INTERNATIONAL COURT OF JUSTICE

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)

MEMORIAL OF THE KINGDOM OF BAHRAIN, THE ARAB REPUBLIC OF EGYPT, AND THE UNITED ARAB EMIRATES

VOLUME I

27 DECEMBER 2018

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GLOSSARY OF PRINCIPAL DEFINED TERMS, ABBREVIATIONS AND ACRONYMS

Appellants	The Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates
Bahrain	The Kingdom of Bahrain
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women, 3 September 1981
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966
Chicago Convention	Convention on International Civil Aviation, Chicago, 7 December 1944
Egypt	The Arab Republic of Egypt
FIR(s)	Flight information region(s)
First Riyadh Agreement	First Riyadh Agreement, 23 and 24 November 2013
GCC	Gulf Cooperation Council
IASTA	International Air Services Transit Agreement, Chicago, 7 December 1944
ICAO	International Civil Aviation Organization
ICAO Application	Application (B) of the State of Qatar; Disagreement on the Interpretation and Application of the International Air Services Transit Agreement, (Chicago, 1944), 30 October 2017

ICAO Council	Council of the International Civil Aviation Organization
ICAO Council Decision or **Decision**	Decision of the Council of the International Civil Aviation Organization on the Preliminary Objection in the Matter: The State of Qatar and The Arab Republic of Egypt, the Kingdom of Bahrain and the United Arab Emirates (2017) – Application (B), 29 June 2018
ICAO Memorial	Memorial appended to Application (B) of the State of Qatar, Disagreement on the Interpretation and Application of the International Air Services Transit Agreement (Chicago 1944), 30 October 2017
ICAO MID Office	ICAO Middle East Regional Office
ICAO Preliminary Objections	Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain and the United Arab Emirates in Re Application (B) of the State of Qatar Relating to the Disagreement Arising under the International Air Services Transit Agreement done at Chicago on 7 December 1944, 19 March 2018
ICAO Rejoinder	Rejoinder to the State of Qatar's Response to the Respondents' Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain and the United Arab Emirates In Re Application (B) of the State of Qatar Relating to the Disagreement under the International Air Services Transit Agreement done at Chicago on 7 December 1944, 12 June 2018

ICAO Response to the Preliminary Objections	Response of the State of Qatar to the Preliminary Objections of the Respondents; In re Application (B) of the State of Qatar Relating to the Disagreement on the interpretation and application of the International Air Services Transit Agreement (Chicago, 1944), 30 April 2018
ICAO Rules	Rules for the Settlement of Differences, approved by the ICAO Council on 9 April 1957, and amended on 10 November 1975; ICAO document 7782/2
ICJ Application	Joint Application Instituting Proceedings, Appeal Against a Decision of the ICAO Council dated 29 June 2018 on Preliminary Objections (Application (B), *Kingdom of Bahrain, Arab Republic of Egypt and the United Arab Emirates v. State of Qatar*), 4 July 2018
ICSFT	International Convention for the Suppression of the Financing of Terrorism, 9 December 1999
ILC	International Law Commission
IRGC	Iranian Islamic Revolutionary Guard Corps
Implementing Mechanism	Mechanism Implementing the Riyadh Agreement, 17 April 2014
MENA	Middle East and North Africa
NOTAMs	Notices to Airmen
Qatar	State of Qatar

Riyadh Agreements	First Riyadh Agreement, 23 and 24 November 2013 Mechanism Implementing the Riyadh Agreement, 17 April 2014 Supplementary Riyadh Agreement, 16 November 2014
Saudi Arabia	The Kingdom of Saudi Arabia
Supplementary Riyadh Agreement	Supplementary Riyadh Agreement, 16 November 2014
UAE	The United Arab Emirates
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982

CHAPTER I
INTRODUCTION

1.1 This case concerns an appeal by the Kingdom of Bahrain (***Bahrain***), the Arab Republic of Egypt (***Egypt***), and the United Arab Emirates (***UAE***) (together, the ***Appellants***) against the Decision of the Council of the International Civil Aviation Organization (***ICAO Council***) dated 29 June 2018 (***Decision***) in respect of proceedings commenced by the State of Qatar (***Qatar***)[1]. The Appeal was filed by means of a Joint Application to the Court on 4 July 2018 (***ICJ Application***)[2]. In its Decision, the ICAO Council rejected the Preliminary Objections of the Appellants contesting the competence[3] of the ICAO Council in respect of proceedings initiated by Qatar by an Application filed on 30 October 2017 (***ICAO Application***)[4], pursuant to Article II, Section 2 of the International Air Services Transit Agreement (***IASTA***)[5]. By its ICAO

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1 **Vol. V, Annex 52**, 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, and the United Arab Emirates (2017) – Application (B), 29 June 2018 (***ICAO Council Decision***); **Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018; **Vol. V, Annex 55**, ICAO Council – 214th Session, Summary Minutes of the Eleventh Meeting of 29 June 2018, ICAO document C-MIN 214/11 (Draft), 10 September 2018.

