elements of Qatar's Counter-Memorial, Joint Appellants mischaracterise Qatar's position. They claim that Qatar raised these points because it supposedly "all but concedes [that] the ICAO Council does *not* have jurisdiction over the question whether the Appellants' countermeasures were justified by Qatar's prior conduct".[135] That is not the case. The point is far simpler: the assumption that lies at the heart of Joint Appellants' case—namely, that the disagreement Qatar submitted to the ICAO Council "would *necessarily* require the Council to adjudicate upon matters falling outside its jurisdiction"[136]—is unfounded. As stated, there are several ways in which the Council could decide this dispute without having to answer—to again use Joint Appellants' words—"the

[133] *Ibid.*, para. 4.53.

[134] *See* QCM (A), paras. 3.58-3.69.

[135] BESUR, para. 4.33; *see also ibid.*, para. 4.5 ("Qatar all but accepts that the Council lacks jurisdiction under Article 84 of the Chicago Convention, including in respect of the Appellants' invocation of countermeasures").

[136] *Ibid.*, para. 4.33 (emphasis added).

question whether the Appellants' countermeasures were justified by Qatar's prior conduct".[137]

3.45 One such way, of course, would be if the Council found that the aviation prohibitions do not violate the Chicago Convention.[138] In that case, the question of circumstances precluding wrongfulness would not arise. Joint Appellants have no response to this point.

3.46 Another such way would be for the Council to decide that Joint Appellants did not comply with the preconditions set by international law for the adoption of countermeasures, including the procedural conditions of notice and an offer of negotiation, among others.[139]

3.47 In this respect, Qatar notes that Joint Appellants have never argued either before the Council or the Court that they gave Qatar the necessary notice or offered to negotiate with it prior to the adoption of the aviation prohibitions. Indeed, as Qatar has shown, the aviation prohibitions were adopted without prior warning.[140] The Council would therefore be well justified in rejecting Joint Appellants' countermeasures defence on this ground alone.

3.48 Joint Appellants complain that "[f]or the ICAO Council to consider only the procedural aspects of countermeasures, without also considering Qatar's transgressions that gave rise to them in the first place, would be incoherent, and

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[137] *Ibid.*

[138] *See* QCM (A), paras. 3.57-3.58.

[139] *See* International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Art. 52(1).

[140] *See* QCM (A), paras. 1.12, 2.5, 4.28.

result in an inchoate and partial decision".[141] It is difficult to understand why that would be the case, however, given that Joint Appellants do not dispute that a countermeasures defence would be invalidated in case it fails to meet the procedural requirements set out in Article 52(1) of ARSIWA. In such case, the "substantive justification" of the defence would not need to be addressed.

3.49 In any event, Joint Appellants' complaint is beside the point. The point is *not* that the Council cannot consider the substantive aspects of Joint Appellant's defence. In Qatar's view as stated above,[142] it can. Article 84 of the Chicago Convention gives it that authority, just like every other body empowered to decide a dispute concerning the "interpretation or application" of a given treaty. The point is simply that the Council may not even have to address the substantive aspects of Joint Appellants' defence.

3.50 The ICAO Council could also conclude that the Chicago Convention excludes as *lex specialis* recourse to (non-reciprocal) countermeasures.[143] This is plainly an issue relating to the "interpretation or application" of the Chicago Convention that is unmistakably within the Council's jurisdiction.[144] If the Council

[141] BESUR, para. 4.54.

[142] *See supra* Section III.A.

[143] *See* QCM (A), paras. 3.59-3.67.

[144] The opposing views of the Parties about whether countermeasures are available under the Chicago Convention "cannot but be indicative of a direct conflict of views as to the meaning of the [Convention], or in other words of a 'disagreement … relating to [its] interpretation or application':—and if there is even one provision … as to which this is so, then the Council is invested with jurisdiction, were it but the only such provision to be found, which is clearly not the case". *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, para. 43.

were to so decide, the substance of Joint Appellants countermeasures argument would be rendered entirely irrelevant.

3.51 Joint Appellants' Reply contains a number of arguments as to why, in their view, the Chicago Convention does not exclude countermeasures.[145] As they acknowledge,[146] the issue is not ripe for decision at this time; it is a matter for decision by the Council when this matter returns to it for decision on the merits. Qatar will therefore not burden the Court by unnecessarily prolonging the debate on this point. It will confine itself to just three observations for purposes of highlighting the extent to which Joint Appellants are content to take liberties with the law to make their case.

3.52 Joint Appellants argue that Qatar's *lex specialis* argument "fails to engage with the terms of the Riyadh Agreements, which clearly establish a broad and free-standing right of Contracting States to adopt 'appropriate action'—without restriction or qualification—in case of another Contracting State's non-compliance".[147] Qatar disagrees with this proposition, and in particular Joint Appellants' suggestion that this "right" goes beyond the customary international law right of countermeasures and/or prevails over the Chicago Convention.[148]

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[145] BESUR, paras. 4.34-4.47.

[146] *Ibid.*, para. 4.33 ("Each of Qatar's three suggestions would require the Council to determine, in whole or in part, the Appellants' claim of countermeasures on the merits, which is improper at the jurisdictional phase of the proceedings".).

[147] *Ibid.*, para. 4.35.

[148] *Ibid.*, para. 2.7.

3.53 On the other hand, Qatar agrees with Joint Appellants that this is "a matter for argument only at the merits stage" before the ICAO Council.[149] Qatar would be remiss not to point out, however, that pursuant to Article 82 of the Chicago Convention, Joint Appellants have undertaken "*not* to enter into any … obligations and understandings [which are] inconsistent with the terms of [the Chicago] Convention".[150] As Qatar pointed out in its Counter-Memorial, the International Law Commission ("ILC") Report on the Fragmentation of International Law has identified clauses of that precise character as "an express exception to the *lex posterior rule*, designed to guarantee the *normative power* of the earlier treaty".[151] Even though Joint Appellants question the "intransgressible" nature of the substantive obligations under the ICAO Convention,[152] they entirely fail to account for this provision.

3.54 Joint Appellants also claim that "aviation-related countermeasures are well-known in State practice".[153] The instances of practice they cite are, however, beside the point here. The examples Joint Appellants invoke relating to the U.S.-France

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[149] *Ibid.*, para. 4.36.

[150] Chicago Convention, Art. 82 (**BESUM Vol. II, Annex 1**) (emphasis added). *See* QCM (A), para. 3.64 and fn. 270 ("To the extent that Joint Appellants base their countermeasures defence on the Riyadh Agreements, this provision alone defeats their claim".).

[151] 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).

[152] BESUR, paras. 4.39, 4.43. Joint Appellants are also wrong to suggest that as long as the obligations under the Chicago Convention are not "given a status akin to *jus cogens*", the issue of exclusion of countermeasures does not arise. *Ibid.*, para. 4.39. The ILC Commentary on Article 50 ARSIWA—which Joint Appellants quote—clearly rejects such view: "States may agree between themselves on other rules of international law which may not be the subject of countermeasures, *whether or not they are regarded as peremptory norms under general international law*". *Ibid.*, para. 4.41 fn. 328 (quoting International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 50, p. 133, para. 10 (**BESUM Vol. II, Annex 13**) (emphasis added)).

[153] BESUR, para. 4.45.

1978 arbitration, Poland and the Soviet Union, South Africa and Yugoslavia all concern *landing rights* granted under *bilateral treaties*,[154] matters not governed by the Chicago Convention. And the one example they cite that does at least in part involve overflight—the E.U. ban on North Korean carriers[155]—was imposed pursuant to paragraph 21 of *U.N. Security Council Resolution 2270* adopted on 2 March 2016,[156] *not* as a countermeasure.[157]

3.55 Finally, Joint Appellants wrongly assert that "specific, express agreement" is required to exclude countermeasures[158] and that they are always available "even where … treaties already provide exceptions for different circumstances".[159] Nothing in the work of the ILC, however, suggests that countermeasures must be explicitly excluded. On the contrary, by underscoring that derogation clauses and the prohibition of reservations can be indicative of a *lex specialis* excluding

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[154] *See ibid.*, para. 4.45(a), (b), (c), (d). Joint Appellants refer in particular to the European Union's Council Regulation n°1901/98 of 7 September 1998 concerning a ban on flights of Yugoslav carriers between the Federal Republic of Yugoslavia and the European Community (BESUR, fn. 342), but they fail to note that Article 3, paragraph 2, of that Regulation specifies that "[n]othing [therein] shall be construed as limiting any existing rights of Yugoslav carriers and aircraft registered in the FRY other than rights to land in or to take off from the territory of the Community".

[155] *Ibid*., para. 4.45(e).

[156] UN Security Council, *Resolution 2270*, UN Doc. S/RES/2270 (2 Mar. 2016), para. 21: "*Decides* that all States shall deny permission to any aircraft to take off from, land in or overfly, unless under the condition of landing for inspection, their territory, if they have information that provides reasonable grounds to believe that the aircraft contains items the supply, sale, transfer or export of which is prohibited by resolutions 1718 (2006), 1874 (2009), 2087 (2013), 2094 (2013) or this resolution, except in the case of an emergency landing, and calls upon all States, when considering whether to grant overflight permission to flights to assess known risk factors".

[157] Joint Applicants misrepresent the facts of this ban. Citing only UNSC Resolution 1718 (2006), they assert that the EU landing, taking off and overflying bans "are separate from the sanctions required by the United Nations Security Council". BESUR, para. 4.45(e). As the text of UNSC Resolution *2270* quoted in the previous footnote shows, that is plainly incorrect.

[158] BESUR, para. 4.41.

[159] *Ibid.*, para. 4.41, fn. 330. Joint Appellants purport to illustrate their point by invoking the practice of Nazi Germany in relation to the Locarno Treaty. *Ibid*., fn. 330. Qatar considers it telling that Joint Appellants look to that practice for legal guidance.

countermeasures,[160] the ILC makes clear that countermeasures may be excluded by implication. Indeed, treaties that are silent on the issue have been interpreted as excluding countermeasures.[161] Such treaties include the Vienna Conventions on Diplomatic Relations and on Consular Relations, which the Court has held to "exclude[] the possibility of recourse to countermeasures",[162] even though they do not contain a "specific, express agreement" to that effect.

3.56 Qatar reiterates that the point of this discussion is *not* that the Court should decide all these issues now. The point is simply that it is entirely possible that the Council will never have occasion to deal with the substance of Joint Appellants' claim that Qatar's actions justified the aviation prohibitions. Joint Appellants' request that the Court disregard this possibility is another way in which they seek to impermissibly control the competence of the Council, and ultimately of the Court itself.

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

3.57 Joint Appellants maintain their argument that even if the Council has jurisdiction, Qatar's claims should be deemed inadmissible as a matter of "judicial propriety".[163] As they see it, "it would be 'incompatible with the fundamental principle of the consensual basis of international jurisdiction'" for the Council to

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[160] *See* QCM (A), para. 3.59-3.63.

[161] *See* Court of Justice of the European Communities, *Commission v. Grand Duchy of Luxembourg and Belgium*, joined cases 90 and 91/63, Judgment (13 Nov. 1964), *Rep.* 1964, p. 626.

[162] BESUR, para. 4.47 (discussing *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, I.C.J. Reports 1980, paras. 83-86).

[163] BESUR, para. 4.29.

exercise jurisdiction.[164] This argument need not detain the Court long. It is an obvious repurposing of their jurisdictional argument as an objection to admissibility.

3.58 According to Joint Appellants, "the simple point is that the Council cannot properly determine the civil aviation issues of the dispute without also adjudicating the broader aspects of the dispute which fall outside of its jurisdiction, including the Appellants' reliance on countermeasures".[165] Their admissibility argument thus assumes the premise of their jurisdictional argument. If the latter fails (as it does for all the reasons Qatar has explained), so too does the former. Joint Appellants' countermeasures defence does not "fall outside" the Council's jurisdiction; it falls squarely within it.

3.59 Additionally, as explained in Qatar's Counter-Memorial, by analogy to the logic of *forum prorogatum*, a respondent State presenting a defence on the merits should be deemed to have consented to it being duly examined should the relevant international court or tribunal find itself with jurisdiction.[166] To recall once again the words of the Court in the 1972 *ICAO Council Appeal* case, the opposite would be tantamount to allowing a "defence on the merits" to negative "the competence of the tribunal or other organ concerned".[167]

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[164] *Ibid.*, para. 4.28 (quoting BESUM, para. 5.2(b)).

