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CR 2019/17

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Friday 6 December 2019, at 3 p.m., at the Peace Palace,

President Yusuf presiding,

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

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le vendredi 6 décembre 2019, à 15 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

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

COMPTE RENDU

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

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

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The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the second round of oral argument of Qatar. I shall now give the floor to Professor Vaughan Lowe. You have the floor, Sir.

Mr. LOWE: Thank you, Mr. President.

I. INTRODUCTION AND GENERAL CONSIDERATIONS

A. Introduction

1. Mr. President, Members of the Court, in this round we will respond only to the main new points raised yesterday by our friends opposite, though we maintain all of the submissions that we have made, in writing or orally, in this case.

2. My colleagues will deal, each of them, with specific points on the topics that they addressed on Tuesday. I have three more general points to make.

B. The Joint Appellants do not seek the reversal of the Court's 1972 ICAO decision

3. The first point is the clarification of the Joint Appellants' case. We understand from Professor Shaw that they do not ask the Court to reconsider its 1972 *ICAO* decision. They say that their case is consistent with it[1]. We disagree. We have given our reasons; and on the "real issue in dispute" point, the only point that we would add at this stage is that in *Chagos* and other cases, the question has been whether the Applications and relief sought disguised the true object of the claim. ***But h***ere there is no question that a ruling on the compatibility of the measures with the ICAO Treaties, no more, no less, is exactly what Qatar asked for in its ICAO Applications two years ago and still seeks, as Professor Klein will explain further.

C. The dispute falls within the ICAO disputes procedure

4. The second point is systemic. The Joint Appellants say that Qatar's desire to have the ICAO Council hear its applications neglects the principle of speciality — by which they seem to

[1] CR 2019/16, pp. 28-32 (Shaw).

mean no more than that ICAO has a limited competence — and also the technical limitations of the Council.

5. In fact, Qatar's October 2017 applications to ICAO indisputably fall within that limited specialized competence. They are in Annex 23 to the Joint Appellants' Memorial; and I draw your attention to Qatar's reliance on provisions of the Chicago Convention that address the very points raised by the Joint Appellants here before you: Article 4 — whether civil aviation can be used as a coercive tool; Article 9 — whether the Joint Appellants' security concerns can justify discriminatory measures; Article 89 — whether the Joint Appellants can rely on the "national emergency" provisions of the Convention without notifying the ICAO Council as is prescribed[2]. These are among the questions put by Qatar to the ICAO Council, in accordance with the Chicago Convention.

6. Yes: there is a reference in the applications to "other rules of international law"[3]. That is necessary to cover possible reference to, for example, the Vienna Convention on the Law of Treaties~~,~~ to answer those questions, or to the international law definitions of "territory" and "high seas" and so on. But the question is on the compatibility of the measures with the Chicago Convention and IASTA.

7. Yes: the ICAO Council has "technical" expertise, including in economics, diplomacy, law and other specializations represented in the delegations chosen by contracting States. It may be that the Joint Appellants consider it unfit for the discharge of judicial functions. But this is the system that the Joint Appellants signed up for, and if they do not like it, the answer is not to suggest that the Court intervene and impose rules that the contracting States themselves did not negotiate or consent to: it is to persuade the contracting States to revise the Chicago Convention. Until then, they must take the Convention as it stands — not that there is any difficulty in that. The Convention envisages that the Council may make decisions that need legal supervision: and that is what this Court is for. If the Council gets a legal decision wrong, this Court is here to correct it.

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[2] ICAOA Memorial (A) pp. 599-601 (MA — ICAOA, Vol. III, Ann. 23).

[3] ICAO Application (A), p. 592; ICAO Application (B), p. 593 (MA — ICAOA and ICAOB, Vol. III, Ann. 23).

8. There is a further point, on the principle of speciality, and on the more basic principle of taking the world as one finds it. The Joint Appellants refer to considerations of "judicial propriety". The content and the origin of the concept is vague. ***And w***hile Qatar does not doubt that it exists**,** it does submit that the concept is no Procrustean bed to which all specialized agencies must be lashed. What is proper for one specialized agency, given its specific competence and composition, may not be proper for another. If the principle of speciality is applicable in this case, we submit that it requires respect for the particular way in which the ICAO disputes procedure and the provision for appeals to this Court have been framed. That is what the States parties to the ICAO Treaties have agreed to, and what has worked effectively for ICAO for the past 72 years.

9. So, to answer Dr. Petrochilos[4], we indeed accept that just as the Council can rule on Qatar's Applications, it could have ruled on an application from the Appellants for a declaration that their measures are consistent with the Chicago Convention. In considering Qatar's Applications, it could rule that Qatar has not made out its case; or that under the Chicago Convention and IASTA civil aviation can never be used for countermeasures; or that, as the Agent for the UAE suggested, under the Riyadh Agreements the Joint Appellants had a self-judging right to impose whatever measures they choose on Qatar[5]; or that procedures for imposing countermeasures were not followed. No one here is asking this Court to limit what the Council can decide. The Joint Appellants can put whatever arguments they wish to the Council. They can appeal any decision they believe to be legally erroneous to this Court. There is no prospect of rogue decisions on rules of international law unrelated to civil aviation being cemented into the international legal order if ICAO is allowed to exercise its competence in this case.

D. The Joint Appellants' neglect of the Riyadh Agreement mechanism

10. The third point concerns the Riyadh Agreements. Professor Akhavan said that Qatar manifestly failed to use the opportunity to negotiate a solution to the dispute under the Riyadh Agreements before the filing of its Applications with the Council[6]. Well, if the Joint Appellants really believed that the Riyadh Agreements governed all of this dispute, and

[4] CR 2019/16, p. 15, para. 6 (Petrochilos).

[5] CR 2019/16, p. 62, para. 7 (Al-Otaiba).

[6] CR 2019/16, p. 57, para. 24 (Akhavan).

believed that Qatar was in breach of the ***A***greements, and if they were really willing to negotiate, why did *they* not invoke the Riyadh mechanism after 2014? As Professor Shaw stated, the mechanism was used by all parties to the Riyadh Agreements to discuss disagreements throughout 2014[7]: so why did the Joint Appellants abandon that mechanism and resort to unilateral action?

11. Qatar is the only party that has put this dispute before an international dispute settlement mechanism. It brought this dispute to the ICAO Council because it is about civil aviation, not about the Riyadh Agreements. The argument that it should be turned back at the door because the Joint Appellants' alleged self-judging rights or invocation of a countermeasures defence allegedly render the dispute non-justiciable by the very international body established to address such disputes, or because it would allegedly "politicize" the ICAO, is the kind of argument that was heard in this building over a century ago, but which many had hoped had been long abandoned.

12. That, Sir, completes my submission on behalf of Qatar. I thank the Court for its patient attention, and ask that you call Professor Klein to the lectern.