2 Joint Application Instituting Proceedings, Appeal Against a Decision of the ICAO Council dated 29 June 2018 on Preliminary Objections (Application (B)), (*Kingdom of Bahrain, Arab Republic of Egypt and the United Arab Emirates v. State of Qatar*), 4 July 2018 (***ICJ Application***).

3 The Appellants use the term "competence" to refer to the ability of an adjudicatory body as a matter of law to adjudicate upon a dispute submitted to it, as such it encompasses both questions of the adjudicatory body's jurisdiction over a dispute, and issues as to the admissibility of claims submitted to it. See Chapter IV below.

4 **Vol. III, Annex 23**, Application (B) of the State of Qatar; Disagreement on the Interpretation and Application of the International Air Services Transit Agreement, (Chicago, 1944), 30 October 2017 (***ICAO Application***).

5 **Vol. II, Annex 2**, International Air Services Transit Agreement, signed at Chicago on 7 December 1944) United Nations, *Treaty Series* (***UNTS***) 252, entered into force on 30 January 1945 (***IASTA***).

Application, Qatar alleged breaches of the IASTA by the Appellants as the result of airspace restrictions adopted on 5 June 2017 in respect of Qatar-registered aircraft.

1.2 The ICJ Application advances three grounds for the appeal against the ICAO Council Decision as follows:

(a) *First*, the Decision is null and void, and should be set aside, on the grounds that the procedure adopted by the ICAO Council, including the absence of a reasoned opinion, was manifestly flawed and in violation of fundamental principles of due process, which constitute general principles of law, as well as violations of the ICAO Council's own applicable procedural rules;

(b) *Second*, the ICAO Council erred in fact and in law in rejecting the First Preliminary Objection made by the Appellants in respect of the competence of the ICAO Council to hear the disagreement; namely that determination of the real issue in dispute between Qatar and the Appellants would require the ICAO Council to rule on the lawfulness of countermeasures (including the airspace restrictions) adopted by the Appellants to induce compliance by Qatar with its obligations under international law – including in respect of the principle of non-intervention and in respect of terrorism and violent extremism – and in particular, violations of Security Council Resolutions, binding international and regional agreements, and the Riyadh Agreements[6] concluded under the auspices of the Gulf Cooperation Council (***GCC***),

[6] **Vol. II, Annexes 19-21**, First Riyadh Agreement, 23 and 24 November 2013; Implementing Mechanism, 17 April 2014; Supplementary Riyadh Agreement, 16 November 2014 (collectively the ***Riyadh Agreements***).

and that this dispute is wholly unrelated to and manifestly beyond the limited competence conferred on it by Article II, Section 2 of the IASTA; and

(c) *Third*, the ICAO Council erred in fact and in law in rejecting the Second Preliminary Objection made by the Appellants in respect of the competence of the ICAO Council to hear the disagreement, namely that Qatar had not complied with the necessary precondition to the jurisdiction of the ICAO Council, contained in Article II, Section 2 of the IASTA, of first attempting to resolve the disagreement regarding the airspace restrictions through negotiations with the Appellants, prior to submitting its Application to the ICAO Council; and Qatar also failed to comply with the attendant procedural requirement in Article 2(g) of the ICAO Rules for the Settlement of Differences (***ICAO Rules***)[7] of establishing in its Memorial that negotiations to settle the disagreement had taken place between the Parties, but were unsuccessful.

1.3 By Order dated 25 July 2018, the Court fixed 27 December 2018 as the time limit for the filing of the Memorial by the Appellants, and 27 May 2019 as the time limit for the filing of the Counter-Memorial by Qatar. This Memorial is submitted pursuant to that Order[8].

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7 **Vol. II, Annex 6**, Rules for the Settlement of Differences, approved by the ICAO Council on 9 April 1957, and amended on 10 November 1975, ICAO document 7782/2 (***ICAO Rules***), Art. 2(g).

8 *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)*, Order of 25 July 2018.

1.4 As set out below, beyond the issues of procedural fairness and Qatar's compliance with the precondition of negotiations contained in Article II, Section 2 of the IASTA, this Appeal raises the novel and far-reaching question of whether an organ of a United Nations specialized agency of a technical nature, composed of State representatives but exercising judicial functions pursuant to a narrowly defined compromissory clause, may make legally binding decisions in respect of complex matters of fact and law that are wholly unrelated to, and manifestly beyond, its defined competence *ratione materiae*. In the present case, the Appellants submit that the consent of States Parties to the competence of the ICAO Council under Article II, Section 2 of the IASTA does not extend to adjudication of disputes relating to violations of the principle of non-intervention, nor obligations as to terrorism and violent extremism, in response to which the airspace restrictions were adopted as lawful countermeasures.