[165] BESUR, para. 4.28.

[166] QCM (A), para. 3.73, fn. 290.

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

3.60 No issue of consent or "judicial propriety" therefore arises. Joint Appellants' admissibility argument must be rejected.

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3.61 The dispute between the Parties relates to the interpretation or application of the Chicago Convention and its Annexes. The Council therefore has jurisdiction. In line with the Court's prior jurisprudence, Qatar cannot be deprived of its right to have its claims heard simply because Joint Appellants make unilateral assertions that the "real issue" in dispute between the Parties concerns matters falling outside the scope of the Convention. The ICAO Council properly dismissed Joint Appellants' 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' Third Ground of Appeal is that the Council erred in rejecting their objection relating to prior negotiations.[168] They claim that the Council's decision is wrong for two reasons. *First*, Qatar allegedly did not comply with the negotiation requirement in Article 84 of the Chicago Convention, which Joint Appellants characterise as the "jurisdictional limb"[169] of their objection. *Second*, "in the alternative",[170] Qatar allegedly did not comply with the requirement in Article 2(g) of the ICAO Rules for the Settlement of Differences, which Joint Appellants characterise as "giv[ing] rise to a question of admissibility".[171]

4.2 Both arguments are without merit for the reasons explained below. Accordingly, Joint Appellants' Third Ground of Appeal fails, just like the other two. **Section I** of this Chapter deals with Joint Appellants' misguided complaint

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[168] Joint Appellants allege in their Reply that the Decision adopted by the ICAO Council "provides no basis to conclude that the Council held that Qatar had in fact 'satisfied the negotiation requirement'". BESUR, para. 5.5. However, later in their argument, Joint Appellants admit that the ICAO Council "reject[ed] the Appellants' Preliminary Objections in this regard". *Ibid.*, para. 5.79. They did the same in their Joint Application (Joint Application Instituting Proceedings, Appeal Against a Decision of the ICAO Council dated 29 June 2018 on Preliminary Objections (Application (A), Kingdom of Bahrain, Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates v. State of Qatar), 4 July 2018 (hereinafter "ICJ Application (A)"), para. 31) and in their Memorial, where they actually stated that the Council had "not accept[ed] the Appellants' Second Preliminary Objection". BESUM, para. 6.1. The Decision of the ICAO Council itself expressly states that the Council "decide[d] that the preliminary objection of the Respondents is not accepted" 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 (**BESUM Vol. V, Annex 52**).

[169] BESUR, para. 5.8; *see also ibid.*, para. 5.78.

[170] *Ibid.*, para. 5.2; *see also ibid.*, para. 5.78.

[171] *See, e.g., ibid.*, paras. 5.1-5.2.

that the ICAO Council erred in rejecting their objection based on Article 84 of the Chicago Convention. **Section I.A** explains why Joint Appellants misunderstand the applicable legal standard. **Section I.B** shows how Joint Appellants misapply that standard to the facts of the case. **Section II** then deals with Joint Appellants' equally misguided complaint that Qatar did not comply with Article 2(g) of the ICAO Rules for the Settlement of Differences.

I. The ICAO Council Properly Decided that Qatar Satisfied the Article 84 Negotiation Requirement

A. JOINT APPELLANTS MISUNDERSTAND THE RELEVANT LEGAL STANDARD

4.3 In Section I.A of Chapter V of their Reply, Joint Appellants challenge three elements of Qatar's position concerning the legal standard governing the negotiation requirement, characterising all three of them as "wrong".[172] In this section, Qatar responds to those challenges and shows why it is Joint Appellants who are mistaken.

1. Article 84 does not require a disputing Party to attempt to negotiate if the other side entirely refuses to negotiate

4.4 Qatar's Counter-Memorial showed that after severing diplomatic relations, Joint Appellants at all times took the view that there was "nothing to negotiate" with Qatar unless it adhered to their facially unreasonable 13 Demands, which themselves were "non-negotiable".[173] Qatar also explained that Article 84 of the

[172] *Ibid.*, para. 5.10.

[173] QCM (A), paras. 1.12, 4.30, 4.41.

Chicago Convention does not require a disputing party to attempt to negotiate if the other disputing party refuses to negotiate *ab initio*,[174] as Joint Appellants did.

4.5 Joint Appellants' Reply does not argue that they were open to negotiation with Qatar about the aviation prohibitions (or any other subject). They never once dispute the fact that they refused to negotiate *ab initio*. Indeed, they maintain that position to this day. As recently as 20 June 2019, for example, Saudi Arabia's Foreign Minister reportedly stated that dialogue with Qatar was "ruled out … unless it changes its behavior".[175]

4.6 Rather than argue that dialogue with Qatar was possible, Joint Appellants instead take the position that, even in such circumstances, the first disputing party must *still* make an attempt to negotiate.[176] Qatar considers this self-evidently absurd.

4.7 It is true that the Court in both *Georgia v. Russian Federation* and *Obligation to Extradite or Prosecute* held that the "precondition of negotiation" requires "at the very least … a genuine attempt … to engage in discussions with the other disputing party, with a view to resolving the dispute".[177] But neither case involved the circumstance presented here: the counter-party's immediate and total refusal to talk at any time, in any forum, on any subject. The question of the

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[174] *Ibid.*, paras. 4.20, 4.36.

[175] Ramadan Al Sherbini, "Iran to face 'strong response' if it closes Strait of Hormuz", *Gulf News* (20 June 2019) (**QR (A) Vol. II, Annex 11**).

[176] BESUR, paras. 5.10(a), 5.11-5.31.

[177] *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; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, para. 57.

application of the negotiation requirement in such circumstances was not before the Court in those two cases. Joint Appellants' insistence on the "genuine attempt" language is therefore misplaced.

4.8 Interpreting Article 84 of the Chicago Convention to require a disputing party to attempt to negotiate even in the face of the other disputing party's absolute refusal would be inconsistent with good faith as well as the object and purpose of the requirement, not to mention common sense. If no talks are possible on any subject, no purpose could be served by insisting that States nevertheless make a futile, entirely formalistic attempt to negotiate merely for purposes of "checking the box".

4.9 This reading of Article 84 would in no way negate the "three distinct functions" of a negotiation requirement the Court identified in *Georgia v. Russian Federation*.[178]

4.10 A disputing party that refuses *ab initio* to negotiate can hardly claim that it is not already aware of the existence of the other party's claims, or of their scope and subject-matter. Indeed, why decline to negotiate if those claims are not disputed? This is certainly the case with Joint Appellants. Not only were they fully

[178] *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. 131: "[i]t is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. Such resort fulfills three distinct functions. In the first place, it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter … In the second place, it encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication. In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States …".

informed of Qatar's complaints from the outset,[179] they also expressly refused to discuss them on multiple occasions, both before the ICAO Council[180] and publicly.[181]

4.11 A disputing party's absolute refusal to negotiate also discharges the negotiation requirement's second function as well: settlement by mutual agreement is obviously impossible, making recourse to binding third-party adjudication unavoidable.

4.12 Finally, considering that the negotiation requirement in Article 84 is dispensed of by virtue of a disputing party's *ab initio* refusal does not undermine in any way its function "in indicating the limit of consent given by States".[182]

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[179] As explained in Qatar's Memorial, and has not been contested in Joint Appellants' Reply, two days after the imposition of the aviation prohibitions, on 7 June 2017, the ICAO Secretary General replied to Qatar's June 5 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, 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. To the contrary, they later expressly excluded from consideration and appropriate action by the ICAO Council the question of the lawfulness of the aviation prohibitions. QCM (A), paras. 4.60-4.63.

[180] *See* QCM (A), paras. 4.60-4.62.

[181] 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) (stating that "there is no negotiation over the 13 demands" and that "we made a decision not to allow our airspace or borders to be used and this is our sovereign right") (**BESUM Vol. IV, Annex 25**).

[182] *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. 131.

4.13 Joint Appellants argue that they are right to insist that an attempt to negotiate be made because "reaching a conclusion as to the failure or futility of negotiations necessarily presupposes that a genuine attempt to negotiate has at the very least been made".[183] They are mistaken. An absolute and total refusal to talk not only makes it possible to reach the conclusion that negotiations would be futile, it makes that conclusion unavoidable.

4.14 Qatar's interpretation of Article 84 is entirely consistent with the interpretation of procedural requirements in several specialised areas of international law. For example, in the law of diplomatic protection, local remedies generally need to be exhausted, but one need not even *attempt* to exhaust them if such remedies are futile.[184] Similarly, in human rights law, complainants are generally required to exhaust local remedies, but once again they do not even need to *attempt* to pursue such remedies where they are evidenced to be futile.[185] And in

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[183] BESUR, para. 5.20.

[184] International Law Commission, *Draft Articles on Diplomatic Protection* (2006), in *Official Records of the General Assembly, Sixty-first Session*, UN Doc. A/61/10, Art. 15(a) ("Local remedies do not need to be exhausted where: (a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress"); International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 15(3): "In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question; the national legislation justifying the acts of which the alien complains will not be reviewed by local courts; the local courts are notoriously lacking in independence; there is a consistent and well-established line of precedents adverse to the alien; the local courts do not have the competence to grant as appropriate and adequate remedy to the alien; or the respondent State does not have an adequate system of judicial protection".

See also Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain), Award (9 May 1934), UNRIAA, Vol. III, p. 1503 ("The parties in the present case, however, agree—and rightly—that the local remedies rule does not apply where there is no effective remedy".).

[185] *Cyprus v. Turkey* (app. no. 25781/94), Judgment (ECtHR 10 May 2001), para. 99 ("The Court recalls…that the exhaustion rule is inapplicable where an administrative practice…has been shown to exist and is of such a nature as to make proceedings futile or ineffective …".); *Earl Pratt and Ivan Morgan v. Jamaica*, Human Rights Committee, Communication Nos. 210/1986 and 225/1987, Views (6 Apr. 1989), para. 12.3 ("That the local remedies rule does not require resort to appeals

international investment law, investors are sometimes subject to requirements of litigation before the courts of the host State contained in investment treaties, but investors are not even required to *attempt* local litigation when it is proven to be futile.[186]

4.15 Qatar also observes that the language of Article 84 of the Chicago Convention is different from both Article 22 of CERD and Article 30(1) of the Convention Against Torture ("CAT"), the jurisdictional titles in *Georgia v. Russian Federation* and *Obligation to Extradite or Prosecute*, respectively.

4.16 Article 84 of the Chicago Convention provides:

> "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the

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that objectively have no prospect of success, is a well established principle of international law and of the Committee's jurisprudence".); *Case of Akdivar and Others v. Turkey* (app. no. 21893/93), Judgment (ECtHR 16 Sept.1996), para. 67 (holding that the application could not be rejected for failure to exhaust local remedies (*Ibid.*, para. 76) because of "obstacles to the proper functioning of the system of the administration of justice" (*Ibid.*, para. 70), even though the applicants "did not even make the slightest attempt" to exhaust local remedies (*Ibid.*, para. 56)); *Case of Hornsby v. Greece* (app. no. 18357/91), Judgment (ECtHR 19 Mar. 1997), paras. 36-37 (holding that local remedies were futile and thus did not need to be exhausted, even though the applicants did not even attempt to initiate proceedings before civil courts and the administrative authorities).

[186] *See, e.g., Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013), paras. 594, 620 (holding that the local litigation requirement was inapplicable because "having recourse to the Argentine domestic courts and eventually to the Supreme Court …would have accordingly been futile" (*Ibid.*, para. 620), even though "Claimants did not submit the dispute to Argentine courts" (*Ibid.*, para. 594); *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction (18 July 2013), paras. 364-365 (holding that "*every treaty or rule of international law has to be interpreted in good faith*. As a consequence, it can be considered that there is an implied condition that if there is a clear and insuperable futility in following a required procedure, this procedure might, in these specific circumstances, be dispensed of".) (emphasis added).

disagreement, be decided by the Council."[187]

4.17 Unlike Article 22 of CERD and Article 30(1) of CAT,[188] Article 84 of the Chicago Convention is prefaced by the conditional conjunction "if".[189] "If" means: "in the event that"; "allowing that"; "on the assumption that"; and "on condition that". [190] It is thus a conjunction used to express a condition that is necessary in order for something to happen. Particularly when paired with the use of the term "cannot",[191] which denotes impossibility, the use of "if" in Article 84 clearly calls

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

[188] Article 22 of CERD provides: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement". International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 U.N.T.S. 195 (12 Mar.1969) (entry into force: 4 Jan. 1969), Art. 22. Article 30(1) of CAT provides in relevant part: "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration". Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984) 1465 U.N.T.S. 85 (26 June 1984) (entry into force: 26 June 1987), Art. 30(1). Both provisions establish negotiation requirements that directly modify the word "dispute". Article 84 of the Chicago Convention, on the other hand, establishes its negotiation requirement through an "if" clause. Chicago Convention, Art. 84 ("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".) (**BESUM Vol. II, Annex 1**).