Le PRESIDENT : Je remercie le professeur Lowe. Je donne à présent la parole au professeur Klein. Vous avez la parole.

M. KLEIN : Merci, Monsieur le président.

II. LA COUR DEVRAIT REJETER LE DEUXIEME MOTIF D'APPEL

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, l'audience d'hier a permis de mettre en lumière les principaux points qui continuent à opposer les Parties à ce stade des débats en ce qui concerne le deuxième motif d'appel invoqué par les demandeurs. Il y a, d'une part, la question de la détermination de l'objet véritable du différend soumis au Conseil. Relève-t-il ou non de la compétence de cet organe ? C'est la question sur laquelle je m'attarderai dans un premier temps. Il y a, d'autre part, le problème de l'étendue des compétences du Conseil lorsqu'il est saisi d'un différend : sur quel type de question juridique peut-il se prononcer, eu égard aux limites que lui impose le principe de spécialité ? Ce dernier principe se trouvera-t-il nécessairement

[7] CR 2019/16, p. 36, para. 28 (Shaw).

remis en cause si le Conseil était appelé à examiner sur le fond la plainte dont il a été saisi par le Qatar ? C'est à cette problématique que je consacrerai la seconde partie de cette plaidoirie.

A. La violation par les demandeurs des conventions relatives à l'aviation civile internationale constitue l'objet véritable du différend

2. Les débats relatifs à la détermination de l'objet véritable du différend se sont, pour l'essentiel, focalisés sur deux précédents jurisprudentiels : l'affaire relative à *Certains actifs iraniens* et l'arbitrage relatif aux *Chagos*. J'y reviendrai donc successivement. Selon nos contradicteurs, l'interprétation que propose le Qatar de l'arrêt de 2019 serait qu'il suffirait de faire mention d'une convention pour que l'organe juridictionnel saisi d'un différend relatif à son application soit automatiquement compétent[8]. Et ils affirment par ailleurs que la «matrice factuelle» de cette affaire et celle de la nôtre sont différentes, car la temporalité le serait aussi. Dans notre affaire, vous a expliqué le professeur Shaw, le véritable différend n'a pas débuté le 5 juin 2017, lorsqu'ont été adoptées les mesures restrictives en matière d'aviation, mais avec la violation antérieure par le Qatar des accords de Riyad et d'autres obligations internationales[9]. J'avoue avoir un peu de mal à saisir cet argument. A ma connaissance, c'est il y a très exactement 40 ans cette année que les relations entre l'Iran et les Etats-Unis se sont dramatiquement dégradées et qu'un différend de grande ampleur s'est fait jour entre ces deux Etats, et non en 2012, lorsque le président américain a promulgué le décret qui a bloqué tous les actifs de l'Etat iranien aux Etats-Unis. Bien plus encore que dans notre affaire, le désaccord plus large qui opposait les deux Etats en cause était donc antérieur — et de très loin — à la survenance d'un différend particulier qui s'inscrivait dans ce cadre plus large. Cela n'a à l'évidence en rien empêché la Cour de conclure que le différend relatif aux actifs iraniens aux Etats-Unis constituait un différend autonome, dont elle pouvait connaître en tant que tel. Et pour ce qui est encore de cette question de temporalité, il est certain qu'avant le 5 juin 2017, il n'existait pas de différend aérien dont le Conseil de l'OACI aurait pu être saisi à la demande du Qatar.

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[8] CR 2019/16, p. 33, par. 18 (Shaw).

[9] CR 2019/16, p. 34, par. 19 (Shaw).

3. Quant à la première des critiques de nos contradicteurs, relative à l'interprétation prétendument donnée par le Qatar du test utilisé par la Cour dans cet arrêt, il est évident que la seule invocation d'un instrument potentiellement applicable ne suffit pas à fonder la compétence d'un organe juridictionnel — et le Qatar ne l'a d'ailleurs jamais prétendu. Comme l'indique la Cour dans l'affaire relative à *Certains actifs iraniens*, «elle doit rechercher si les actes dont l'Iran tire grief entrent dans les prévisions du traité d'amitié»[10]. Elle doit, en d'autres termes, mettre en adéquation les faits invoqués à l'appui de sa demande par le requérant avec l'instrument juridique sur lequel celui-ci entend fonder la compétence de la Cour. C'est très précisément de cette manière que le Qatar a procédé devant le Conseil. Il ne fait donc aucun doute que le prononcé de la Cour dans l'affaire relative à *Certains actifs iraniens* valide pleinement la thèse du Qatar quant à la manière d'identifier l'objet véritable du différend et à la possibilité pour un organe juridictionnel de traiter d'un différend circonscrit qui s'inscrit dans le cadre d'un désaccord plus large.

4. L'arbitrage relatif aux *Chagos*, quant à lui, s'inscrit sur une toile de fond totalement différente de celle de la présente affaire. Le but de la République de Maurice, en mettant en œuvre cette procédure, était très manifestement d'obtenir un prononcé sur la question de la souveraineté sur les Chagos, qui faisait l'objet d'un désaccord de longue date avec le Royaume-Uni. Ceci ressort de façon très claire de la première demande de Maurice qui avait pour but de faire déclarer que le Royaume-Uni n'était pas un Etat côtier au sens de la convention de Montego Bay et qu'il ne pouvait donc créer à ce titre une zone maritime protégée autour de l'archipel. Dans l'affaire des *Chagos*, la demande soumise par Maurice concernait la question du titre de souveraineté territoriale, la contestation de l'Etat côtier n'étant en quelque sorte que l'habillage de cette question de souveraineté qui ne pouvait — selon la majorité des arbitres — être tranchée sur la base de la convention de Montego Bay. Ici, le Qatar n'habille en rien ses demandes en vue d'obtenir autre chose.

[10] *Certains actifs iraniens (Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2019*, p. 23, par. 36.

5. Ce qui est en effet absent dans notre affaire, c'est l'intention du Qatar de se servir d'un différend particulier — celui relatif à l'aviation civile — pour obtenir un prononcé sur le désaccord plus large qui l'opposait aux Etats qui ont imposé le blocus aérien. Le seul focus du Qatar dans ce cadre a toujours été l'aviation civile, et uniquement l'aviation civile.

6. Le 5 juin 2017, le jour même de l'imposition des mesures restrictives, le Qatar s'adresse à la secrétaire générale de l'OACI en faisant valoir que l'action des Etats concernés est contraire à l'esprit de la convention de Chicago et qu'elle aura un impact majeur sur la sécurité et l'efficacité du transport aérien dans la région. Il n'y a pas de prétentions cachées derrière cette demande du Qatar. Ses avions sont alors déroutés, il leur est interdit d'atterrir et de décoller, et c'est pour faire face à cet état de choses que le Qatar se tourne d'emblée vers l'organisation compétente en cette matière.