1.5 It is notable that in its Memorial for Application (B) before the ICAO Council (***ICAO Memorial***), Qatar admitted that "the aviation aspects" of the dispute between the Parties arose because "[t]he Respondents . . . repeatedly gave an ultimatum to the State of Qatar *on matters unrelated to air navigation and air transport*."[9] After the Appellants had raised their Preliminary Objections before the ICAO Council, Qatar shifted its position, claiming that the "core issue" relates to the IASTA[10]. Nonetheless, while Qatar denied that it

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[9] **Vol. III, Annex 23**, Memorial appended to Application (B) of the State of Qatar Relating to the Disagreement on the interpretation and application of the International Air Services Transit Agreement done at Chicago on 7 December 1944, 30 October 2017 (***ICAO Memorial***), Sec. (g) (emphasis added).

[10] **Vol. IV, Annex 25,** Response of the State of Qatar to the Preliminary Objections of the Respondents; In re Application (B) of the State of Qatar Relating to the Disagreement on the interpretation and application of the International Air Services Transit Agreement (Chicago, 1944) and its Exhibits, 30 April 2018 (***ICAO Response to the Preliminary Objections***), para. 44.

had breached its obligations in matters "unrelated to air navigation and air transport", it did not deny that those very same allegations were the basis for the disagreement in respect of the IASTA. The *real issue* therefore is whether the wrongfulness (if any) of the Appellants' airspace restrictions under the IASTA is precluded on the grounds that they constitute lawful countermeasures in response to wholly unrelated breaches of international law by Qatar. As such, adjudication of the dispute separating the Parties is manifestly *ultra vires* the ICAO Council, because the Council clearly is not competent under Article II, Section 2 of the IASTA to adjudicate or otherwise make legally binding decisions in respect of allegations of the breach of obligations arising from the principle of non-intervention and the obligations with respect to the suppression of terrorism and extremism.

Section 1. Procedural history before the ICAO Council

1.6 This section briefly outlines the essential procedural history before the ICAO Council. A more detailed discussion of the proceedings is contained in Chapter III below.

1.7 On 30 October 2017, Qatar submitted two applications and accompanying Memorials to the ICAO Council. Application (B) was submitted to the Council pursuant to Article II, Section 2, of the IASTA. It names Egypt, Bahrain and the UAE as Respondents, and alleges that, as a result of the adoption of the airspace restrictions they have violated their obligations under the IASTA[11]. Application (A) was submitted to the ICAO Council pursuant to

[11] **Vol. III, Annex 23**, ICAO Application. In addition to alleging breach of the IASTA, Qatar alleged violations of "other principles of international law" and "other rules of international law" (*Ibid*., pp. 1-2), including the United Nations Charter (*ibid.*, ICAO Application, p. 1, ICAO Memorial, Secs (e) and (f)). The ICAO Council is manifestly without jurisdiction over those claims.

Article 84 of the Convention on International Civil Aviation (***Chicago Convention***). It names Egypt, Bahrain, Saudi Arabia and the UAE as Respondents, and alleges that, as a result of the adoption of the airspace restrictions of 5 June 2017, they have violated various provisions of the Chicago Convention[12].

1.8 The present case concerns only the ICAO Council's Decision in respect of Application (B). The decision of the ICAO Council in respect of Qatar's Application (A) is the subject of the separate proceedings before the Court brought by Bahrain, Saudi Arabia, Egypt and the UAE in *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).*

1.9 On 19 March 2018, the Appellants raised two Preliminary Objections in respect of the competence of the ICAO Council to hear Qatar's ICAO

[12] See *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)*, Memorial of Bahrain, Egypt, Saudi Arabia and United Arab Emirates (***BESUM***), **Vol. III, Annex 23**, Application (A) and Memorial of the State of Qatar Relating to the Disagreement on the interpretation and application of the Convention on International Civil Aviation, 30 October 2017. Again, Qatar alleged violations of "other principles of international law" and "other rules of international law" including the United Nations Charter and the United Nations Convention on the Law of the Sea. (*Ibid.*, Application, pp. 1-2; Memorial, Secs (e) and (f).) The ICAO Council is manifestly without jurisdiction over those claims.

Application[13]. The first preliminary objection was that the ICAO Council was not competent to decide the legality of the measures adopted by the Respondents, as it would require the ICAO Council to adjudicate, among other elements, whether Qatar has breached its obligations under international law with regard to matters clearly falling outside of the IASTA. The second preliminary objection was that the ICAO Council was not competent as Qatar had failed to satisfy the procedural precondition to its competence of prior negotiations under Article II, Section 2 of the IASTA, and had failed to comply with Article 2(g) of the ICAO Rules which requires that the Memorial contain "[a] statement that negotiations to settle the disagreement had taken place between the parties but were not successful."[14] Similar preliminary objections were raised on the same date by Bahrain, Egypt, Saudi Arabia and the UAE in respect of Qatar's Application (A)[15].