[189] The conjunction "if" appears in all of the other equally authoritative versions of the Convention. The French text provides: "*Si* un désaccord … ne peut être réglé par voie de négociation …". The Russian text provides: "*Если* какое-либо разногласие … не может быть урегулировано путем переговоров …". The Spanish text provides: "*Si* surge un desacuerdo … que no pueda ser solucionado mediante negociaciones …". Convention on International Civil Aviation (7 Dec. 1944) (entry into force: 4 Apr. 1947), Quadrilingual Version, ICAO Doc. 7300/9 (9th ed. 2006), Art. 84 (**QR (A) Vol. II, Annex 3**) (emphasis added).

[190] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed., 2009), p. 617 (**QR (A) Vol. II, Annex 14**).

[191] The term "cannot" also appears in all of the other equally authoritative versions of the Convention. The French text provides: "Si un désaccord … *ne peut* être réglé par voie de négociation …". The Russian text provides: "Если какое-либо разногласие … *не может* быть урегулировано путем переговоров …". The Spanish text provides: "Si surge un desacuerdo … que *no pueda* ser solucionado mediante negociaciones …". Convention on International Civil Aviation (7 Dec. 1944) (entry into force: 4 Apr. 1947), Quadrilingual Version, ICAO Doc. 7300/9 (9th ed. 2006), Art. 84 (**QR (A) Vol. II, Annex 3**) (emphasis added).

for an *objective assessment of fact*:[192] the impossibility of settlement by negotiation of a "disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes".[193]

4.18 In making this objective assessment, the Court may be guided by the existence of a "genuine attempt" to negotiate which subsequently failed or became futile. But there is no reason why it may not be equally guided by a disputing party's refusal *ab initio* to enter into negotiations, which no less demonstrates that the disagreement "cannot be settled by negotiation".

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[192] In this sense, although Qatar recognises the differences in the wording of the two provisions, Article 84 is akin to Article XXI(2) of the US-Iran Treaty of Amity, Economic Relations and Consular Rights, which the Court recently held to be "descriptive in character". *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Islamic Republic of Iran v. United States of America)*, Request for the Indication of Provisional Measures, Order, I.C.J. Reports 2018, para. 50. In its Counter-Memorial, Qatar cited the *Tehran Hostages*, where the Court had its first occasion to interpret and apply that provision, as an example of a case where one State, in that case Iran, refused to negotiate *ab initio*. QCM (A), para. 4.8. Joint Appellants raise three objections to the relevance of this case, none of which holds particular merit. *First*, Joint Appellants attempt to distinguish the case on the basis of the precise wording of Article XXI(2). BESUR, para. 5.26. True, the language of Article 84 of the Chicago Convention and that of Article XXI(2) of the US-Iran Treaty of Amity are different, but so is the language of Article 22 of CERD at issue in *Georgia v. Russian Federation*). As explained above, the introduction of the negotiation requirement by the conditional conjunction "if" calls for an objective assessment of non-settlement of the dispute as a matter of fact. *Second*, Joint Appellants point out that the words "immediate and total refusal" cited by Qatar in its Counter-Memorial were used by the Court in discussing another aspect of Article XXI(2). BESUR, para. 5.27. Again, this is a meaningless distinction. The point is that the Court used these words to describe Iran's conduct, and ultimately relaxed its application of the negotiation requirement as a result of Iran's complete refusal to negotiate. *Third*, and finally, Joint Appellants assert that, in the *Tehran Hostages* case, "the United States had in fact made genuine attempts to initiate negotiations with Iran". BESUR, para. 5.28. Joint Appellants fail, however, to specify what these alleged "attempts" were. The Court's Judgment specifies only three such attempts: (1) the dispatch of a special emissary who "denied all contact with Iranian officials [and] never entered Iran"; 2) requests for help by the US Chargé d'affaires during the assault on the embassy; and (3) a letter sent by the United States to the President of the Security Council. *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, paras. 18, 28, 47. If this conduct can be considered as "genuine attempts" to negotiate, then, as explained below in Section I.B, Qatar most certainly satisfied the negotiation requirement in the present case.

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

4.19 In conclusion, the only reasonable, good faith interpretation of the negotiation requirement of Article 84 of the Chicago Convention is that it does not require a disputing party to attempt to negotiate if the other disputing party refuses to negotiate *ab initio*.

4.20 That said, Qatar wishes to add that it makes this argument both because it considers it correct as a matter of law and to highlight Joint Appellants' lack of good faith in every aspect of this proceeding. Their attempt to hide behind the Article 84 negotiation requirement even as they adamantly—and now admittedly—refused to talk with Qatar is an act of pure audacity. Qatar does *not* make the argument presented here because it did not make a genuine attempt to negotiate. As detailed in Section II below, it did so on multiple occasions and in multiple fora.

2. A genuine attempt to negotiate need only be made "with a view to resolving the dispute"

4.21 In their Reply, Joint Appellants argue that Qatar's formulation of the subject-matter requirement of negotiation attempts is "wrong".[194] Immediately thereafter, however, they state that "the difference between the Parties [on this issue] appears to be one of emphasis rather than one in law".[195] Citing the Court's jurisprudence, Qatar's Counter-Memorial showed that a negotiation attempt must address the subject-matter of the dispute with "sufficient clarity".[196] Joint

[194] BESUR, para. 5.10.

[195] *Ibid.*, para. 5.10(b).

[196] QCM (A), para. 4.15.

Appellants now argue in their Reply that the subject-matter must be identified with "sufficient *specificity*".[197]

4.22 Although the two formulations may appear similar at first glance, the way in which Joint Appellants seek to apply their "sufficient specificity" test leads to an approach that is plainly inconsistent with the Court's jurisprudence. Joint Appellants assert, for example, that an attempt to negotiate must "identify the *specific obligations* which form the subject-matter of the dispute",[198] and "identify the relevant *substantive obligations* which are said to have been breached".[199] Joint Appellants go so far as to say that the attempt must identify the "*specific substantive obligations* under the Chicago Convention".[200] These assertions are incorrect.

4.23 The only support that Joint Appellants cite is the following passage from *Georgia v. Russian Federation*:

> "[T]hese negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the

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[197] BESUR, para. 5.10(b) (emphasis added).

[198] *Ibid.*, Chapter V, Section 1(A)(3) heading (emphasis added).

[199] *Ibid.*, para. 5.37 (emphasis added).

[200] *Ibid.*, para. 5.64 (emphasis added). Joint Appellants also state that "[t]his requirement of specificity is particularly important in a situation such as the present, where the dispute alleged by Qatar forms only one part of a much broader international dispute between the Parties, as Qatar acknowledges". *Ibid.*, para. 5.37. However, as explained above, Joint Appellants were put on notice of a dispute relating to the interpretation or application of the Chicago Convention a mere two days after the imposition of the aviation prohibitions on 5 June 2017. *See Letter* from Fang Liu, ICAO Secretary General, to Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, Reference No. AN 13/4/3/Open-AMO66892 (7 June 2017) (**QCM (A) Vol. III, Annex 22**). And they refused to discuss that dispute not only then, but also in the ensuing debates before the ICAO Council. *See, e.g.*, ICAO Council, 211th Session, *Summary Minutes of the Tenth Meeting*, ICAO Doc. C-MIN 211/10 (23 June 2017), paras. 15, 18, 20 (**QCM (A) Vol. III, Annex 24**).

> negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question".[201]

4.24 Joint Appellants misconstrue what the Court held. This passage states only that the negotiations must "relate to the subject-matter of the dispute" (i.e., the aviation prohibitions). The dispute, in turn, must "concern the substantive obligations contained in the treaty" (i.e., obligations of international civil aviation). The Court distinctly does *not* state that negotiations must *identify specific substantive obligations* in the treaty.[202] Indeed, the Court in that case held that the negotiation requirement would have been satisfied if the negotiations between the parties had covered only general subject matters covered by the treaty in question (there, CERD). Specifically, the Court held that the requirement would have been satisfied if there had been negotiations between the parties concerning "extermination" and "ethnic cleansing", without specifying the substantive obligations of CERD in question.[203]

4.25 It should also be emphasised that the passage quoted relates to the subject-matter requirement for negotiations that have *commenced*, not to *attempts* to negotiate that were rebuffed and thus did not lead to actual negotiations.[204] In the latter situation, it does not make sense to impose as stringent a subject-matter requirement as Joint Appellants advance, since negotiations did not actually take place. Consistent with this logic, the Court in *Georgia v. Russian Federation* held

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[201] *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. 161.

[202] BESUR, para. 5.37.

[203] *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. 181.

[204] *Ibid.*, para. 161.

that attempts to negotiate need only to be made "with a view to resolving the dispute".[205] That confirms the appropriate legal standard to be applied here. Joint Appellants entirely miss this distinction.

3. Negotiations should be assessed with flexibility

4.26 Qatar's Counter-Memorial also explained that what constitutes negotiations "should be assessed with flexibility"[206] and that "no specific format or procedure is required".[207] Joint Appellants' Reply first calls Qatar's position in this respect "wrong".[208] Immediately thereafter, however, it states that there is "apparent agreement" between the Parties on this point.[209] The latter view appears to be the right one. Indeed, Joint Appellants specifically state that they "do not dispute that as a matter of principle, an attempt to negotiate may be held to have been made through the medium of diplomacy by conference or parliamentary diplomacy".[210]

4.27 Joint Appellants dispute only the facts and "in particular whether Qatar's actions in international organisations, including in the context of ICAO, qualify as a 'genuine attempt … to engage in discussions with the other disputing party, with a view to resolving the dispute'".[211] As Qatar will show in the next section, its

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[205] *Ibid.*, para. 157.

[206] QCM (A), para. 4.16.

[207] *Ibid.*, para. 4.17.

[208] BESUR, para. 5.10.

[209] *Ibid.*, para. 5.10(c); *see also ibid*, para. 5.38 (noting that "there appears to be no substantive disagreement between the Parties as to the applicable legal principles").

[210] *Ibid.*, para. 5.39.

[211] *Ibid.*, para. 5.40 (quoting *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, para. 157).

actions, including in the ICAO context, plainly constituted a genuine attempt to negotiate.

B. JOINT APPELLANTS MISAPPLY THE LEGAL STANDARD TO THE FACTS

4.28 Joint Appellants' Reply maintain their incredible assertion that Qatar "has not shown that at any point prior to the submission of its Application to ICAO on 30 October 2017, it took any concrete steps to initiate negotiations with the Appellants" in respect of Qatar's claims of breach of the Chicago Convention and its Annexes.[212] At the same time, as stated, Joint Appellants never *once* deny that they entirely refused to negotiate with Qatar, not just about the aviation prohibitions, but about anything at all.[213] The Court may thus find that any negotiation requirement in Article 84 was satisfied without more, for the reasons explained above.

4.29 If, however, the Court finds it necessary to examine Qatar's "genuine attempts" to negotiate with Joint Appellants "with a view to resolving the dispute" under the Chicago Convention and its Annexes, the result would be no different. In its Counter-Memorial, Qatar explained how it met the Article 84 negotiation requirement through direct means,[214] ICAO,[215] the WTO,[216] and third States.[217] Joint Appellants' Reply does not deny any of the facts or evidence that Qatar put forward. Instead, they quibble over what these facts and evidence mean in light of

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[212] BESUR, para. 5.41.

[213] *See* QCM (A), paras. 4.30-4.34, 4.54.

[214] *Ibid.*, Chapter 4, Section I.B.1.

[215] *Ibid.*, Chapter 4, Section I.B.2.

[216] *Ibid.*, Chapter 4, Section I.B.3.

[217] *Ibid.*, Chapter 4, Section I.B.4.

technical aspects of the applicable legal standards in an attempt to avoid the conclusions that flow from the undisputed record. The facts, however, speak for themselves, as Qatar will further demonstrate below.