7. Lors de sa réunion du 23 juin 2017, le Conseil se penche sur la demande formulée par le Qatar sur la base de l'article 54 *n)* de la convention de Chicago. Seules des considérations relatives à l'aviation civile internationale sont alors abordées. Le représentant de l'Arabie saoudite limite son intervention à des observations quant au rôle que le Conseil devrait jouer en l'espèce et à la pertinence du recours aux procédures prévues par l'article 54 *n)* et l'article 84 de la convention, respectivement[11]. La représentante des Emirats arabes unis intervient dans le même sens, sans faire référence à quelque élément extérieur à la convention que ce soit[12]. Et si le moindre doute subsistait encore à cet égard, le représentant de l'Egypte expose de manière plus détaillée la position de son Etat selon laquelle les mesures restrictives constituaient une réponse à la méconnaissance par le Qatar de ses obligations en vertu de la convention de Chicago, et plus particulièrement de son article 4. Je vous ai donné lecture de l'extrait pertinent de son intervention au début de cette semaine. Vous n'aurez pas manqué d'observer que les demandeurs ont soigneusement passé cette intervention sous silence dans leurs plaidoiries d'hier. Et on ne peut que le comprendre, car elle met à néant l'ensemble de leur argumentation. A cette date, de l'aveu même des représentants des

[11] Voir l'onglet n° 10 du dossier des juges, Item under Article 54(n) of the Convention on International Civil Aviation — Request of the State of Qatar, ICAO Council — 211th Session, Summary Minutes of the Tenth Meeting of 23 June 2017, ICAO document C-MIN 211/10, 11 July 2017, par. 15 (MD — ICAOA, vol. V, annexe 34).

[12] *Ibid.*, par. 18.

appelants au Conseil, le différend concerne exclusivement les règles relatives à l'aviation civile internationale. Pas la moindre mention des accords de Riyad.

8. La situation n'est pas différente au moment où le Qatar dépose sa requête et son mémoire le 30 octobre 2017. Là encore, les arguments portent exclusivement sur l'interprétation et l'application de la convention de Chicago et de l'accord sur les services aériens.

9. Ce n'est finalement qu'en mars 2018, neuf mois après que le Qatar eut saisi pour la première fois les instances de l'OACI, que l'accord de Riyad et les justifications par les demandeurs des mesures restrictives comme contre-mesures non réciproques font leur grande entrée sur la scène de notre différend. C'est la première fois, la toute première fois, que ces arguments sont avancés par les demandeurs devant le Conseil comme fondement des mesures en matière d'aviation qu'ils ont prises à l'encontre du Qatar en juin 2017.

10. Et les conséquences que les demandeurs tirent de cette invocation des accords de Riyad et du droit international général sont radicales. L'invocation de ce *corpus* juridique extérieur en défense des actes qui font l'objet du différend aurait pour effet, selon eux, de changer l'objet du différend et de mettre fin rétroactivement à la compétence du Conseil.

11. On comprend sans doute encore mieux, sur cette base, pourquoi — n'en déplaise à nos contradicteurs — la Cour a mis tant d'emphase dans son arrêt de 1972 sur le caractère inadmissible de la détermination de la compétence du Conseil par une partie du simple fait du choix opéré par cette partie quant à la présentation de ses moyens de défense au fond. Admettre cette possibilité, ce serait à l'évidence permettre à n'importe quel Etat d'échapper au jeu d'une clause compromissoire.

B. Il n'est aucunement nécessaire, pour trancher le différend que lui a soumis le Qatar, que le Conseil de l'OACI se prononce sur la validité substantielle des contre-mesures invoquées par les demandeurs

12. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, permettez-moi maintenant d'aborder l'autre argument majeur invoqué par les demandeurs pour contester la compétence du Conseil de l'OACI dans la présente affaire, celui fondé sur le principe de spécialité. Nos contradicteurs vous ont rappelé hier à quel point ce principe jouait un rôle fondamental dans l'analyse des pouvoirs des organisations internationales et, singulièrement, des institutions

spécialisées du système des Nations Unies[13]. Ils se sont aussi émus que le Qatar ne se soit pas exprimé très longuement à ce sujet[14]. Mais, que la Cour soit rassurée, le Qatar n'entend nullement remettre en cause ce principe et son importance. Ce que le Qatar conteste fermement, en revanche, c'est qu'il existe un risque qu'il y soit porté atteinte dans la présente affaire.

13. Nos contradicteurs vous ont fait hier une présentation assez apocalyptique de ce qu'impliquait le traitement, par un organe judiciaire, d'allégations relatives au terrorisme ou à l'espionnage[15]. Si les difficultés sont telles, vous ont-ils exposé, devant des instances telles que le Cour elle-même ou les juridictions pénales internationales, qu'en serait-il devant le Conseil de l'OACI, encore moins équipé pour faire face à des défis de cet ordre[16] ?

14. Mais cet argument — ou plutôt cette stratégie oratoire — des demandeurs est tout entier fondé sur le présupposé qu'il existerait une nécessité absolue, pour le Conseil, d'examiner d'abord la conformité — ou non — des agissements du Qatar aux accords de Riyad et au droit international général avant de pouvoir se prononcer *in fine* sur d'éventuelles violations des traités de 1944. Comme le Qatar l'a amplement montré dans ses écritures, et comme je l'ai rappelé en début de cette semaine, cette nécessité n'existe tout simplement pas.

15. Il existe en effet plusieurs cas de figure — ce que nos contradicteurs ont appelé des «hypothèses»[17] — dans lesquelles le Conseil pourrait parfaitement trancher le différend qui lui est soumis sans devoir pour autant examiner les défenses de fond avancées par les demandeurs pour justifier leurs actions. Et contrairement à ce que semblent penser nos contradicteurs[18], ces cas de figure restent tous pertinents aux yeux du Qatar. Il y en a d'ailleurs un qu'ils se sont soigneusement abstenus de mentionner tant dans leur premier que dans leur second tours de plaidoiries. C'est bien sûr celui où le Conseil en viendrait à conclure qu'aucune violation des traités de 1944 n'est survenue en l'espèce au préjudice du Qatar. En pareil cas, évidemment, nul besoin d'examiner quelque défense au fond que ce soit. L'argument de la nécessité est, d'emblée, désintégré.

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[13] CR 2019/16, p. 38, par. 37 (Shaw).

[14] *Ibid.*

[15] CR 2019/16, p. 54-55, par. 9-14 (Akhavan).

[16] CR 2019/16, p. 56, par. 15 (Akhavan).

[17] CR 2019/16, p. 20, par. 22 (Petrochilos).