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13 **Vol. III, Annex 24**, Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain and the United Arab Emirates in Re Application (B) of the State of Qatar Relating to the Disagreement Arising under the International Air Services Transit Agreement done at Chicago on 7 December 1944, 19 March 2018, (***ICAO Preliminary Objections***). See also *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)*, **BESUM, Vol. III, Annex 24**, Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, Saudi Arabia and the United Arab Emirates before the ICAO Council in respect of Application (A), 19 March 2018.

14 **Vol. II, Annex 6**, ICAO Rules, Art. 2(g).

15 See *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)*, **BESUM, Vol. III, Annex 24**, Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates before the ICAO Council in respect of Application (A), 19 March 2018.

1.10 Following the filing of response submissions by Qatar on 30 April 2018[16], and of rejoinder submissions by the Appellants on 12 June 2018[17], the ICAO Council included the issue on the agenda of its 214th session on 26 June 2018.

1.11 At the conclusion of that meeting, at which the three Respondents were given insufficient time adequately to present their case, the ICAO Council voted to reject what it referred to as the "Preliminary Objection" – in the singular – in respect of each Application. The ICAO Council's formal Decision

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16 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections; see also *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)*, **BESUM, Vol. IV, Annex 25**, 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 International Convention on Civil Aviation (Chicago, 1944), 30 April 2018.

17 **Vol. IV, Annex 26**, Rejoinder to the State of Qatar's Response to the Respondents' Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, and the United Arab Emirates In Re Application (B) of the State of Qatar Relating to the Disagreement Arising under the International Air Services Transit Agreement done at Chicago on 7 December 1944, 12 June 2018, (***ICAO Rejoinder***), see also *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)*, **BESUM, Vol. IV, Annex 26**, Rejoinder to the State of Qatar's Response to the Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates 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.

in respect of the "Preliminary Objection", reflecting the votes cast on 26 June 2018, was adopted at the ICAO Council meeting on 29 June 2018[18].

1.12 Although the ICAO Council was exercising judicial functions as required by Article II, Section 2 of the IASTA, the ICAO Council Decision was reached, *inter alia*, without any deliberation, without providing any reasons whatsoever in support of its conclusions, as required by its applicable procedural rules, and by a secret vote of State representatives despite the Respondents' request for a roll call with open vote.

Section 2. Jurisdiction and scope of the Appeal

1.13 The Court has jurisdiction over the present Appeal by virtue of Article II, Section 2 of the IASTA, read in conjunction with Chapter XVIII of the Chicago Convention, and Articles 36(1) and 37 of the Statute of the Court.

1.14 Article II, Section 2 of the IASTA provides:

> "If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation, the provisions of Chapter XVIII of the [Chicago] Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the above-mentioned Convention."

[18] **Vol. V, Annex 52**, ICAO Council Decision; **Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018; see also *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)*, **BESUM, Vol. V, Annex 52**, Decision of the ICAO Council of the International Civil Aviation Organization 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.

1.15 That provision cross-refers to Chapter XVIII of the Chicago Convention, which contains Article 84 of that Convention, including the appellate mechanism provided therein:

> "*Settlement of Disputes*
>
> 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. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

1.16 Pursuant to Article 37 of the Statute of the Court, the reference to the Permanent Court of International Justice in Article 84 of the Chicago Convention is to be read as a reference to the International Court of Justice. This is the settled jurisprudence of the Court, as indicated in *Barcelona Traction, Light and Power Company, Limited*[19], and specifically confirmed in respect of Article II, Section 2 of the IASTA in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*[20].

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[19] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, pp. 26-39; see also *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, p. 14.

[20] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 53, para. 15.

1.17 The Court has previously held that the appellate jurisdiction conferred on it by Article 84 of the Chicago Convention and Article II, Section 2 of the IASTA encompass appeals against decisions of the ICAO Council regarding preliminary objections to its jurisdiction[21].

1.18 The scope of the Court's jurisdiction under the IASTA is limited to an appeal of the ICAO Council Decision. The Court's appellate jurisdiction under Article 84 of the Chicago Convention and Article II, Section 2 of the IASTA is not a jurisdiction of first instance, nor is its competence *ratione materiae* more extensive than that which is conferred on the ICAO Council itself.

1.19 The first ground of appeal arises directly out of the manner in which the ICAO Council dealt with the Preliminary Objections raised by the Appellants. The defects in the proceedings, and the consequences thereof for the validity of the ICAO Council Decision, are a matter for appreciation and decision by the Court.

1.20 The second and third grounds, however, involve a *de novo* consideration by this Court of the competence of the ICAO Council over Qatar's ICAO Application. As the Court observed in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, in such proceedings, despite the fact that they are brought by ordinary Application of one State against another, such that "[t]he case is presented to the Court in the guise of an ordinary dispute between States (and such a dispute underlies it) . . . it is the act of a third entity – the Council of ICAO – which one of the Parties is impugning and the other defending."[22] In particular:

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21 *Ibid*., pp. 55-56, para. 18.