1. Qatar genuinely attempted to negotiate with Joint Appellants directly

4.30 Joint Appellants allege that "Qatar puts forward no evidence of even a single attempt to settle the dispute with the Appellants by seeking to engage in discussions as to the alleged breaches by the Appellants of their obligations under the Chicago Convention".[218] This is wrong on the law and on the facts. On the law, as stated, Qatar's genuine attempts to negotiate need only have been made "with a view to resolving the dispute"; they did not need to "seek[] to engage in discussions as to the alleged breaches". On the facts, Qatar's Counter-Memorial presented a veritable mound of evidence of such attempts to settle the dispute.[219]

4.31 Joint Appellants' Reply attempts to distract the Court from Qatar's evidence by discussing its "original, abortive, applications" to the Council filed on 15 June 2017.[220] Those applications, however, are not the applications relevant to the present proceedings. The present appeal concerns only the applications Qatar filed with the Council on 30 October 2017.

4.32 Joint Appellants next attempt to discredit the call between His Highness the Amir of Qatar and the Crown Prince of Saudi Arabia on 8 September 2017.[221] They

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[218] BESUR, para. 5.43 (emphasis omitted).

[219] QCM (A), paras. 4.38-4.56.

[220] BESUR, para. 5.45.

[221] *Ibid.*, para. 5.48. Notably, Joint Appellants do not dispute anymore that the phone call between His Highness the Amir of Qatar and the Crown Prince of Saudi Arabia took place. *Compare* BESUM, para. 6.78 to BESUR, para. 5.49.

assert that "the telephone conversation did not go beyond a general call for dialogue in relation to the wider dispute between the Parties as a whole" and did not "concern[] 'the substantive obligations contained in the treaty in question'".[222] But, as explained, this is not the proper subject-matter test for attempts to negotiate.[223] The attempt must be made "with a view to resolving the dispute", which was indeed the case with the telephone call between His Highness the Amir and the Crown Prince.[224] Indeed, as stated in Qatar's Counter-Memorial, an Emirati news agency recorded a Saudi Foreign Ministry official's statement in the aftermath of the call that "[t]he call was at the request of Qatar and was a request for dialogue with the four countries on the demands".[225] And according to Qatar News Agency, His Highness the Amir also welcomed a proposal made by the Saudi Crown Prince "to assign two envoys to settle [the] issues in dispute",[226] which included the aviation prohibitions that Joint Appellants had excluded from consideration and appropriate action by the ICAO Council during the preceding months.[227]

4.33 Joint Appellants also try to discredit Qatari official statements expressly referencing "air links" and "the blockade", claiming "they do not identify nor seek to initiate negotiations in relation to the dispute as to the Appellants' compliance with their relevant substantive obligations contained in the Chicago Convention".[228] But once again, they are mistaken. To cite just the examples Joint

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[222] BESUR, para. 5.49.

[223] *See supra* Section I.A.2.

[224] *See* QCM (A), paras. 4.48-4.49.

[225] *Ibid.*, para. 4.45 (quoting "Hopes for Qatar crisis breakthrough raised, shattered within minutes", *Gulf News* (9 Sept. 2017) (**QCM (A) Vol. IV, Annex 90**)).

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

[227] *See infra* Section I.B.2.

[228] BESUR, para. 5.53.

Appellants' Reply refers to,[229] the Qatari statements reported in the press on 28 June, 5 July and 22 July 2017 *all* seek to initiate negotiations;[230] and all were made with a view to resolving *all* of the disputes arising from Joint Appellants' 5 June 2017 measures, including the dispute under the Chicago Convention and its Annexes.[231] That is all that international law requires in terms of attempts to negotiate, as explained above.

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[229] Joint Appellants take issue only with statements reported on 28 June 2017, 5 July 2017 and 22 July 2017, but these are not the only statements establishing Qatar's attempts to negotiate with a view to resolving the dispute. *See* QCM (A), para. 4.38.

[230] ICAO Response to the Preliminary Objections (A), Exhibit 34, BBC, *Qatar condemns Saudi refusal to negotiate over demands* (28 June 2017) (reporting His Excellency the Foreign Minister of Qatar's statement that Qatar "will engage in a constructive dialogue with the parties concerned if they want to reach a solution and overcome this crisis") (**BESUM Vol. IV, Annex 25**); ICAO Response to the Preliminary Objections (A), Exhibit 40, *Foreign Minister: Any Threat to Region is Threat to Qatar* (5 July 2017) (reporting His Excellency the Foreign Minister of Qatar's statement that "[t]he 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".) (**BESUM Vol. IV, Annex 25**); "Emir speech in full text: Qatar ready for dialogue but won't compromise on sovereignty", *The Peninsula* (22 July 2017), p. 7 (reporting His Highness the Amir of Qatar's statement that Qatar is "ready for dialogue and for reaching settlements on all contentious issues") (**QCM (A) Vol. IV, Annex 86**).

[231] ICAO Response to the Preliminary Objections (A), Exhibit 34, BBC, *Qatar condemns Saudi refusal to negotiate over demands* (28 June 2017) (reporting His Excellency the Foreign Minister of Qatar's reference to Qatar's "Gulf neighbours…refusing to negotiate over their demands for restoring air, sea and land links") (**BESUM Vol. IV, Annex 25**); ICAO Response to the Preliminary Objections (A), Exhibit 40, *Foreign Minister: Any Threat to Region is Threat to Qatar* (5 July 2017) (reporting His Excellency the Foreign Minister of Qatar's repeated references to the "blockade" and to the "extraordinary, unprovoked and hostile actions against Qatar") (**BESUM Vol. IV, Annex 25**); "Emir speech in full text: Qatar ready for dialogue but won't compromise on sovereignty", *The Peninsula* (22 July 2017), p. 7 (reporting His Highness the Amir of Qatar's statement that Qatar is "ready for…reaching settlements on all contentious issues") (**QCM (A) Vol. IV, Annex 86**). All of these statements follow Qatar's initiation of the Article 54(n) procedure and Joint Appellants' submissions before the ICAO Council in the context of those proceedings seeking to exclude from consideration and Council action the aviation prohibitions as such. QCM (A), paras. 4.60-4.63.

4.34 In conclusion, Qatar's attempts to negotiate through direct means were sufficient in and of themselves to satisfy the Article 84 negotiation requirement.

2. Qatar genuinely attempted to negotiate through ICAO

4.35 Joint Appellants admit that "an attempt to negotiation may be held to have been made through the medium of diplomacy by conference or parliamentary diplomacy".[232] They nevertheless challenge the adequacy of Qatar's attempts to negotiate through ICAO on the facts.

4.36 Joint Appellants first challenge the relevance of the letters Qatar sent to the ICAO Secretary General and the President of the Council on the grounds that the letters "were not addressed to the Appellants, and in any event did not seek to initiate negotiations in respect of the dispute relating to the Chicago Convention".[233] Joint Appellants entirely fail, however, to respond to the points Qatar made in its Counter-Memorial on this issue.

4.37 The fact that the letters "were not addressed" to Joint Appellants is immaterial. As Qatar explained in its Counter-Memorial,[234] upon receiving Qatar's letters, the ICAO Secretary General immediately "brought the matter to the attention of the relevant Representatives on the Council of ICAO", which included representatives of Egypt, Saudi Arabia and the UAE.[235] Moreover, on 19 June 2017, the President of the Council transmitted all of Qatar's letters to all Council

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[232] BESUR, para. 5.39.

[233] *Ibid.*, para. 5.56.

[234] QCM (A), para. 4.59, fn. 391.

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

delegations, again including Egypt, Saudi Arabia and the UAE.[236] Joint Appellants do not deny any of this in their Reply. Their complaint that the letters "were not addressed to [them]" is therefore meritless.

4.38 Moreover, Joint Appellants' contention that the letters "did not seek to initiate negotiations in respect of the dispute relating to the Chicago Convention" is simply false. For example, Qatar's 5 June 2017 letter to the ICAO Secretary General stated that the aviation prohibitions were "not in accordance with the Spirit of the Chicago Convention" and invited her to "consider bringing this issue to the attention of the ICAO Council".[237]

4.39 Similarly, Qatar's 17 June 2017 letter to the President of the Council requested that the Council "include this top-urgent item to the Work Programme of the ongoing ICAO Council 211th Session and [undertake] urgent actions to restore the safe, secured and efficient flow of air traffic and *immediate removal of the current blockade exercised unlawfully against Qatar-registered aircraft*…"[238] None of the Joint Appellants provided any response of any kind.

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[236] *Email* from Olumuyiwa Benard Aliu, President of the ICAO Council, to All Council Delegations (19 June 2017) (**QR (A) Vol. II, Annex 4**).

[237] ICAO Response to the Preliminary Objections (A), Exhibit 2, *Letter* from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Fang Liu, ICAO Secretary General (5 June 2017) (**BESUM Vol. IV, Annex 25**); *see also* ICAO Response to the Preliminary Objections (A), Exhibit 3, *Letter* from Abdulla 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**).

[238] ICAO Response to the Preliminary Objections (A), Exhibit 1, *Letter* from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Olumuyiwa Benard Aliu, President of the ICAO Council (17 June 2017) (**BESUM Vol. IV, Annex 25**) (emphasis added).

4.40 Both letters plainly meet any requirement, including under Joint Appellants' own case, of attempting to negotiate "through the medium of diplomacy by conference or parliamentary diplomacy".[239]

4.41 Joint Appellants next seek to discount the Parties' exchanges in the context of the procedure Qatar initiated pursuant to Article 54(n) of the Chicago Convention, arguing that they "cannot be regarded as constituting negotiations" because they "were limited to issues relating to safety of aviation and contingency routes".[240] Joint Appellants also claim that Qatar's complaints about their violations of the Chicago Convention in the Article 54(n) proceedings were "mere protests or disputations", and thus cannot constitute negotiations.[241]

4.42 This is not an accurate description of the facts. Qatar initiated the Article 54(n) procedure with a view to resolving the *same* dispute over the aviation prohibitions that it was later constrained to bring before the ICAO Council pursuant to Article 84. If the procedure ultimately only addressed issues relating to the safety of aviation and contingency routes, that is only because Joint Appellants refused to engage in any way at all on any other subject.

4.43 Qatar's Request under Article 54(n) did not only raise "issues relating to safety of aviation and contingency routes".[242] It also expressly called for the urgent intervention of the ICAO Council to "urge the Blocking States to lift all the

[239] BESUR, para. 5.39.

[240] *Ibid.*, para. 5.58.

[241] *Ibid.*, para. 5.59.

[242] *Ibid.*, para. 5.58.

restrictions over the high seas",[243] and to "examine and consider" Joint Appellants' "*international airspace blockade over the High Seas against Qatar-registered aircraft and the State of Qatar*".[244] And it did not only "broadcast [Qatar's] accusations before the ICAO Council".[245] It also called on the Council to "urge [Joint Appellants] *to cease these unjustified measures against the State of Qatar, in order to ensure the rights of the State of Qatar under the Chicago Convention are fully respected*".[246]

4.44 Joint Appellants' response was uncompromising. As Qatar recalled in its Counter-Memorial—and the Reply does not dispute—Appellants Egypt, Saudi Arabia and the UAE refused to enter into any discussion of the aviation prohibitions at the ICAO Council's 211th Session on 23 June 2017.[247] And all Joint Appellants reiterated their refusal in their joint working paper submitted prior to the Council's

[243] ICAO Response to the Preliminary Objections (A), Exhibit 10, *Council – Extraordinary Session: Request of the State of Qatar for Consideration by the ICAO Council under Article 54(n) of the Chicago Convention*, ICAO Doc. C-WP/14641, p. 1 (**BESUM Vol. IV, Annex 25**).

[244] Request of the State of Qatar for Consideration by the ICAO Council under Article 54(n) of the Chicago Convention (15 June 2017), p. 1 ("Background"), pp. 6-8 ("Violations of the Chicago Convention") (**BESUM Vol. V, Annex 31**) (emphasis added).

[245] BESUR, para. 5.60.

[246] Request of the State of Qatar for Consideration by the ICAO Council under Article 54(n) of the Chicago Convention (15 June 2017), p. 10 ("Conclusion") (**BESUM Vol. V, Annex 31**) (emphasis added).

[247] ICAO Council, 211th Session, *Summary Minutes of the Tenth Meeting*, ICAO Doc. C-MIN 211/10 (23 June 2017), para. 15 (the Saudi representative stating that "the focus of the discussion should rest on safety, security and air navigation"); *Ibid.*, para. 18 (the Emirati representative agreeing to that statement); *Ibid.*, para. 20 (the Egyptian representative stating that ICAO should "not delve into political considerations") (**QCM (A) Vol. III, Annex 24**).