[18] *Ibid.*

16. Par ailleurs, les Parties divergent sur la question de savoir si les Etats parties aux traités de 1944 demeurent en droit de recourir à des contre-mesures non réciproques. Si le Conseil concluait que les traités n'autorisent pas le jeu des contre-mesures, il n'aurait pas non plus à se prononcer sur le fond de la défense des demandeurs. Il en irait encore de même si le Conseil estimait que l'article 82 de la convention de Chicago aurait pour effet d'empêcher l'invocation des accords de Riyad en raison de leur incompatibilité avec cette convention.

17. Le dernier des cas de figure envisagés par le Qatar mérite lui aussi de retenir l'attention. Ce qui ne peut en effet manquer de frapper également, dans les présentations qui vous ont été faites hier par nos contradicteurs, c'est l'absence complète de réfutation de l'argument avancé par le Qatar, tant à l'écrit qu'à l'oral, selon lequel le Conseil pourrait se limiter en l'espèce à rejeter la défense des contre-mesures en raison du non-respect des exigences formelles auxquelles sont assujetties les contre-mesures. Le Qatar a montré qu'en l'absence de toute notification préalable, sans que cette absence puisse être justifiée par une quelconque urgence particulière, les mesures restrictives prises par les demandeurs en juin 2017 ne satisfont pas aux conditions de validité des contre-mesures énoncées à l'article 52 des articles sur la responsabilité internationale des Etats. Nos contradicteurs ne trouvent visiblement rien à redire à cette affirmation, qui confirme encore une fois que le Conseil n'est nullement tenu de se prononcer sur le fond de la défense bâtie par les demandeurs pour trancher le différend qui lui est soumis. Ici encore, point de nécessité qui tienne et aucune impossibilité logique pour le Conseil de se prononcer sur le fond de la demande qui lui a été soumise par le Qatar. En fin de compte, ce que tentent de faire les demandeurs, sous le couvert d'un appel, c'est de vous amener à priver le Conseil de son droit inhérent en tant qu'organe juridictionnel de se prononcer sur l'étendue de sa propre compétence.

18. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, le deuxième motif d'appel avancé par les demandeurs repose sur l'affirmation selon laquelle le différend porté devant le Conseil n'est pas le véritable différend qui oppose les Parties. Ce dernier serait beaucoup plus large, impliquerait d'autres instruments et règles de droit que les traités de 1944 et échapperait de ce fait inévitablement à la compétence du Conseil. Mais ce n'est ni ce que montre le dossier, ni ce qu'impose la logique. Ce que montre le dossier, c'est que le différend relève bel et bien de la compétence du Conseil. C'est au regard des règles relatives à l'aviation civile internationale que les

demandeurs eux-mêmes ont formulé leur défense initiale. Et ce n'est que beaucoup plus tardivement qu'ils ont avancé des justifications extérieures à ce champ de référence, des justifications qui ne sauraient avoir pour effet de modifier *a posteriori* l'objet du différend. Ce qu'impose la logique, c'est de constater qu'il n'y a aucune nécessité inéluctable pour le Conseil de se prononcer sur le fond de la défense avancée par les demandeurs pour justifier les mesures restrictives qu'ils ont adoptées en juin 2017, au risque, selon nos contradicteurs, de le faire sortir de son champ limité de compétences en tant qu'organe d'une institution spécialisée. Il existe indubitablement plusieurs situations dans lesquelles le Conseil pourrait parfaitement trancher le présent différend sans devoir s'engager dans un tel examen — et ces situations sont très loin de ne constituer que de simples hypothèses d'école, ainsi que les demandeurs paraissent visiblement l'accepter eux-mêmes. Pour l'ensemble de ces raisons, Monsieur le président, Mesdames et Messieurs de la Cour, je vous réitère mon invitation à rejeter le deuxième moyen d'appel formulé par les demandeurs.

19. Je vous remercie pour votre aimable attention et je vous prie, Monsieur le président, de bien vouloir passer la parole à mon collègue M. Lawrence Martin.

The PRESIDENT: I thank Professor Klein for his statement. I shall now give the floor to Mr. Lawrence Martin. You have the floor.

Mr. MARTIN:

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

1. Mr. President, Madam Vice-President, distinguished Members of the Court, good afternoon. Today I will again respond to the Joint Appellants' arguments in respect of their third ground of appeal. We are mindful of your admonitions, Mr. President. I shall therefore endeavour to be brief and limit myself to only certain key points.

2. Let me begin with a very simple, but also very fundamental, point: the Joint Appellants still do *not* deny that they entirely refused to negotiate with Qatar on any issue, in any forum, at any time before Qatar submitted its Applications to the ICAO Council in October 2017. They have had

every opportunity to do so. Qatar raised this issue in our Counter-Memorial[19], in our Rejoinder[20] and in our first-round oral pleadings[21]. In our Rejoinder and again on Tuesday, we all but dared them to deny it. They did not.

3. The Joint Appellants seem to take offence that we construe their silence as an admission. Mr. Olleson yesterday characterized as a "metamorphosis" our interpretation of their studious non-denial as an admission[22]. There is nothing Kafkaesque about what we have done, Mr. President. It is unclear how their non-denial could be interpreted as anything *other* than an admission. If there were a way to interpret their conduct other than that they were absolutely closed to the possibility of engaging with Qatar on any issue, at any time, they would have said so. The fact that they have not tells the Court all it needs to know.

4. That brings me then to the central question of law that continues to divide the Parties: whether a State is required to make a "genuine attempt" to negotiate even in the face of an admitted — or at least undisputed — refusal to negotiate *ab initio*. Mr. Olleson not surprisingly chose to characterize our position as showing "a clear recognition that the facts it relies upon to argue that it in fact complied with the precondition of negotiation are insufficient"[23]. He is deeply mistaken. Our position could not be clearer. We raise the issue because the point of principle is important. We also raise it because we consider it outrageous that the Joint Appellants ask you to set aside the Council's decision on the grounds that Qatar allegedly did not try to negotiate with them, when even in these proceedings they have not denied that they were unwilling to negotiate.

5. Our friends say our position is "unsupported by any authority"[24]. We have a different view. The Court has long recognized the central role good faith plays in international law[25]. The

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[19] CMQ — ICAOA and ICAOB, paras. 4.29-4.37.

[20] RQ — ICAOA and ICAOB, paras. 1.10, 4.4-4.5.

[21] CR 2019/15, pp. 44-45, paras. 10-11 (Martin).

[22] CR 2019/16, p. 44, para. 22 (Olleson).

[23] CR 2019/16, p. 43, para. 19 (Olleson).

[24] CR 2019/16, p. 44, para. 21 (Olleson).

[25] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94.