22 *Ibid*., p. 60, para. 26.

> ". . . the appeal to the Court contemplated by the Chicago Convention and the Transit Agreement [i.e., IASTA] must be regarded as an element of the general regime established in respect of ICAO. In thus providing for judicial recourse by way of appeal to the Court against decisions of the Council concerning interpretation and application . . . the Chicago Treaties gave member States, and through them the Council, the possibility of ensuring a certain measure of supervision by the Court over those decisions. To this extent, these Treaties enlist the support of the Court for the good functioning of the Organization, and therefore the first reassurance for Council lies in the knowledge that means exist for determining whether a decision as to its own competence is in conformity or not with the provisions of the treaties governing its action."[23]

1.21 In any event, in the present case, a *de novo* consideration of the issue raised as to the ICAO Council's competence is unavoidable, because, as discussed below in Chapter III, the ICAO Council provided no reasons whatsoever to justify its Decision. The Court thus has no option but to examine the question afresh for itself.

1.22 Given that the issue before the Court is an appeal against the ICAO Council Decision as to its competence, there is no question of the Court ruling upon the merits of the dispute between the Parties, including Qatar's claims, Qatar's internationally wrongful acts in respect of which the Appellants have adopted countermeasures, and whether the airspace restrictions adopted by the Appellants are indeed lawful countermeasures such that any wrongfulness is precluded. As the Court also noted in *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)*:

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[23] *Ibid*., pp. 60-61, para. 26.

> ". . . with the substance of this dispute as placed before the Council, and the facts and contentions of the Parties relative to it, the Court has nothing whatever to do in the present proceedings, except in so far as these elements may relate to the purely jurisdictional issue which alone has been referred to it, namely the competence of the Council to hear and determine the case . . ."[24]

1.23 The Court has observed that "[i]n principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings"[25]. The resolution as a preliminary matter of the Appellants' objections to the competence of the ICAO Council to adjudicate Qatar's claims (as with the resolution of the preliminary objections of any respondent State) implicates important considerations of principle deriving from the consensual basis for jurisdiction in international law. As the Court recognized (albeit in a somewhat different context) in *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)*:

> ". . . for the party raising a jurisdictional objection, its significance will also lie in the possibility it may offer of avoiding, not only a decision, but even a hearing, on the merits, – a factor which is of prime importance in many cases. An essential point of legal principle is involved here, namely that a party should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established."[26]

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24 *Ibid*., p. 51, para. 11.

25 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 852, para. 51.

26 *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 56, para. 18(b).

1.24 In the present case, the Court should rule that the Appellants are not required to enter into issues of the merits of the dispute before the ICAO Council where the real issue in the dispute, which concerns Qatar's internationally wrongful acts and the Appellants' countermeasures adopted to induce its compliance, is manifestly beyond the ICAO Council's competence under Article II, Section 2 of the IASTA.

Section 3. The real issue between the Parties

1.25 In evaluating the scope of the ICAO Council's jurisdiction under Article II, Section 2 of the IASTA, the Court is not confined to the characterization of the dispute as set out in Qatar's ICAO Application. As the Court recently confirmed in its Judgment on the Preliminary Objection in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*:

> "It is for the Court itself . . . to determine on an objective basis the subject-matter of the dispute between the parties, that is, to 'isolate the real issue in the case and to identify the object of the claim' . . ."[27]

1.26 As set out in Chapter II, the real issue in this case is not the interpretation or application of the IASTA. The airspace restrictions beginning on 5 June 2017 – which form the subject-matter of Qatar's Application before the ICAO Council – were adopted by the Appellants as countermeasures to induce the cessation by Qatar of its prior violations of fundamental obligations under international law. Qatar is in breach of the principle of non-intervention and, with respect to terrorism and extremism, particularly its obligations under

[27] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 602, para. 26; see also *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, para. 48 ("[t]he matter is one of substance, not of form").

the Riyadh Agreements[28] concluded for the specific purpose of putting an end to such unlawful conduct, as well as applicable Security Council Resolutions. Pursuant to the Riyadh Agreements, Qatar expressly undertook to cease its long-standing support of all hostile entities and groups, including the Muslim Brotherhood, that pose threats to or target the GCC countries, an issue of particular interest for Egypt, and to refrain from incitement of extremism on its State-owned and -controlled news network *Al Jazeera*[29].

1.27 The Riyadh Agreements included an Implementing Mechanism that specifically recognized the right of its States parties to take countermeasures to ensure compliance with its provisions, reinforcing the existing right in customary international law[30]. Despite these undertakings, Qatar continued to breach its obligations. Notably, it continued to harbour members of the Muslim Brotherhood and certain terrorist suspects and funders of terrorism on its territory – including Al-Qaida operatives named on the United Nations Security Council Sanctions Lists – who provided financing and support to extremist groups[31]. Further, in April 2017, Qatar paid as much as US$1 billion as a "ransom" payment to terrorist groups[32].