Extraordinary Session on 31 July 2017.[248] They did the same at the Extraordinary Session itself.[249]

4.45 In their Memorial, among other writings of publicists, Joint Appellants cited Judge Buergenthal's authoritative book on ICAO.[250] Qatar's Counter-Memorial quoted a passage from the same book where Judge Buergenthal wrote: "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*".[251] There, Czechoslovakia brought a complaint to ICAO's attention (not under Article 84) and the United States, not unlike Joint Appellants, argued that, aside from the safety aspects of the dispute, ICAO was not the proper forum for dealing with the matter.[252] The United States further denied that the launching of the balloons violated the Chicago

[248] 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) (inviting 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") (**BESUM Vol. IV, Annex 25**).

[249] 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. 32-33 (Appellant UAE stating on behalf of all Joint Appellants that "their airspace closures were legitimate, justified, and a proportionate response to Qatar's actions and were permitted under international law", 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".) (**BESUM Vol. IV, Annex 25**).

[250] *See* BESUM, fn. 173 (citing T. Buergenthal, *Law-making in the International Civil Aviation Organization*, 1969, Part III (**BESUM Vol. VI, Annex 125**).

[251] QCM (A), para. 4.19 (quoting T. Buergenthal, *Law-making in the International Civil Aviation Organization*, 1969, Part III, p. 131 (**BESUM Vol. VI, Annex 125**) (emphasis added)).

[252] T. Buergenthal, *Law-making in the International Civil Aviation Organization*, 1969, Part III, pp. 132-133 (**BESUM Vol. VI, Annex 125**).

Convention,[253] and refused to give the assurances requested by Czechoslovakia that no further balloons would be released into its airspace.[254]

4.46 After describing this situation, Judge Buergenthal concludes:

> "[I]f both sides had remained adamant in their respective positions, and if Czechoslovakia had thereupon referred the dispute to the ICAO Council under Article 84 of the Convention, it could properly have pointed to the proceedings in the Council and Assembly to sustain the jurisdictional requirement that the dispute 'cannot be settled by negotiation'".[255]

4.47 The present dispute is no different. Qatar's genuine attempts to negotiate through ICAO satisfied the negotiation requirement.

3. Qatar genuinely attempted to negotiate through the WTO

4.48 In their Reply, Joint Appellants also discount Qatar's genuine attempts to negotiate over the subject matter of this civil aviation dispute through the WTO because its Requests for Consultations concerned "breaches of distinct obligations".[256] However, they never even try to come to terms with the fact that, as Qatar showed in its Counter-Memorial, its Requests for Consultations with Saudi Arabia, Bahrain and the UAE *expressly* stated that the subject-matter of the requested consultations would include Joint Appellants' "prohibition on Qatari aircraft from accessing [their] airspace", as well as their "prohibition on flights to

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[253] *Ibid.*, p. 136 (**BESUM Vol. VI, Annex 125**).

[254] *Ibid.*

[255] *Ibid.*

[256] BESUR, para. 5.61.

and from [their territories] operated by aircraft registered in Qatar, including prohibiting landing of Qatari Aircraft at airports [in their territories]".[257] Qatar's Requests for Consultations therefore meet the subject-matter requirement for attempts to negotiate.[258]

4.49 The Reply also discounts the Requests because they were addressed to three of the four Joint Appellants, not Egypt. As Qatar explained in its Counter-Memorial, however, this is an artificial, excessively formalistic distinction in this context of this dispute. Joint Appellants have at all times been in lock-step, acting in concert.[259] They fail to respond meaningfully to this point in their Reply.[260]

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[257] QCM (A), para. 4.67 (quoting 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) (**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) (**BESUM Vol. IV, Annex 25**); ICAO Response to the Preliminary Objections (A), Exhibit 13, World Trade Organization, United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WT/DS526/1 (4 Aug. 2017) (**BESUM Vol. IV, Annex 25**)). Qatar maintains that the aviation prohibitions imposed by Saudi Arabia, Bahrain and the UAE violated their obligations not only under various WTO agreements, but also under the Chicago Convention. As the *Southern Bluefin Tuna* tribunal noted: "There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder". *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan), Decision of 4 August 2000*, UNRIAA, Vol. XXIII, p. 40, para. 52. In view of this parallelism, there is no question that settling one of the disputes through negotiations would settle the other one as well. The WTO negotiations therefore must also apply to satisfying the negotiation requirement under the Chicago Convention.

[258] *See supra* Section I.A.2.

[259] QCM (A), para. 4.71.

[260] BESUR, para. 5.63.

4. Qatar genuinely attempted to negotiate through third parties

4.50 Finally, Joint Appellants summarily dismiss Qatar's genuine attempts to negotiate through third parties. They assert, without any explanation: "(a) none of the requests or statements was addressed to the Appellants; and (b) all of the requests were in general terms, and failed to refer to the specific substantive obligations under the Chicago Convention".[261]

4.51 The first argument is incoherent. Attempts to negotiate through third parties are, to state the obvious, different from attempts to negotiate directly. Indeed, the Reply elsewhere admits that attempts to negotiate may be indirect. Specifically, Joint Appellants state that in the *Tehran Hostages* case:

> "[T]he requirement in Article XXI(2) of the Iran-United States Treaty of Amity that the dispute was 'not satisfactorily adjusted by diplomacy' was easily satisfied in the absence of diplomatic relations between Iran and the United States, *with the Foreign Interests Section of the Embassy of Switzerland in Tehran serving as the channel for communication between the States*".[262]

4.52 Moreover, it cannot be the case that international law requires attempts to negotiate through third parties to be addressed directly to the opposing party in circumstances, like here, where that party has made it clear that it has no interest in direct talks.

4.53 As for their second argument, Qatar has already explained that the negotiation requirement does not require reference to the "specific substantive

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[261] *Ibid.*, para. 5.64.

[262] *Ibid.*, fn. 433 (emphasis added).

obligations" of the treaty in question, as Joint Appellants mistakenly claim. That goes well beyond what the Court's *jurisprudence constante* requires. Rather, the attempts need only be made "with a view to resolving the dispute", which was the case with each one of Qatar's attempts, as explained in its Counter-Memorial,[263] and above.[264]

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

4.54 Joint Appellants' Reply repeats the argument first stated in their Application:[265] that Article 2(g) of the ICAO Rules for the Settlement of Differences requires not just a "statement" on negotiations, but also "appropriate[] substantiat[ion]" of the statement.[266]

4.55 In its Counter-Memorial, Qatar explained how Joint Appellants' interpretation of Article 2(g) not only contravenes the text of the provision (in English and French), but also contradicts the practice of the Council.[267] Indeed, the Council found Cuba's Memorial in *Cuba v. United States* admissible even though it did not even contain a specific Article 2(g) statement,[268] and the Council similarly found the United States' Memorial in *United States v. 15 EU Member States* admissible even though the United States did not provide any evidence

[263] QCM (A), paras. 4.72-4.83.

[264] *See supra* Section I.B.

[265] ICJ Application (A), para. 19(ii).

[266] BESUR, para. 5.69.

[267] QCM (A), paras. 4.86-4.87.

[268] ICAO Council, *Cuba v. United States*, Memorial of Cuba (11 July 1966), para. 9 (**QCM (A) Vol. II, Annex 11**).

substantiating its Article 2(g) statement therein.[269] In their Reply, Joint Appellants entirely fail to respond to these arguments, apparently conceding their force.

4.56 The Reply also repeats the contrived argument from Joint Appellants' Memorial[270] that, even if Article 2(g) were a requirement of form, Qatar's statement did not satisfy it.[271] In truth, this argument is not really an alternative one, as it presupposes that Article 2(g) requires "appropriate[] substantiat[ion]" of the statement,[272] which is not true. In any case, as Qatar explained in its Counter-Memorial,[273] its Article 2(g) statement easily satisfied the requirement. Indeed, Article 2(g) cannot be read as imposing a more stringent requirement than that contained in Article 84, which, as explained above,[274] does not require negotiations if one side entirely refuses to negotiate. And even if there were some kind of deficiency (*quod non*), Qatar cured it when it amended its statement in its Response to Joint Appellants' Preliminary Objections.[275]

4.57 Finally, it should be emphasised that, as the Court stated in the 1972 *ICAO Council Appeal* case, whether or not the Council has jurisdiction is "an objective question of law" to be answered without regard to the procedure followed before the Council.[276] As a result, even if Qatar did not comply with the Article 2(g)

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[269] ICAO Council, *United States v. 15 EU Member States*, Memorial of the United States (14 Mar. 2000), p. 16 (**QCM (A) Vol. II, Annex 12**).

[270] BESUR, paras. 6.98-6.99.

[271] *Ibid.*, paras. 5.70-5.71.

[272] This is most evident in *ibid.*, paras. 5.73, 5.75-5.76.

[273] QCM (A), paras. 4.88-4.89.

[274] *See above* Section I.A.1.

[275] QCM (A), para. 4.90.

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

requirement (*quod non*), it should not affect the Court's determination of the Council's jurisdiction.

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4.58 For all the above reasons, the Court should deny Joint Appellants' Third Ground of Appeal.

CHAPTER 5

THE COURT SHOULD DENY JOINT APPELLANTS' FIRST GROUND OF APPEAL

5.1 Qatar's Counter-Memorial set out four independent reasons why the Court should reject Joint Appellants' First Ground of Appeal, asking that the Decision of the ICAO Council "be set aside".[277] Joint Appellants' Reply does not undermine any of them. It fails to address several of Qatar's key arguments and its responses to those that it does address are entirely unpersuasive.

5.2 For example, and most remarkably, Joint Appellants chose not to address, let alone dispute, the Court's characterisation of its appellate function under the Chicago Convention in the 1972 *ICAO Council Appeal* case. In that case, the Court understood its appellate function *vis-à-vis* the jurisdictional decision at issue in terms of deciding an objective question of law "the answer to which cannot depend on what occurred before the Council".[278] The Reply dares not mention this aspect of the Court's decision, let alone argue why it does not apply equally here.

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[277] BESUR, para. 3.1. The first reason is that, consistent with the Court's decision in the 1972 *ICAO Council Appeal* case, the Court does not need to rule on the alleged procedural violations because they are irrelevant in answering the objective question of law before it, namely, the question of the Council's jurisdiction over Qatar's claims. QCM (A), Chapter 5.I. The second reason is that far from being "manifestly flawed and in violation of the fundamental principles of due process" (BESUR, para. 3.1), the procedure adopted by the ICAO Council to dispose of Joint Appellants' Preliminary Objections was entirely consistent with the applicable procedural framework and its previous practice under Article 84 of the Chicago Convention. QCM (A), Chapter 5.II. The third is that, even if (*quod non)* the Council violated any of the procedural rules it was bound to follow, those violations did not prejudice in any fundamental way the requirements of a just procedure. QCM (A), Chapter 5.III. And the fourth is that the Joint Appellants waived their right to appeal the Decision on account of several alleged procedural irregularities. QCM (A), paras. 5.38, 5.32.

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

5.3 **Section I** of this Chapter recalls the Court's central holding on this aspect of India's appeal in the 1972 *ICAO Council Appeal* case and shows why Joint Appellants' efforts to argue for a different outcome in this case are unavailing. The Council's Decision in this case must stand so long as it "reached the right conclusion", even if it did so "in the wrong way".[279] This Section also addresses Joint Appellants' misplaced attempt to rely on the Court's subsidiary reason not to inquire into the alleged procedural irregularities in the 1972 *ICAO Council Appeal* case. Several of the "grave and widespread" defects in the procedure adopted by the ICAO Council that Joint Appellants allege[280] are the same as the irregularities "strenuously argued" by India in that case.[281] The Court ruled that the latter did not "prejudice in any fundamental way the requirements of a just procedure"[282] and there is no reason to come to a different conclusion concerning the former.

5.4 **Section II** shows that, in any event, Joint Appellants' procedural complaints are meritless. The ICAO Council did not commit any procedural errors, let alone any errors that undermined the requirements of a just procedure. Indeed, the Council's actions were entirely consistent with the applicable procedural framework. Joint Appellants' First Ground of Appeal should be therefore dismissed.

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[279] *Ibid.*

[280] BESUR, para. 3.3.

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

[282] *Ibid.*, para. 45.