Court has also long eschewed formalism in favour of realism[26]. And in the *North Sea Continental Shelf* cases, and reiterated many times since, the Court expressly said what is required of States ***in the context of negotiations***[27]. Putting these authorities and the principles for which they stand together, it is hard *not* to conclude that the requirement to make a genuine attempt to negotiate should be dispensed with, when the undisputed evidence makes clear that no negotiations were remotely possible. If there is no case directly on point, it is only because the issue has never come up.

6. Mr. Olleson continued yesterday to miss the point when he argued that the Court should be reluctant to carve out exceptions "based on a unilateral assertion of supposed futility"[28]. He also said that there was a "clear subjective element implicit in [our] position"[29]. But there is nothing "unilateral" or "subjective" about our position in the circumstances of this case. The record is clear that the Joint Appellants at all times refused any and all talks with Qatar. They have never once denied it. The futility of negotiations in this case is thus an objective, undisputed fact.

7. Mr. Olleson also took issue with my point that procedural requirements are dispensed with in case of futility in other areas of international law, including the exhaustion of local remedies. He said that the exhaustion requirement "serves very different purposes" from a negotiations requirement[30]. Mr. Olleson did not explain why the distinction he raises makes a difference. Given that both the exhaustion and negotiation requirements condition a State's ability to bring litigation on the international plane, there is every reason to treat them the same.

8. Mr. Olleson also said that the exhaustion rule "requires clear proof of futility based on actual prior attempts"[31]. This point does not fare any better than the last. Futility can be established

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[26] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 428, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 81.

[27] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 46, para. 85; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 67, para. 146; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 36, para. 41.

[28] CR 2019/16, p. 42, para. 11 (Olleson).

[29] CR 2019/16, p. 44, para. 22 (Olleson).

[30] CR 2019/16, p. 45, para. 25 (Olleson).

[31] *Ibid.*

even without "actual prior attempts". Article 15 of the International Law Commission's ***(ILC)*** Draft Articles on Diplomatic Protection identify several circumstances where local remedies need not even be attempted, including when "the injured person is manifestly precluded from pursuing local remedies"[32].

9. The text of Article 84 of the Chicago Convention also supports our position. As I explained on Tuesday, that text is different from Article 22 of CERD. The texts of the two provisions are on the screen. Article 84 uses the term "if"; Article 22 of CERD does not. In our view this plainly calls for an objective assessment of fact.

10. Mr. Olleson yesterday had no response on this important textual point. He said merely that he did not need to address it because our argument is supposedly "inconsistent with Qatar's acceptance that the clauses constitute preconditions of negotiation"[33]. The point cannot be so easily glossed over. We accept that Article 84 creates a precondition. But the question is, what is the content of that precondition? Does it require a "genuine attempt" to negotiate, even when it is objectively obvious that such an attempt would be futile? Or does it, as we submit it does, simply call for an objective assessment of fact, which can be satisfied when one side to a dispute entirely refuses to negotiate *ab initio*? In that case, the dispute obviously "cannot be settled by negotiations".

11. I come then to the issues of fact concerning Qatar's multiple, genuine attempts to negotiate with the Joint Appellants, notwithstanding their obstinate refusal to engage with Qatar. I will focus, as I did on Tuesday, on the proceedings before the ICAO Council.

12. In the first round, I explained how Qatar instituted a procedure for purposes of trying to resolve the same dispute over the aviation prohibitions that it later submitted to the Council by means of its October 2017 Applications[34]. Mr. Olleson yesterday did not dispute ***that is*** what Qatar did[35]. What he did say was that the efforts did not count because "[f]ulfilment of the precondition of negotiation through parliamentary diplomacy is . . . dependent upon the relevant subject-matter

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[32] International Law Commission, *Draft Articles on Diplomatic Protection* (2006), Art. 15 *(d)*.

[33] CR 2019/16, p. 45, para. 24 (Olleson).

[34] CR 2019/15, pp. 48-51, paras. 25-33 (Martin).

[35] See CR 2019/16, p. 47, paras. 34-35 (Olleson).

of the dispute in fact having been ventilated through 'collective negotiations' within the relevant forum"[36].

13. In other words, our friends seem to be taking the position that a "genuine attempt" to initiate a parliamentary diplomatic process for purposes of resolving the Parties' dispute does not satisfy Article 84. In their view, it seems, parliamentary diplomacy only counts if actual negotiations have taken place and the subject-matter has been adequately "ventilated". With great respect, the argument makes no sense.

14. The Court does not need me to remind it that, in the *South West Africa* cases, it determined that there was no reason to distinguish between "direct negotiations" and "collective negotiations" under the auspices of an international organization[37]. There is equally no reason to distinguish between a genuine attempt to negotiate directly and a genuine attempt to engage a parliamentary diplomatic process, and the Joint Appellants have offered none.

15. The point now is that Qatar plainly tried to air the substance of its dispute with the Joint Appellants through a diplomatic process before the Council. The minutes of the Council's 31 July 2017 Extraordinary Session could not be any clearer. Paragraph 1 of the minutes states:

> "The President referred to the Council's earlier consideration, at the Tenth Meeting of its 211th Session (211/10) on 23 June 2017, of the request by Qatar for the inclusion in the Council's work programme, pursuant to Article 54 *(n)* of the Convention on International Civil Aviation, of a 'top-urgent item' related to the 'matter of the actions of the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates to close their airspace to aircraft registered in the State of Qatar'. He recalled that the Council had decided at that meeting to convene . . . an Extraordinary Session to consider the item as soon as practicable"[38].

16. The fact that the substance of the dispute was not, in fact, aired, especially since it was the Joint Appellants who would not allow it to be, in no way negates the fact that Qatar made a "genuine attempt" to initiate a diplomatic process for purposes of resolving the dispute over the aviation prohibitions.

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[36] CR 2019/16, p. 46, para. 29 (Olleson).

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

[38] ICAO Response to the Preliminary Objections (A), Exhibit 10, ICAO Council, Extraordinary Session, Summary Minutes, ICAO Doc. C-MIN Extraordinary Session (31 July 2017), para. 1 (MA — ICAOA, Vol. IV, Ann. 25).

17. The only other point Mr. Olleson seemed to be trying to make yesterday about Qatar's efforts through the ICAO Council related to the specific question of whether the Council made the decision to exclude the substance of Qatar's complaint from consideration[39]. Mr. Olleson accused me of omitting certain key references[40]. The debate here is quite esoteric and I am not at all sure it is helpful for the Court. I stand by my previous characterization of events in its entirety and I welcome the Court's examination of the record. I would be remiss if I did not also note that the Council was particularly well placed to determine that there had been negotiations, given that so many of the exchanges among the Parties took place before it.

18. Mr. President, I now turn to Qatar's invitation to Appellants Bahrain, Saudi Arabia and the UAE to engage in consultations within the framework of the World Trade Organization (WTO). Our friends continue to dismiss this request for consultations and the Appellants' rejection thereof as irrelevant. According to Mr. Olleson yesterday, this request "could not reasonably have been understood by the relevant States as being a request for negotiations under the Chicago Convention and/or IASTA"[41]. But that is not the relevant test.