1.28 In view of these persistent breaches, on 5 June 2017, the Appellants terminated diplomatic relations with Qatar and – consistent with their

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28 **Vol. II, Annexes 19-21**, Riyadh Agreements.

29 **Vol. II, Annex 19**, First Riyadh Agreement, 23 and 24 November 2013, Art. 2; **Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Arts 1 and 2; **Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, Art. 3(c) and (d).

30 **Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Art. 3.

31 See below, paras 2.14; 2.36-2.38.

32 See below, paras 2.47.

simultaneous declarations[33] – took various countermeasures, including airspace restrictions, to induce the cessation of Qatar's unlawful conduct. The airspace restrictions are directly and inextricably linked to Qatar's breach of its international obligations. In other words, but for Qatar's prior unlawful conduct, the Appellants would not have imposed such airspace restrictions.

1.29 The Appellants note that although Qatar – unsurprisingly – denies that it has committed internationally wrongful acts, it has not sought to refute the characterization of the dispute regarding airspace restrictions as arising from prior disputes wholly unrelated to civil aviation. Instead, in its Response to the Preliminary Objections of the Appellants to the competence of the ICAO Council (***ICAO Response to the Preliminary Objections***), Qatar repeatedly confirmed this understanding.

1.30 Qatar's Memorial expressly admitted that the airspace restrictions resulted from "matters *unrelated* to air navigation and air transport."[34] Its Response to the Appellants' Preliminary Objections further stated that Qatar will provide "a robust defence" against allegations that it "supports terrorism, or terrorism financing etc", and demonstrate that "the actions taken by the Respondents are not lawful countermeasures"[35].

1.31 Qatar's own assertions therefore, confirm that the *real issue* between the Parties relates to Qatar's prior internationally wrongful acts, in regard to matters wholly unrelated to the IASTA. Contrary to Qatar's view, however, that dispute is manifestly beyond the competence of the ICAO Council insofar as

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33 See below, paras 2.4-2.6.

34 **Vol. III, Annex 23**, ICAO Memorial, Sec. (g) (emphasis added).

35 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 78.

the Council cannot adjudicate complex questions of law and fact that are manifestly beyond its narrow and specialized judicial functions under Article II, Section 2 of the IASTA.

Section 4. Novel character and significance of the question before the Court

1.32 The issues of jurisdiction and admissibility raised by the Appellants' second ground of appeal are novel and a matter of first impression, whether in the jurisprudence of the Court or of other international tribunals. In particular, the Appeal concerns the juxtaposition of the strictly limited jurisdiction of an organ of a United Nations specialized agency under a compromissory clause in a treaty (i.e., Article II, Section 2 of the IASTA), with the taking of countermeasures in response to breaches of obligations that are manifestly outside the scope of that treaty.

1.33 The real issue, or true "disagreement" between the Parties in the present case is clearly not about the IASTA as such. Rather, it relates to Qatar's internationally wrongful acts in regard to the principle of non-intervention and with respect to terrorism and extremism, which resulted in the 5 June 2017 declarations; and, consequently, to the lawfulness of the adoption of countermeasures by the Appellants to induce Qatar's compliance with those obligations.

1.34 The context, object and purpose of the IASTA makes clear that even when exercising its judicial function under Article II, Section 2, the ICAO Council, composed as it is of State representatives and not legal experts appointed *intuitu personae*, was not intended to adjudicate the interpretation or application of other treaties or principles of customary law that are wholly unrelated to civil aviation. Such an impermissible expansion of the ICAO

Council's jurisdiction would politicize and undermine the functioning of United Nations specialized agencies, the effectiveness of which depends on adhering to specific technical competences in their respective fields of specialization.

1.35 Unlike the present case, in previous cases involving countermeasures, the Court or other tribunal undoubtedly had jurisdiction over the entirety of the dispute, including both the lawfulness of the non-performance of obligations said to have been adopted by way of countermeasures, and the preceding allegedly internationally wrongful act relied upon as the justification for adoption of those countermeasures. The question of jurisdiction over the issues relating to the validity of countermeasures was thus not in issue.

1.36 *First*, in some previous cases, the Court either had general jurisdiction based on optional clause declarations made under Article 36, paragraph 2 of the Statute (for example, the decision of the Court in *Military and Paramilitary Activities*)[36]; or based on a *compromis* which was sufficiently broad in scope so as to confer jurisdiction in relation to all issues relating to the lawfulness of the countermeasures, including the alleged prior internationally wrongful conduct (for example, the decision of the Court in *Gabčíkovo-Nagymaros Project*)[37].

1.37 *Second*, in other cases, the alleged countermeasures consisted of the suspension of treaty obligations purportedly in response to an alleged breach of the same treaty (so-called "reciprocal countermeasures"). As a result, questions as to whether there was a prior internationally wrongful act were undoubtedly within the jurisdiction of the Court or tribunal. This was the case in the *Air*

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[36] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, I.C.J. Reports 1986*, p. 14.