I. The Court Should Decline to Exercise Its Supervisory Authority in Respect of the So-Called Procedural Irregularities

A. WHETHER THE COUNCIL HAS JURISDICTION IS AN "OBJECTIVE QUESTION OF LAW", THE ANSWER TO WHICH DOES NOT TURN ON THE NATURE OF THE PROCEDURE BEFORE THE COUNCIL

5.5 Qatar respectfully invites the Court to decline to exercise its supervisory authority over the alleged procedural irregularities about which Joint Appellants complain. Not only did they never happen, they are also irrelevant to the objective question of law before the Court: namely, the Council's jurisdiction over Qatar's claims under the Chicago Convention. For the reasons explained in the preceding two Chapters, the ICAO Council properly decided that it has jurisdiction over Qatar's claims. Joint Appellants' Second and Third Grounds of Appeal therefore fail, and with them so does the First.

5.6 As Qatar explained in its Counter-Memorial,[283] this is how the Court disposed of India's complaints about the alleged procedural irregularities the 1972 *ICAO Council Appeal* case—the only prior case to come to the Court on appeal from an ICAO Council decision. Much like Joint Appellants here,[284] India argued that

> "irrespective of the correctness in law or otherwise of the Council's decision assuming jurisdiction in the case from which India is now appealing, it was vitiated by various procedural irregularities, and

[283] QCM (A), paras. 5.6-5.12.

[284] *See, e.g.*, BESUR, para. 6.2.

> should accordingly, on that ground alone, be declared null and void".[285]

5.7 The Court disagreed. It concluded that its "task in the present proceedings [was] to give a ruling as to whether the Council ha[d] jurisdiction in the case".[286] That task required the Court to answer only "an objective question of law, the answer to which cannot depend on what occurred before the Council".[287] Having concluded that the ICAO Council had correctly upheld its jurisdiction in the underlying case, the Court did not deem it "*necessary* or even *appropriate*" to examine India's allegations any further.[288]

5.8 Joint Appellants cite the portion of the Court's 1972 Judgment where it described the purpose of the appeal under the "Chicago Treaties".[289] But they never once mention how the Court discharged that function *vis-à-vis* India's procedural complaints. They try instead to distract the Court and lead it down a dead-end path. They argue that the ICAO Council was "structurally incapable of adjudicating upon the Appellants' Preliminary Objections in a proper judicial manner" and therefore, they say, "it falls to the Court, as the guardian of the integrity of the international judicial process, to exercise its supervisory authority in order to provide the Council with necessary direction on how to comply with the duties of due process…".[290]

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

[286] *Ibid.*, para. 45.

[287] *Ibid.*

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

[289] BESUR, para. 3.17 (quoting *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, para. 26).

[290] BESUR, paras. 3.8, 3.11.

5.9 Qatar does not consider it either "necessary" or "appropriate" for the Court to address this argument. It is not necessary because, unlike India,[291] Joint Appellants do not even suggest that, but for the procedural irregularities they allege, the ICAO Council would have upheld their preliminary objection. Accordingly, even if their complaints had merit (*quod non*),[292] "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*".[293] In terms of procedural economy, it would make no sense to reverse a substantially correct decision on procedural grounds, so only to have the ICAO Council reach the same decision again in a different proceeding.[294]

5.10 It is not appropriate because what Joint Appellants are really asking the Court to do is *expand* its appellate function and review what they call the "sparse and antiquated" ICAO Rules in order to give the ICAO Council "guidance as to how to conduct judicial proceedings before it".[295] Even if the Court's supervisory

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[291] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, para. 44 (noting India's argument that "but for these alleged irregularities, the result before the Council would or might have been different").

[292] *See infra* Chapter 5.II.

[293] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, para. 45 (emphasis added). In view of the preceding two Chapters, it would be no different had Joint Appellants made this allegation.

[294] *See* Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (2013), Vol. I, p. 737 (discussing the Court's ruling on India's allegations of procedural irregularities in light of the "general principle of procedural economy".). The fact that the decision is substantively correct also implies that the alleged procedural irregularities did not "materially [impair] the exercise of any of the fundamental procedural rights and directly cause[] a 'mis-decision'".). V.S. Mani, *International Adjudication: Procedural Aspects* (1980), p. 53.

[295] BESUR, para. 3.21; *see also ibid*. ("…to date the ICAO Council has handled only seven disputes judicially … As the guardian of the international judicial process, it falls to the Court to exercise its supervisory authority in respect of procedural deficiencies by the ICAO Council in this case".); para. 3.16 ("[i]t is indeed the function of the Court to set and supervise judicial decision-making standards in the international legal system. There can therefore be no serious dispute that failure to

authority under Article 84 of the Chicago Convention extended to a review of the procedure followed in the underlying proceedings,[296] a "properly conducted judicial process" within the framework of the Chicago Convention can only mean a process conducted in accordance with the rules designed and approved by the

abide by fundamental guarantees of due process entitles—indeed requires—the Court to set aside a decision that emanates from a flawed process".) (internal footnote omitted).

[296] Qatar notes in this regard that none of the authorities cited by Joint Appellants establishes the proposition that Article 84 of the Chicago Convention confer a right of appeal against procedural irregularities. BESUR, paras. 3.13-3.15. Judge Jiménez de Aréchaga's view that the right of appeal under Article 84 also comprises "whether [the ICAO Council's] decision was validly adopted in accordance with the essential principles of procedure which must govern the quasi-judicial function entrusted to the organ of the first instance" was expressed in his separate opinion, and was not adopted by the Court majority. *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, Separate Opinion of Judge Jiménez de Aréchaga, I.C.J. Reports 1972, para. 37. As Joint Appellants admit, the Statute of the Administrative Tribunal of the United Nations expressly permits applicants to appeal a Judgment if the Tribunal had "committed a fundamental error of procedure which has occasioned a failure of justice". *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1973, para. 12; BESUR, fn. 185. And in the *Arbitral Award of 31 July 1989* case, the Court emphasised that "these proceedings allege the inexistence and nullity of the Award rendered by the Arbitration Tribunal *and are not by way of appeal from it* or application for revision of it". *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, para. 25. If anything, therefore, the case stands for the reverse proposition, namely, that a right of appeal does not encompass a right of review of allegations of procedural irregularities in the underlying proceedings. Indeed, Professor Thirlway has contrasted that decision with the 1972 *ICAO Council Appeal* case to say that

> "If the Court is seised solely of a *recours en nullité*, on the authority of the *Arbitral Award of 31 July 1989*, it is not required to determine, and therefore presumably unable to say, whether the first jurisdiction did or did not arrive at the correct conclusion. It would therefore seem that that in such circumstances the Court would have to determine whether or not there had been procedural error, and if found there had, to draw the appropriate consequences".

H. Thirlway, "Procedural Aspects of the ICJ", in *Fifty Years of the International Court of Justice* (V. Lowe & M. Fitzmaurice eds., 1996), p. 400. Relatedly, Professor Cheng has noted that

> "…nullity or revision of a final judgment is distinct from reconsideration of a judgment subject to appeal. In the latter case, the object is to decide whether a judgment which is not yet final has been well or ill decided and to reform it, if necessary, by a hierarchically superior court. In the case of appeal, the principle of res judicata is not juridically affected; for a decision is not final until it is no longer subject to appeal".

Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), p. 372

ICAO Council to settle disagreements between Member States.[297] To the extent that Joint Appellants ask the Court to rectify what they perceive as shortcomings in the framework created by the ICAO Council—a task which they themselves admit properly belongs to the organs of the ICAO[298]—they are asking the Court to overstep its supervisory function.

5.11 In any case, Joint Appellants criticism of the ICAO dispute settlement system is unwarranted. Joint Appellants find it "astounding", for example, that when ICAO Council Member representatives are acting in Article 84 proceedings, they do so on behalf of their appointing States.[299] However, unlike other international adjudicatory bodies, such as, for example, the Court, the ICAO Council is composed of individuals acting in a *representative* capacity on behalf of ICAO Member States, not in their *personal* capacity.[300] In the words of the United

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[297] The goal of the working group designated by the ICAO Council to draft the ICAO Rules was to "arrive at a set of rules as simplified and as flexible as possible in order to provide workable machinery to the Council, *taking into account the many ways in which this body differs from the conventional type of court or arbitral tribunal"*. ICAO Council, 19th Session, *Working Paper: Report to Council of the Working Group on Rules for Settlement of Differences*, ICAO Doc. C-WP/1457 (13 Mar. 1953), p. 2 (**QR (A) Vol. II, Annex 1**) (emphasis added).

[298] *See* BESUR, fn. 195 (referring to the ICAO Secretariat's direction in September 2018 to the ICAO Legal Committee to consider whether the ICAO Rules needed to be revised and "realigned with the current ICJ Rules". ICAO, Working Paper of the Secretariat submitted to the Legal Committee for consideration at its 37th Session, ICAO document LC/37-WP/3-2, 27 July 2018, para. 3.2.1 (**BESUM Vol. V, Annex 54**).

[299] BESUR, para. 3.3.

[300] Article 50 of the Chicago Convention provides:

> "a) The Council shall be a permanent body responsible to the Assembly. It shall be composed of *thirty-six contracting States* elected by the Assembly … b) In electing the members of the Council, the Assembly shall give adequate representation to 1) *the States* of chief importance in air transport; 2) *the States* not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation; and 3) *the States* not otherwise included whose designation will insure that all the major geographic areas of the world are represented on the Council … c) No representative of a Contracting State on the Council shall be actively associated with the operation of an international air service or financially interested in such service".

States' representative at the *Pakistan v. India* hearing, a decision of the ICAO Council under Article 84 of the Chicago Convention is a "decision of [the] governments [sitting at the Council], not of the individuals who sit at this Council table".[301] It is entirely consistent with the judicial function of such individuals to receive external advice on questions of law.[302] In any event, and as stated in Qatar's Counter-Memorial, Joint Appellants have pointed to no evidence that the Council delegates acted on instruction when they overwhelmingly rejected their preliminary objections.[303]

5.12 A closer look at the degree of similarity between the procedural violations alleged here and those India alleged in the 1972 *ICAO Council Appeal* case, the

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Chicago Convention, Art. 50 (**BESUM Vol. II, Annex 1**) (emphasis added)

Tellingly, Joint Appellants' only support for their proposition that it is "settled law" that "once the individual adjudicator has been designated by the State, it is that individual who must act, in their personal capacity, not on instruction" is an authority discussing this Court and the Judges comprising it. BESUR, para. 3.10 and fn. 180.

[301] ICAO Council, 74th Session, *Minutes of the Sixth Meeting*, ICAO Doc. 8956-C/1001 (29 July 1971), para. 16 (**QCM (A) Vol. II, Annex 8**).

[302] At the ICAO Council hearing in the *Pakistan v. India* case, the representative of the United Kingdom stated, for example, that "[i]t is not unique for a body of persons other than professional judges to sit in a judicial capacity, at any rate not in the United Kingdom. It is usual in such circumstances for the body to have recourse to legal advice on points of strict law". ICAO Council, 74th Session, *Minutes of the Sixth Meeting*, ICAO Doc. 8956-C/1001 (29 July 1971), para. 18 (**QCM (A) Vol. II, Annex 8**). More generally, Heads of State who were not jurists have frequently served as adjudicators of inter-State disputes in the past. Writing almost contemporaneously with the adoption of the Chicago Convention, Judge Hudson wrote in that regard that "[t]he decision in such case is usually prepared by a jurist or a group of jurists, whose names are seldom announced, working under the direction of the Chief of State". Manley O. Hudson, *International Tribunals: Past and Future* (1944), pp. 17-18.

[303] QCM (A), para. 5.40. Instead, Joint Appellants speculate that the Decision "had been predetermined", given that "several of the governments which participate in the ICAO Council had made political statements about the underlying dispute between the Parties". BESUR, para. 3.8 and fn. 177. A mere perusal of the statements in question, however, shows that they were merely intended to underscore the importance of implementing promptly contingency measures for the safety of civil aviation in the Gulf region. *See* ICAO Council – Summary Minutes of the Meeting of the Extraordinary Session of 31 July 2017, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, 22 August 2017, paras 69-84 (**BESUM Vol. V, Annex 41**).

underlying facts and applicable procedural framework all further confirm that the First Ground of Appeal is entirely without merit.