19. I explained on Tuesday that the Court's jurisprudence is clear: a request for negotiations does *not* have to explicitly refer to the treaty in question. In *Georgia* v. *Russia*, the Court specifically stated that "the absence of an express reference to the treaty in question does not bar the invocation of the compromissory clause to establish jurisdiction"[42].

20. As I also explained on Tuesday, the Court in that case held that the negotiation requirement would have been satisfied if Georgia had negotiated about, or tried to negotiate about, the subjects of "extermination" and "ethnic cleansing" without specifically mentioning CERD[43]. As much as Mr. Olleson was fond of accusing me of not engaging on certain issues, it was, in fact, he who had nothing to say by way of rebuttal on this aspect of the Court's holding.

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[39] CR 2019/16, pp. 47-49, paras. 36-41 (Olleson).

[40] CR 2019/16, pp. 48-49, paras. 40-41 (Olleson).

[41] CR 2019/16, p. 49, para. 43 (Olleson).

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

[43] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 139, para. 181.

21. Mr. President, distinguished Members of the Court, I do not think I need to spend any more time on the subjects of Qatar's efforts to negotiate directly or with the facilitation of third States. Still less do I need to take more of your valuable time addressing the Joint Appellants' admissibility argument about Article 2 *(g)* of the ICAO Rules. You know well what the Parties' positions are.

22. I will make only one last point. Our friends have characterized the need for a "genuine attempt" to negotiate as being an issue of "choice". Mr. Olleson said yesterday that the requirement "means that the respondent State is given a choice of acceding to an offer to negotiate regarding that dispute"[44]. He said much the same thing on Monday[45].

23. The record in this case is abundantly clear that the Joint Appellants consciously made their choice, and that choice was *not* to negotiate over the airspace restrictions. Just one reminder: at a joint press conference on 30 July 2017 — *the day before the ICAO Council's Extraordinary Session* — the Minister for Foreign Affairs of Saudi Arabia reiterated the Joint Appellants' unwavering position that "there is no negotiation over the 13 demands"[46]. In the presence of his counterparts from the other three Appellants, he added that "we made a decision not to allow our airspace or borders to be used and this is our sovereign right"[47]. They thus knew they had a choice and they made it. They decided that there would be "no negotiation" over the aviation prohibitions.

24. No matter how Article 84 is understood, there can be no question on the facts of this case that it was plainly satisfied.

25. Mr. President, Madam Vice-President, distinguished Members of the Court, thank you again for your kind attention this afternoon. May I ask that you invite Ms Malintoppi to the podium?

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[44] CR 2019/16, p. 41, para. 10 (Olleson).

[45] CR 2019/14, p. 25, para. 19 (Olleson).

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

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

The PRESIDENT: I thank Mr. Martin for his statement and I invite Ms Loretta Malintoppi to take the floor. You have the floor.

Ms MALINTOPPI: Thank you, Mr. President.

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

1. Mr. President, Members of the Court, I will not take much of your time this afternoon on the Joint Appellants' first ground of appeal. I am mindful of the importance of the President's admonition on Tuesday that the second round pleadings "are to be as succinct as possible"[48].

2. My brief remarks will focus on two points: (i) the *pièce de résistance* of the Joint Appellants' first ground of appeal, namely the allegation that the procedure before the Council violated the core principles of due process; and (ii) the claims that because the ICAO Council is in essence an inept dispute settlement body the Court must "provide guidance and encourage the Council and other United Nations specialized agencies to exercise their judicial functions properly"[49].

3. I turn to the first point: the argument that the procedure followed by the ICAO Council was manifestly inconsistent with elementary principles of due process.

4. Let me be clear, Mr. President, Members of the Court, Qatar has no difficulty in recognizing that there are, broadly speaking, certain procedural principles that are widely accepted by international courts and tribunals as essential to the exercise of their judicial functions. These are in particular the principle of equality of the parties, the *audiatur et altera pars* principle, and a party's right to be heard and to rebut the contentions advanced by its opponent.

5. Where we part ways with our colleagues on the other side is that we feel strongly that the proceedings before the ICAO Council "d[id] not prejudice in any fundamental way the requirements of a just procedure"[50], and that they were consistent with the applicable procedural framework and practice. There was no unfair treatment of the parties, no improper procedural

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[48] CR 2019/15, p. 70 (President Yusuf).

[49] CR 2019/16, p. 53, para. 5 (Akhavan).

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

advantage of one party over the others, and no grave and manifest violation of the fundamental principles of due process.

6. For procedural injustice to exist, as noted in the Commentary to the ILC Draft Convention on Model Procedure, "The procedural rights involved must . . . be fundamental in the sense that the interests of a party are materially affected, so as to go to the very root of the award"[51].

7. In this case, the extreme gravity of the sanction sought by the Joint Appellants, namely the nullity of the decisions *ab initio*, requires that any procedural violations in the proceedings before the ICAO Council must fundamentally prejudice "the requirements of a just procedure", as held by the Court in its 1972 Judgment. But, as Qatar has already shown, there were no such procedural flaws in this case, and if they did exist *(quod non)*, they were *de minimis*. I will briefly review them once more in the light of our opponents' arguments yesterday.

8. The Joint Appellants were afforded ample opportunity to present and argue their case in writing and orally. Qatar had no improper procedural advantage, so there was no violation of the *audiatur et altera pars* principle, or the fundamental requirement of equality of treatment between the parties in judicial proceedings and their equal right to be heard.

9. I note that counsel yesterday repeated the argument made in the Joint Appellants' written submissions that the procedural irregularities in this case are more serious than those in the 1972 *ICAO Council Appeal* case. Counsel started out by saying that India had five days of hearing for one preliminary objection while in our case the Council heard the parties' observations on two objections, voted and rendered its decisions in one afternoon only.

10. There are at least two reasons why the hearing in *Pakistan* v *India* took longer[52]. *First*, there was only one round of written pleadings for the preliminary objection in that case. In our case, there were two rounds for the Joint Appellants (you recall that Qatar only had one), which means that the case was briefed extensively at the written stage and not much new could be said in oral argument — and in fact, nothing new was said at the hearing (not unlike in these proceedings). *Second*, in the 1972 *ICAO Council Appeal* case, the Council addressed Pakistan's application under

[51] "Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session", UN Doc. A/CN. 4/92 (New York, 1955), Art. 14, p. 55.

[52] CMQ — ICAOA, para. 5.42 (fn. 525); CMQ — ICAOB, para. 5.42, (fn. 532).

the Chicago Convention (case No. 1) and Pakistan's complaint under the Transit Agreement (case No. 2) *separately*. Here, the Joint Appellants effectively agreed to address Applications A and B *concurrently*[53].