[37] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7. For the text of Article 2 of the Special Agreement, see *ibid.*, p. 11, para. 2.

Services case[38], the *Gabčíkovo-Nagymaros Project*, and the *Application of the Interim Accord* cases[39].

1.38 In some of these cases, both factors – namely, general jurisdiction and reciprocal countermeasures under the same treaty – were present.

1.39 By contrast, in the present case, the issues as to the competence of the ICAO Council, which arise from the specific and novel characteristics of the dispute between the Parties, are as follows:

(a) on the one hand, Qatar has brought its claims as to the alleged non-performance by the Appellants of their obligations under the IASTA pursuant to Article II, Section 2, a jurisdictional clause which, as discussed in Chapter V, is expressly circumscribed *ratione materiae*, and which in any case, in light of the specific role of ICAO, is to be interpreted narrowly;

(b) on the other hand, the Appellants' defence to those claims that any non-compliance with their obligations may be justified on the basis of customary international law as lawful countermeasures, adopted in response to internationally wrongful acts clearly arising outside the IASTA, is manifestly outside the scope of Article II, Section 2.

1.40 In such circumstances, the Court cannot simply disregard the manifest lack of jurisdiction of the ICAO Council over essential elements in the dispute – notably the manifest lack of jurisdiction *ratione materiae* over the Appellants'

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38 *Case concerning Air Service Agreement of 27 March 1946 between the United States of America and France*, Decision, 9 December 1978, *RIAA*, Vol. XVIII, p. 417.

39 *Application of the Interim Accord of 13 September 1995 (The former Yugoslav Republic of Macedonia v. Greece), Judgment, I.C.J. Reports 2011*, p. 644.

claims of Qatar's internationally wrongful conduct in violation of its obligations in respect of the principle of non-intervention, and suppression of terrorism and extremism – that are wholly unrelated to the IASTA, but which constitute the basis for the adoption of countermeasures by the Appellants, including *inter alia*, the airspace restrictions at issue.

Section 5. Outline of the Memorial

1.41 This Memorial consists of five chapters in addition to the present introductory chapter. In addition, the Appellants' Memorial is accompanied by six volumes of supporting documents.

1.42 Chapter II sets out the factual background of the dispute between the Parties that led to Qatar's initiation of proceedings before the ICAO Council on 30 October 2017. This includes the conclusion of the Riyadh Agreements by which Qatar specifically undertook, *inter alia*, not to interfere in the domestic affairs of other States and not to support the activities of extremists or terrorist groups that threaten the security and stability of the region. It was Qatar's continuing violations of its obligations under the Riyadh Agreements and its other fundamental obligations under international law – including through continued interference in the internal affairs of the Appellants and continued support for terrorist and extremist groups – that resulted in the severance of diplomatic relations on 5 June 2017, and the adoption of countermeasures by the Appellants, including the airspace restrictions that form the basis of Qatar's claims before the ICAO Council.

1.43 Chapter III sets out the procedural history of the ICAO Council proceedings and the manifest violations of due process in the procedure, resulting in the ICAO Council Decision rejecting the Appellants' Preliminary Objections – which, notably, was arrived at by secret vote and without any

written opinion or other explanation whatsoever as to the legal reasoning for the decisions adopted, notwithstanding the obligation of the ICAO Council under Article II, Section 2 of the IASTA to act in a judicial capacity and the requirement under the ICAO Rules to give reasons for its decisions[40]. As a consequence of the manifest defects in the procedure adopted by the ICAO Council, the Decision in respect of the ICAO Application is null and void.

1.44 Chapter IV addresses a discrete preliminary issue as to the competence of the ICAO Council to consider objections to admissibility as a preliminary matter, and discusses the distinction between admissibility and jurisdiction as it applies in the context of the ICAO Council.

1.45 Chapter V then sets out the arguments regarding the ICAO Council's manifest lack of competence over the issues relating to Qatar's internationally wrongful acts and the corresponding countermeasures by the Appellants, including the airspace restrictions. In rejecting this first Preliminary Objection, whether as a matter of jurisdiction or admissibility, and notwithstanding the absence of any reasons setting out the grounds for the Decision in this regard, the ICAO Council erred in fact and in law.

1.46 Chapter VI sets out the arguments regarding Qatar's failure to satisfy the procedural precondition of negotiations prior to initiating legal proceedings before the ICAO Council under Article II, Section 2 of the IASTA, and its failure to comply with the parallel procedural requirements under the ICAO Rules. In rejecting the Appellants' second Preliminary Objection on this basis, and notwithstanding the absence of any reasons setting out the grounds for the Decision in this regard, the ICAO Council likewise erred in fact and in law.

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40 **Vol. II, Annex 6**, ICAO Rules, Art. 15(2)(v).