B. JOINT APPELLANTS' ATTEMPT TO DISTINGUISH THE PRESENT CASE FROM THE 1972 ICAO COUNCIL APPEAL CASE FAILS

5.13 Joint Appellants' Reply suggests that the only reason why the Court declined to rule on the alleged procedural irregularities India complained about in the *1972 ICAO Council Appeal* case was because such irregularities "were not important enough to trigger [the Court's] 'supervisory authority'".[304] As Joint Appellants see it, this case is different because the ICAO Council "did in fact prejudice the requirement of a just procedure in a fundamental way".[305]

5.14 As Qatar has explained,[306] however, the actual reason the Court declined to exercise its supervisory authority with respect to India's procedural complaints was *not* because they did "not prejudice in any fundamental way the requirements of a just procedure";[307] it was because it considered them irrelevant in light of the fact that the Council reached "the right conclusion" on the question of its jurisdiction.

5.15 In any event, the alleged procedural irregularities Joint Appellants raise are very similar to those India raised before the Court in 1972. If the latter did not prejudice the requirements of a just procedure, neither did the former.

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[304] BESUR, para. 3.19; *see also ibid*., para. 3.40.

[305] *Ibid.*, para. 3.20.

[306] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, para. 46.

[307] *Ibid.*, para. 45.

5.16 The Court will recall that India complained that the ICAO Council failed to state reasons in its decision,[308] improperly framed the questions that were put to vote,[309] adopted its decision in breach of Article 52 of the Chicago Convention[310] and voting procedures[311] and improperly deliberated.[312] The Court did not consider any of these serious enough to vitiate the procedure before the Council. Joint Appellants offer no reason why their substantially similar allegations—lack of reasons and proper deliberations, breach of Article 52 of the Chicago Convention and of the applicable voting procedures and improper drafting of the questions put to vote—warrant a different conclusion here.

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[308] *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. 614 ("The Rules for the Settlement of Differences require that the Council must give reasons for its decision. In the present case the Council has given a decision without any reasons at all, and such a decision is no decision in law".).

[309] *Ibid.*, p. 596 ("The decision of the Council was vitiated by the fact that the questions were framed in the wrong manner. The propositions put to vote were framed in a negative manner, namely, 'The Council has no jurisdiction …', instead of being framed in a positive way, namely, 'The Council has jurisdiction …'".).

[310] *Ibid.*: "The decision of the Council as regards the Complaint is directly contrary to Article 52 of the Convention which provides that 'decisions by the Council shall require approval by a majority of its members'. The Council's decision that it had jurisdiction to consider the Respondent's Complaint was not supported by a majority of the Members of the Council. … If the question had been rightly framed and if the proposition that the Council had jurisdiction to consider the Respondent's Complaint had been put to vote, the decision of the Council would have been in favour of the Applicant on the same pattern of voting".

[311] *Ibid.*, p. 607 ("The decision of the Council was further vitiated by the fact that the propositions put to vote in respect of Pakistan's Application and Complaint were neither introduced nor seconded by any member of the Council as required in Rules 41 and 46 of the Rules of Procedure for the Council".).

[312] *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(3) ("Although some of the members asked for time to consider the issues of far-reaching importance which had been raised by the Applicant and asked for verbatim notes of the oral hearing, their request was turned down, with the result that some of the judges were unable to participate in the deliberations and in the final decision of the Council".).

5.17 The Reply is hard-pressed to identify differences between Joint Appellants' procedural complaints and India's. They therefore cast about for others and argue that the fact that the Council scheduled one half-day session for the hearing on their Preliminary Objections;[313] they were allotted the same amount of time with Qatar at the hearing;[314] the Council proceeded to hold a vote immediately after hearing oral submissions;[315] and the Council adopted the Decision by secret ballot (even though it is expressly authorised to do so under the procedural framework governing its operation[316]) somehow means that the putative procedural violations were "greater in number and magnitude than those at issue in *Pakistan v. India*—so much so that the … Decision must be recognized as nullity".[317] Qatar will show in the next Section that all of these allegations, as well as the ones that substantially overlap with India's complaints in the 1972 *ICAO Council Appeal* case, are entirely unfounded.

II. The ICAO Council Properly Discharged Its Functions Under Article 84

5.18 Even if the Court were to consider the merits of Joint Appellants' procedural complaints, their First Ground of Appeal would still have to be rejected. As Qatar explained in its Counter-Memorial[318] and will detail further below,[319] the

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[313] BESUR, para. 3.20(a).

[314] *Ibid.*, para. 3.20(b)

[315] *Ibid.*, para. 3.20(e), (f).

[316] *See* QCM (A), para. 5.30; BESUR, para. 3.20(g).

[317] BESUR, para. 3.20.

[318] *See* QCM (A), Chapter 5.II.

[319] Joint Appellants appear to have effectively dropped their claim in the Application and the Memorial that the ICAO Council incorrectly required 19 votes to uphold the Preliminary Objections. BESUM, para. 3.1(c). Even though Joint Appellants formally maintain this complaint (*see* BESUR, para. 3.33(b)), they say nothing in response to Qatar's rebuttal in the Counter-Memorial that the number of votes required by the ICAO Council was consistent with the text of Article 52 of the Chicago Convention and its consistent application by the Council and even if there

ICAO Council procedure was 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. 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

5.19 Qatar explained in its Counter-Memorial that the absence of open deliberations on the substantive issues in dispute and of reasons in the Decision are natural consequences of the ICAO Council's decision to vote by secret ballot.[320] Qatar further explained that the Council's decision was entirely consistent with the approach followed in *Brazil v. United States*, the most recent practice under Article 84 at that time. Indeed, that case was expressly mentioned in the Mexican Representative's proposal to proceed directly to a vote by secret ballot.[321] None of the Council Member States voting in that case, which included Appellants Saudi Arabia, Egypt and the UAE (the latter actually proposed the vote by secret ballot in that case) complained about the absence of open deliberations on the substantive issues in dispute prior to disposing of the United States' objection.[322]

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was some merit in Joint Appellants' allegation, the ensuing procedural error would be harmless. QCM (A), paras. 5.50-5.59. Finally, Joint Appellants concede that in spite of what they alleged in their Memorial, Appellant Saudi Arabia agreed to the concurrent presentation and consideration of arguments on the two preliminary objections. *Compare* BESUM, para. 3.58 to BESUR, para. 3.32.

[320] QCM (A), para. 5.29. Joint Appellants do not dispute that the applicable procedural framework expressly permits votes by secret ballot. ICAO Council, *Rules of Procedure for the Council*, ICAO Doc. 7559/10 (2014), Rule 50 (**QCM (A) Vol. II, Annex 15**) (emphasis added).

[321] 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**); *see also* QCM (A), para. 5.35.

[322] QCM (A), paras. 5.35-5.37.

5.20 The same is true in the present case: none of the Joint Appellants challenged, let alone raised an objection under Articles 34 (c) and 36 of the Rules of Procedure of the Council,[323] the Council's decision to proceed directly to a vote by secret ballot. As a result, Joint Appellants' procedural complaint should be deemed waived.[324]

5.21 In their Reply, Joint Appellants offer four arguments in response, none of which has merit.

5.22 *First*, Joint Appellants argue that "neither the ICAO Rules nor the ICAO Rules of Procedure for the Council … prevent deliberations or even contemplate that there will be none".[325] That may be true, but they also do not expressly contemplate deliberations. In any event, despite Joint Appellants' protestations to the contrary,[326] the minutes of the 26 June 2018 ICAO Council meeting make clear

[323] *See* ICAO Council, *Rules of Procedure for the Council*, ICAO Doc. 7559/10 (2014) Rule 34(c) "During the discussions of any matter, a Representative may raise a point of order or any other matter related to the interpretation or application of these Rules. The point of order … shall be decided immediately by the President". (**QCM (A) Vol. II, Annex 15**); and *ibid.*, Rule 36: "Rulings given by the President during a meeting of the Council on the interpretation or application of these Rules of Procedure may be appealed by any Member of the Council and the appeal shall be put to vote immediately. The ruling of the President shall stand unless overruled by a majority of the votes cast".

[324] QCM (A), para. 5.38 (citing *Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, Separate Opinion of Judge Jiménez de Aréchaga, I.C.J. Reports 1972, para. 42).

[325] BESUM, para. 3.24.

[326] *Ibid.*, para. 3.25.

that deliberations *were* held,[327] just not on the substantive issues of the case—again, a corollary of the Council's decision to proceed directly to a vote by secret ballot.[328]

5.23 *Second*, Joint Appellants disagree with Qatar and argue that the Council did hold deliberations in *Brazil v. United States*, and it could have done the same in the present case.[329] In fact, however, the Council adopted the same approach in both cases. As stated, the Council *did* hold deliberations in this case—just not on the substantive issues in dispute, because that would be incompatible with its decision to proceed with a vote by secret ballot. That is also what the Council did in *Brazil v. United States*.[330] Qatar's argument therefore stands.

5.24 *Third*, Joint Appellants assert that "the President [of the Council] intervened at the hearing to observe that proceeding to a vote without deliberations

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[327] 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**).

[328] Joint Appellants never explain how open deliberations on the substantive issues in dispute is consistent with the concept of vote by secret ballot. Qatar recalls that the term "Secret Ballot" is defined in the ICAO Council Rules of Procedure as "a ballot where the marking of the ballot paper by a Representative takes place in private and cannot be overseen by any person other than the Representative's Alternate. All ballot papers distributed should be exactly alike so that *it cannot be determined how any one Representative voted"*. ICAO Council, *Rules of Procedure for the Council*, ICAO Doc. 7559/10 (2014), Definitions, p. 2 (**QCM (A) Vol. II, Annex 15**) (emphasis added). Open deliberations on substantive issues would therefore defeat the stated purpose of the vote by "Secret Ballot", as would open deliberations in the presence of the Parties.

[329] BESUM, para. 4.50.

[330] Joint Appellants generally cite to the Council's decision in *Brazil v. United States* but fail to indicate where one can find the evidence of deliberations. *See* BESUM, fn. 296 (citing Decision of the ICAO Council on the Preliminary Objections in the Matter "Brazil v. United States", 23 June 2017 (**BESUM Vol. V, Annex 32**)). Such evidence can be found in the minutes of the Council meeting discussing the United States' preliminary objection. *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. 92 (**BESUM Vol. III, Annex 24**). A mere perusal of these paragraphs make it clear that only one Member State expressed a view on the merit of the United States' jurisdiction objection, Cuba, and this was before Appellant UAE's proposal that the Council proceed with a vote by secret ballot. *Ibid*., paras. 94-95. After the Council agreed to vote by secret ballot, the deliberations or discussions involved procedural matters only.

would be a departure from the Council's own previous practice".[331] The sole basis for Joint Appellants' assertion, however, is the corrections to the hearing transcript *proposed by Appellants* UAE and Bahrain on 2 August 2018, after the institution of these proceedings before the Court. Moreover, the alleged intervention by the President of the Council is not included in the official minutes of the hearing.[332] The Council thus rejected Joint Appellants' proposed insertion.[333]

5.25 In any event, the alleged statement Joint Appellants seek to attribute to the President of the Council (even if he made it) is not what they make it seem. As stated in Appellant Bahrain's proposed amendments, the President of the Council merely "wished to be sure on whether there ought to be deliberations".[334]

5.26 *Fourth*, and finally, Joint Appellants argue that "in every decision handed down since the Court's judgment in the *India v. Pakistan* appeal, the Council has provided reasons for its decisions".[335] However, as Qatar explained in its Counter-

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[331] BESUR, para. 3.25 (citing Bahrain and UAE comments on draft Minutes C-MIN 214.8 Closed circulated by the Secretariat, 2 August 2018, Bahrain comments, para. 108 (**BESUR Vol. II**, **Annex 8**)).

[332] 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**).

[333] The ICAO Secretary General prepares "Draft Minutes" of each meeting within six weeks of the session. The Secretary General submits the "Draft Minutes" to the President of the Council, who then distributes them to Representatives for comment. After the Representatives submit their comments, the Council will adopt the final minutes "through written procedure or at a subsequent meeting". *See* ICAO Council, *Rules of Procedure for the Council*, ICAO Doc. 7559/10 (2014), Rule 57(b): "The Secretary General shall prepare Draft Minutes of each meeting within six weeks of the session of the Council to which they relate. These shall be submitted to the President for agreement, distributed to Representatives who shall have ten working days to comment thereon and adopted by the Council either through written procedure or at a subsequent meeting". (**QCM (A) Vol. II, Annex 15**).

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

[335] BESUR, para. 3.27.