11. Lengthy proceedings and procedural delays are not necessarily a guarantee of due process. On the contrary, they may be symptomatic of an inefficient process. The 1970s were a very different era: in the 1972 *ICAO Council Appeal* case, counsel for India pleaded before the Court for six consecutive days for the first round of pleadings only. One can hardly imagine that happening today before this Court.

12. The Joint Appellants also contend that the equality principle demanded differential treatment of their oral arguments before the Council, and that they should have been given more time than Qatar to present their case. After two rounds of written pleadings and two rounds of oral arguments from our colleagues on the other side, we are still no wiser as to how the Appellants' fundamental rights could have been harmed because they pleaded jointly rather than separately before the Council. No response whatsoever was provided to my observation that the Joint Appellants chose to plead as a single party in these proceedings in spite of the additional time that they were granted.

13. When it comes to the vote by secret ballot, which the Joint Appellants also interpret as a lack of transparency, I remind our colleagues on the other side that the required procedure was followed in this case and no objections were raised at the time. In addition, as I recalled on Tuesday, vote by secret ballot is expressly allowed by Rule 50 of the Rules of Procedure for the Council, a point which has gone (yet again) unanswered from the other side. In fact, the UAE requested a secret ballot vote in the *Brazil* v. *United States* case, thus expressly endorsing this method of voting and its implications.

14. Counsel also argued that a vote by "secret ballot does not exclude deliberations" and that "a collegial formation can fully hold deliberations, and then proceed to a secret ballot in which

[53] ICAO Council — 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO Doc. C-MIN 214/8, 23 July 2018 (Final), para. 2 (RA — ICAOA and ICAOB, Ann. 56).

members vote in a free and independent manner"[54]. But the definition of the term "Secret Ballot" in the Rules of Procedure of the ICAO Council does not support such conclusion.

15. 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*"[55].

Open deliberations on substantive issues would therefore defeat the stated purpose of the vote by "Secret Ballot". This explanation appears to have been overlooked by opposing counsel.

16. It is also very hard to understand the complaints about the vote by secret ballot when three of the four Joint Appellants, as members of the Council, have contributed, and continue to contribute, to this practice in the Council. They cannot disown it now, simply because this particular finding goes against their interests.

17. I note that, in essence, the Joint Appellants' complaint is that the Council moved to the decisions without a discussion amongst the member States, which is exactly the complaint made by India in 1972[56]. A complaint that the Court did not even consider in its Judgment then.

18. I also recall that the Joint Appellants' preliminary objection was rejected by a wide margin, with a vote on both the justifications provided by the legal adviser of Bahrain.

19. This leads me to the complaint that the Council merged the Joint Appellants' two objections, made an amalgam. The record shows that there was a clear understanding that the preliminary objections were based on two justifications, as recorded in the Minutes of the hearing of the Council. After all, I recall that it was Dr. Petrochilos, acting as legal adviser of the Bahraini delegation before the Council, who explained that "accepting either one of [the] preliminary objections had the effect of disposing of the case here and now"[57]. The President "took the point"

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[54] CR 2019/16, p. 26, para. 25 (van der Meulen).

[55] ICAO, Rules of Procedure for the Council, Ninth Edition (2013), Definitions p. 2 (MA — ICAOA, Vol. II, Ann. 17); emphasis added; RA — ICAOA, para. 5.22 (fn. 328); RQ — ICAOB, para. 5.22 (fn. 332).

[56] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Pleadings, Oral Arguments, Documents*, Memorial submitted by the Government of India (22 Dec. 1971), para. 93.

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

and added "the voting on each preliminary objection applied to both the justifications". Where is the manifest violation of due process here?

20. A very similar complaint was raised by India in 1972. India argued that the Council's decision was vitiated because the question of jurisdiction was framed in the negative, rather than in the affirmative[58]. India also contended that the wrong framing of the question resulted in the Council upholding its jurisdiction, while, had the proposition been put in the affirmative, the Council would have concluded that it had no jurisdiction to deal with the complaint.

21. Interestingly, however, unlike India, the Joint Appellants do not come to the conclusion that, had the preliminary objections been heard separately, this would have changed the outcome of the Council's decisions. All that counsel said yesterday was that, if two separate objections had been put to the Council, there would have been a vote on each one of them. But that still does not explain why the outcome would have been different when the minutes of the Council show that all voting members of the Council were perfectly aware that they were deciding two complaints, not just "one jurisdictional objection".

22. What about the absence of reasons? It is true that the decisions do not contain reasons for the conclusions reached by the Council, but this conforms with the practice of the Council. No reasons were provided in the *Brazil* v. *United States* case either. I pointed out that three of the four Joint Appellants participated in that case and none of them objected in any way. There was no answer on this point by our friends on the other side. Nor were there any reasons offered as to why the Joint Appellants' argument should be treated any differently than India's complaint in the 1972 case[59]. The Court dismissed it then, finding as it did that, to use the Appellants' own words, it was "not important enough to trigger the Court's supervisory authority"[60].

23. One more observation before I leave this first point. Qatar submits that procedural irregularities of the kind alleged in this case cannot be regarded as automatically vitiating a Council decision because the Court on appeal may substitute its decision for that of the ICAO Council. And

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[58] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Pleadings, Oral Arguments, Documents*, pp. 605-606 (Palkhivala).

[59] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Pleadings, Oral Arguments, Documents*, p. 607 (Palkhivala).

[60] RA — ICAOA and ICAOB, para. 3.19.

that is why the Court provides "reassurance" to the Council and why the Council's procedural irregularities are irrelevant: if jurisdiction is upheld, the same outcome is reached and any procedural irregularities have no impact; if jurisdiction is dismissed on appeal, the procedural irregularities are also irrelevant.

24. Finally, I wish to make some remarks in response to the argument that the ICAO Council is in essence an inept dispute settlement body.

25. The Joint Appellants are using the first ground of appeal as a lethal weapon aimed at destroying the entire edifice of the ICAO dispute settlement system. Indeed, it is not enough for the Joint Appellants that the Court declare the decisions *null* and *void*, it must also, as part of its appellate jurisdiction, provide the necessary guidance to the Council, and, as if that were not enough, also to other specialized agencies of the United Nations[61]. According to the Appellants, the Court must send an important message, and take this opportunity to review the ICAO dispute settlement system as a whole.

26. But the Joint Appellants are asking the Court to go well beyond its appellate functions under the ICAO Treaties. The "objective question of law" before the Court is whether the Council's "decision as to its own competence is in conformity or not with the provisions of the treaties governing its action"[62]. Nothing more nothing less. It is not for the Court to carry out an overhaul of the ICAO dispute settlement system to which the member States of the ICAO Treaties have consented.