Memorial,[336] while this may be true for decisions adopted by roll call,[337] it is distinctly *not* true for decisions adopted by secret vote.[338] Joint Appellants maintain their refusal to acknowledge this distinction. They also never reconcile their complaint with their acknowledgment elsewhere in their Reply that the lack of reasons in the Council decision in the 1972 *ICAO Council Appeal* case was "not important enough to trigger [the Court's] 'supervisory authority'".[339]

5.27 In the end, the absence of open deliberations on the substantive issues in dispute and of reasons in the Decision is consistent with the ICAO Rules and the Council's decision to vote by secret ballot.

B. JOINT APPELLANTS ARE WRONG TO ASSERT THAT THE COUNCIL DID NOT OPENLY DELIBERATE ON CERTAIN PROCEDURAL MATTERS

5.28 Joint Appellants' Reply also seeks to expand the scope of their procedural complaints under the rubric of "absence of deliberations" to include the Council's alleged failure to deliberate on the majority required to rule on Joint Appellants' Preliminary Objections and the question put to vote.[340] Again, the ICAO Council meeting minutes proves them wrong. The minutes make clear that

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[336] QCM (A), para. 5.35.

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

[338] 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**).

[339] BESUR, para. 3.19; *see also ibid*., para. 3.40.

[340] *Ibid.*, para. 3.23.

- The decision as to the majority required to rule on Joint Appellants' jurisdictional objections was taken *not* by the Director of Legal Affairs, as Joint Appellants falsely allege,[341] but by the Council itself.[342] In taking this decision, the Council expressly considered that

> "[u]nder Article 52 of the Chicago Convention, decisions by the Council required approval by a majority of its Members. In line with the consistent practice of the Council in applying that provision in previous cases, including in the *Pakistan v. India* dispute, since the Council comprised 36 Members, acceptance of the Respondents' preliminary objections in both Application (A) and Application (B) required 19 positive votes".[343]

A request by the UAE Representative that the Council reconsider its decision was similarly addressed by the Council and declined "in the absence of any desire on the part of the Council to determine what constituted the voting majority other than the relevant provisions of the Chicago Convention …"[344] The only involvement of the Director of Legal Affairs in this process was to "read the text of Article 52 of the Chicago Convention and recite[] to the Council the factual historical records of previous Council decisions, no more, no less".[345]

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[341] *Ibid.*, para. 3.23(a).

[342] 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**).

[343] *Ibid.* Qatar recalls once again that Joint Appellants have failed to respond to any of Qatar's arguments in the Counter-Memorial showing that the Council's decision on this issue was entirely consistent with the terms of Article 52 and the Council's previous practice. Therefore, even if their procedural complaint that the Council failed to deliberate on this issue somehow has merit, *quod non*, the fact remains that the decision of the Council was substantively correct.

[344] *Ibid.*, para. 118.

[345] *Ibid.*, para. 111.

- The President of the Council did not "ignor[e] the Appellants' repeated clarifications that there were in fact two distinct Preliminary Objections which were to be assessed separately".[346] To the contrary, the minutes of the meeting record that the President of the Council fully understood that "in essence for each of Qatar's Application (A) and Application (B) the Respondents had a preliminary objection for which they provided two justifications", and he "took the point made by [counsel for Appellant Bahrain] that the voting on each preliminary objection applied to both of the justifications provided therefore".[347] To argue in spite of this, as Joint Appellants do, that the President of the Council "conflated the two objections into one, and the ICAO Council disposed of the two Preliminary Objections raised by the Appellants as a single plea", and that "unlike in *Pakistan v. India*, the Council fundamentally misunderstood and could not properly have applied its collective mind to the objections that were before it",[348] is untenable.[349]

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[346] BESUR, para. 3.23(b). The minutes the Council meeting record only one such "clarification", however. *See* ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 121 (**BESUM Vol. V, Annex 53**).

[347] 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**).

[348] BESUR, para. 3.20(c).

[349] Relatedly, Joint Appellants argue that the President of the Council put to vote a question other than what was introduced and seconded at the hearing, in breach of the requirements under Rules 40 and 45 of the Rules of Procedure of the Council. BESUR, para. 3.33(c). In its Counter-Memorial, Qatar explained that the original motion made by the Mexican Representative, and seconded by the Representative of Singapore, which unquestionably meets the requirements of Rules 40 and 45, was never changed or modified. QCM (A), para. 5.60. The President of the Council made this abundantly clear when he responded to Appellant Bahrain's observations by recalling that "both of the Respondents' … preliminary objections related to the jurisdiction of the Council" as well as the text of Article 5(1) of the ICAO Rules, stating that "[i]f the Respondent questions the jurisdiction of the Council to handle the matter presented by the Applicant, he shall file a preliminary objection setting out the basis of the objection". ICAO Council – 214th Session, Summary Minutes of the

5.29 The minutes of the Council meeting also make clear that Joint Appellants' complaint regarding the question that was put to vote has been waived. Contrary to their claim,[350] Joint Appellants did not object under Articles 34 and 36 of the ICAO Rules of Procedure or otherwise challenge the decision of the Council as to the wording of the question put to vote.

5.30 The ICAO Council therefore properly decided on the majority required to rule on Joint Appellants' Preliminary Objections and the question put to vote.

C. JOINT APPELLANTS HAD AMPLE OPPORTUNITY TO PRESENT THEIR CASE BEFORE THE ICAO COUNCIL

5.31 In its Counter-Memorial, Qatar explained that Joint Appellants were granted two opportunities to brief the issue of jurisdiction in writing as well as an opportunity to present oral arguments.[351] Qatar also pointed to the fact that Joint

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Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 122 (**BESUM Vol. V, Annex 53**).

[350] Joint Appellants allege that they did object "through counsel who intervened to clarify the importance of properly understanding, and ruling upon, each Preliminary Objection separately". BESUR, para. 3.36(d). As is evident from the actual minutes of the Council meeting, counsel did no such thing:

> "As explained by Mr. Petrochilos (Legal Advisor, Bahrain Delegation), the first preliminary objection was that the real issue in dispute was not an issue of the interpretation or application of the Chicago Convention or the Transit Agreement. The second preliminary objection was that the dispute was not one which cannot be settled by negotiation as was required by the jurisdictional clauses of those two treaties. As accepting either one of those preliminary objections had the effect of disposing of the case here and now, Mr. Petrochilos suggested that the appropriate wording of the question for the secret ballot for each Application would be "Do you accept either one of the two preliminary objections formulated by the Respondents in respect of each of the Applications?".

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**).

[351] QCM (A), para. 5.42.

Appellants acted "collectively" before the ICAO Council (as they do now before the Court) and 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.[352] In any event, Joint Appellants failed to explain how or why the opportunities to present their arguments that they were granted were not enough or what prejudice they suffered from not having had more, given the identity of the legal issues in dispute.[353]

5.32 Joint Appellants' Reply maintains that the scheduling of "only one half-day session" for the hearing did not "permit them sufficient time properly to co-ordinate and present their case".[354] This continues to be a mere assertion. They never explain why the time allotted to them, in conjunction with the two opportunities to submit arguments in writing, and the identity of the legal issues in dispute, did not afford them a "reasonable opportunity to present their case" (which as they now admit is what the ICAO Rules safeguards).[355] What argument that was not already in the written pleadings were they precluded from making at the hearing? How did that deprive them of their "reasonable opportunity"? Would the outcome have been any different had they had more time, and why? Joint Appellants never engage with these questions and hence there is no way to know.

5.33 Joint Appellants do say, however, that "[t]he good administration of justice requires that particular attention be given to the proper balancing of the written pleadings allowed and the time for oral presentations to 'equalize eventual

[352] *Ibid.*, paras. 5.44, 5.47.

[353] *Ibid.*, paras. 5.42, 5.46.

[354] BESUR, para. 3.29.

[355] *Ibid.*, para. 3.31.

unevenness among the Parties'".[356] The Council can hardly be faulted for improper balancing here. Despite Qatar's protests, it granted Joint Appellants *two* opportunities to submit written pleadings on the jurisdictional issues.[357] Joint Appellants took full advantage of both, submitting in total 80 pages on their two preliminary objections.[358] Qatar, by contrast, submitted one brief, 58 pages long.[359] Joint Appellants were also granted a hearing, which is at the discretion of the Council.[360] In these circumstances, it is difficult to see how granting Joint

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

[357] QCM (A), paras. 5.19.

[358] 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 (**BESUM Vol. III, Annex 24**); 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 (**BESUM Vol. IV, Annex 26**).

[359] Joint Appellants take issue with Qatar's suggestion that, in view of Joint Appellants' two opportunities to brief the issue of the Council's jurisdiction compared to Qatar's one, if a party was prejudiced by the decision of the Council to schedule only one half-day session for the hearing, that was Qatar. QCM (A), para. 5.22. They argue that if Qatar felt that it was being prejudiced it should not have "declined to ask to be allowed to file a second-round written submission". BESUR, fn. 214. This is rich coming from Joint Appellants who apparently are happy with the fact that with every passing day that their wrongful aviation prohibitions remain in place the risk to the safety and efficiency of civil aviation in the region and the financial detriment to Qatar's national air carrier are getting higher. Seeking "to be allowed to file a second-round written submission" was never an option for Qatar.

[360] Under Article 12 of the ICAO Rules for the Settlement of Differences, the ICAO Council may admit oral arguments at its sole discretion. ICAO, Rules for the Settlement of Differences, approved on 9 April 1957; amended on 10 November 1975, Art. 12(2) (**BESUM Vol. II, Annex 6**); *see also* Thomas Buergenthal, *Law-making in the International Civil Aviation Organization* (1969), p.189 ("An interesting feature of the Rules is their emphasis on written proceedings. *The parties do not have the right to an oral hearing, although the Council may in its discretion accord it*. Even the final arguments of the parties must be presented in writing, 'but oral arguments may be admitted at the discretion of the Council.' *This policy against oral proceedings is probably designed to reduce the time that the Council would have to devote to a given case*".) (**BESUM Vol. VI, Annex 125**) (emphasis added).

Appellants even more time at the hearing would equalise the putative procedural "unevenness among the Parties".

5.34 In sum, Joint Appellants enjoyed ample, and much more than sufficient, opportunities to present their case before the Council.

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5.35 For the reasons stated above, as well as those presented in its Counter-Memorial, Qatar respectfully requests that the Court reject Joint Appellants' First Ground of Appeal.

SUBMISSIONS

On the basis of the facts and law set forth in this Rejoinder, 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,

Dr. Mohammed Abdulaziz Al-Khulaifi
AGENT OF THE STATE OF QATAR
29 July 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

29 July 2019

VOLUME II

ANNEXES

ICAO CORRESPONDENCE AND DOCUMENTS

Annex 1 — ICAO Council, 19th Session, *Working Paper: Report to Council of the Working Group on Rules for Settlement of Differences*, ICAO Doc. C-WP/1457 (13 Mar. 1953)

Annex 2 — International Air Services Transit Agreement (7 Dec. 1944) (entry into force: 30 Jan. 1945), Trilingual Version, ICAO Doc. 7500 (1954)

Annex 3 — Convention on International Civil Aviation (7 Dec. 1944) (entry into force: 4 Apr. 1947), Quadrilingual Version, ICAO Doc. 7300/9 (9th ed. 2006)

Annex 4 — *Email* from Olumuyiwa Benard Aliu, President of the ICAO Council, to All Council Delegations (19 June 2017)

Annex 5 — *Letter* from Abdulla Nasser Turki Al-Subaey, President of Qatar Civil Aviation Authority, to Dr. Olumuyiwa Benard Aliu, President of ICAO Council (20 Feb. 2019)

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Annex 6 — Qatar Civil Aviation Authority, Air Navigation Department, *Reply to Conclusion 17/19 MIDANPIRG/17*, *Assessment of Contingency Routes* (7 July 2019)

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Annex 7 — "Custodian of the Two Holy Mosques welcomes Islamic personalities and heads of Hajj delegations at the annual reception in Mina", *Al Riyadh* (28 Oct. 2012), *available at* http://www.alriyadh.com/779832#

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Annex 13 Al Jazeera, *About Us* (last accessed: 8 July 2019), *available at* https://www.aljazeera.com/aboutus/

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Annex 15 Kenneth L. Marcus, "Accusations in a Mirror", *Loyola University Chicago Law Journal*, Vol. 43 (2012)

Annex 16 African Commission on Human and Peoples' Rights, 16th Extraordinary Session, *Resolution on Human Rights Abuses in Egypt*, ACHPR Res. 287 (EXT.OS/XVI) (20-29 July 2014)

Annex 17 International Commission of Jurists, *Egypt's Judiciary: A Tool of Repression* (Sept. 2016), *available at* https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf

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