27. According to the Joint Appellants, the members of the ICAO Council "take instructions from their capitals". First of all, there is no evidence supporting this assertion. But, even if it were true and the Council members did receive instructions from their Governments, there would be nothing improper with this conduct. After all, Article 50 *(a)* of the Chicago Convention, under that provision, the members of the Council are States, not individuals.

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[61] CR 2019/16, p. 53, para. 5 (Akhavan).

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

28. As we stated repeatedly, the ICAO Council is a body composed not of independent and impartial individuals, like a domestic or international court and tribunal, but of representatives of the member States who speak on behalf of those States and not as individuals. In other words, the characteristics of the ICAO Council are distinctive and substantially different from those of adjudicatory bodies or arbitral tribunals. Any attempt to draw a close analogy between the ICAO Council dispute settlement system and the practice and procedure of international courts and tribunals is ill-founded and misleading.

29. There are important differences to be taken into account when dealing with different types of adjudication, and procedural principles assume a different scope and extent in the context in which the ICAO Council was intended to operate according to the functions assigned to it by the ICAO Treaties.

30. As Professor Lowe has already mentioned, the Joint Appellants have of course the right to engage the ICAO institutional machinery to change the dispute resolution mechanisms established under the Chicago Convention if they deem it appropriate. However, it is not the role of this Court to reform the ICAO dispute settlement system through the exercise of its appellate jurisdiction, even less to amend the Chicago Convention, as the Joint Appellants appear to be claiming in these proceedings.

31. After all, this is only the second time in over 70 years that the Court has been asked to decide upon decisions of the Council pursuant to Article 84 of the Chicago Convention. I would say that it is not a bad record for a body that is, to quote our opponents, "unable to observe even the most elementary norms of due process"[63].

32. Mr. President, Members of the Court, I conclude as I started in the first round: the Court should not — and I promise I will use one last time the dictum of the Court in the *ICAO Council Appeal* case — the Court should not "deem it necessary or even appropriate to go into" the alleged procedural irregularities, "particularly as [they] do not prejudice in any fundamental way the requirements of a just procedure"[64].

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[63] CR 2019/16, p. 56, para. 15 (Akhavan).

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

33. I thank you, Mr. President, Members of the Court, for your very kind attention and I ask you to give the floor to the Agent of the State of Qatar, Dr. Mohammed Abdulaziz Al-Khulaifi, who will make concluding remarks and read Qatar's submissions with respect to Applications A and B.

The PRESIDENT: I thank Ms Malintoppi for her statement. I now invite Mr. Mohammed Abdulaziz Al-Khulaifi, Agent of Qatar, to take the floor. You have the floor.

Mr. AL-KHULAIFI:

V. CLOSING STATEMENT

1. Thank you, Mr. President, honourable Members of the Court. It is my privilege to address you once again and to close the submissions by the State of Qatar.

2. As I explained on Tuesday, the matter before the Council is a dispute about the Joint Appellants' obligations under the ICAO Treaties. It is *not* a dispute about the Joint Appellants' false terrorism allegations or the Riyadh Agreements. I will spend no more of the Court's valuable time on this point.

3. To commemorate the signing of the Chicago Convention, the United Nations has designated tomorrow, 7 December, "International Civil Aviation Day". The purpose of this commemoration, as described by the United Nations, is to recognize and reinforce the importance of international civil aviation "as an engine of global connectivity", as well as to highlight the "unique role of ICAO in helping States to cooperate . . . [in] the service of all mankind"[65].

4. The Joint Appellants have undeniably benefitted, and continue to benefit, from this unique ICAO system — which ensures the safety, security, regularity and efficiency of civil aviation in their territories — on a daily basis.

5. But the ICAO system does not only confer benefits: it also entails obligations and other commitments, including to dispute resolution procedures. The Joint Appellants took on those obligations and agreed to these procedures when they signed on to the ICAO Treaties. Yet, now that it suits them to do so, the Joint Appellants attack the very same procedures, repeatedly asking

[65] United Nations, "International Civil Aviation Day", https://www.un.org/en/events/civilaviationday/index.shtml.

the Court to ignore the fact that the dispute placed before the Council is squarely a disagreement over the interpretation or application of the ICAO Treaties.

6. Mr. President, honourable Members of the Court, the fact is that the threats posed by the Joint Appellants' aviation prohibitions are not conceptual. Nor can they be characterized as mere "inconveniences"[66], as was done yesterday. The impact of the Joint Appellants' prohibitions is concrete and real. One need only recall that because of the manner in which the Joint Appellants imposed the aviation prohibitions, flights caught in mid-air at the time of their imposition had to effect immediate route changes. Limited contingency routes do not satisfy Qatar's needs, meaning that hundreds of flights are negatively affected on a weekly basis. The impact on the international civil aviation in the region is nothing short of staggering.

7. In light of the undeniable damage Qatar has suffered, the Joint Appellants' approach displays a level of contempt for the Council that is brazen. The fact that they have sought, at every opportunity, to delay the Council's important work in reaching the merits and resolving promptly this civil aviation dispute is fundamentally irresponsible.

8. Mr. President, honourable Members of the Court, resolution of the dispute is urgent. As the Court is well aware, Qatar has sought the speedy resolution of this dispute. Indeed, Qatar filed its Counter-Memorial almost three months before the deadline set by the Court. While fully recognizing the Court's busy caseload, Qatar respectfully requests that the Court issue its decision promptly, as it did in *India* v. *Pakistan*.

9. I shall now read out Qatar's final submissions:

> "In accordance with Article 60 of the Rules of Court, for the reasons explained during these hearings, Qatar respectfully requests the Court to reject Joint Appellants' appeals and affirm the ICAO Council's Decisions of 29 June 2018 dismissing Joint Appellants' preliminary objection to the Council's jurisdiction and competence to adjudicate Qatar's claims before the Council."

10. Mr. President, honourable Members of the Court, I thank you for your kind attention. And I also would like to take the opportunity to thank all members of the Registry and interpreters for their dedicated work throughout the hearings. Thank you.

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[66] CR 2019/16, p. 60, para. 3 (Ghaffar).

The PRESIDENT: I thank Mr. Mohammed Abdulaziz Al Khulaifi, the Agent of Qatar. The Court takes note of the final submissions which you have just read on behalf of the State of Qatar with respect to the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* and the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement.*

This brings the hearings of this week to an end. I would like to thank the Agents, Counsel and Advocates of the Applicants and the Respondent for their statements. In accordance with the usual practice, I shall request the Agents of the Parties to remain at the Court's disposal to provide any additional information the Court may require.

With this proviso, I declare closed the oral proceedings in the two cases which have been combined by the Court. The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its judgment in each case.

Since the Court has no other business before it today, the sitting is declared closed.

The Court rose at 4.20 p.m.

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