1.47 The Memorial concludes in Chapter VII with a summary of the Appellants' arguments, followed by the Appellants' Submissions.

CHAPTER II
THE REAL DISPUTE BETWEEN THE APPELLANTS AND QATAR

Section 1. Introduction

2.1 This Chapter sets out the factual background of the dispute between the Parties that resulted in the Appellants' termination of diplomatic relations with Qatar on 5 June 2017 and the adoption of a series of measures related to terrestrial, maritime and aerial links with Qatar, which are intended to induce Qatar to comply with its obligations under international law and to ensure the security of the region. These measures include restrictions against Qatar-registered civil aviation flights over the Appellants' territorial airspace.

2.2 As Qatar recognized in its Memorial submitted to the ICAO Council on 30 October 2017, the alleged breaches of the IASTA by the Appellants are inextricably linked to what Qatar describes as an "ultimatum" "*on matters unrelated to air navigation and air transport*."[41] The general overview in this Chapter sets out the circumstances which confirm the conclusion that the dispute is indeed unrelated to air navigation and transport. The Chapter merely aims to describe the context within which the dispute between the Parties has arisen, including the present Appeal in respect of the Decision of the ICAO Council. It is not intended to constitute a pleading on the merits in relation to Qatar's internationally wrongful acts that have occasioned the adoption of the Appellants' measures. Such matters, in any event, fall beyond the competence of the ICAO Council, and by extension the Court's appellate jurisdiction, under Article II, Section 2 of the IASTA.

41 **Vol. III, Annex 23**, ICAO Memorial, para. (g) (emphasis added).

2.3 Turning to the particular measures complained of by Qatar in the present matter, the Appellants adopted airspace restrictions in respect of Qatar on 5 June 2017. On that date, each of the three Appellants issued official statements clearly explaining the reasons for the adoption of these measures against Qatar, a fellow member of the Arab League and (in respect of Bahrain and the UAE) the GCC.

2.4 Bahrain declared:

> "Based on the insistence of the State of Qatar on continuing to destabilize the security and stability of the Kingdom of Bahrain, to interfere in its affairs, to finance groups associated with Iran and to subvert and spread chaos in Bahrain in flagrant violation of all agreements and principles of international law without regard to values, law, morals, consideration of the principles of good neighbourliness or commitment to the constants of Gulf relations, shunning all previous pledges. The Kingdom of Bahrain announces the severance of diplomatic relations with the State of Qatar to preserve its national security as well as the withdrawal of the Bahraini diplomatic mission from Doha . . . and the closure of airspace … within 24 hours of the announcement of the statement. These dangerous Qatari practices have not only been limited to the Kingdom of Bahrain but have reached sister countries … [they] embody a very dangerous pattern that can not be met with silence or accepted, but which must be vigorously and resolutely addressed."[42]

[42] **Vol. III, Annex 24**, ICAO Preliminary Objections, para. 55, Exhibit 7, Declaration of the Kingdom of Bahrain, 5 June 2017 (alternative translation); **Vol. V, Annex 73**, Kingdom of Bahrain Ministry Foreign Affairs News Details, "Statement of the Kingdom of Bahrain on the severance of diplomatic relations with the State of Qatar", 5 June 2017.

2.5 Egypt declared:

> "The Egyptian government decided to cease all diplomatic relations with the State of Qatar. That came due to the insistence of the Qatari regime on adopting a hostile approach to Egypt, and the failure of all trials to deter its support to the terrorist organizations, topped by the terrorist group of the Muslim Brotherhood. The Qatari regime sheltered its leaders, who have received judicial rulings in terrorist operations targeted the safety and security of Egypt, in addition to promoting the doctrine of Al-Qaeda and ISIL, as well as supporting the terrorist operations in Sinai. Qatar has been insisting on interfering in the internal affairs of Egypt and the countries of the region, in a way that threatens the Arab national security and boosts the feelings of schism and fission inside the Arab communities, according to well-planned schemes targeting the unity of the Arab nation and its interests."[43]

2.6 The Ministry of Foreign Affairs of the UAE issued a statement declaring that measures, including the airspace restrictions, were being taken "based on the insistence of the State of Qatar to continue to undermine the security and stability of the region and its failure to honour international commitments and agreements"[44]. The statement further explained:

> "The UAE is taking these decisive measures as a result of the Qatari authorities' failure to abide by the Riyadh Agreement on returning GCC diplomats to Doha and its Complementary Arrangement in 2014, and Qatar's continued support, funding and hosting of terror groups, primarily Islamic Brotherhood, and its

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43 **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 6, Declaration of the Arab Republic of Egypt, 4 June 2017.

44 **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 9, Declaration of the United Arab Emirates, 5 June 2017.

> sustained endeavours to promote the ideologies of Daesh and Al-Qaeda across its direct and indirect media in addition to Qatar's violation of the statement issued at the US-Islamic Summit in Riyadh on May 21st, 2017 on countering terrorism in the region and considering Iran a state sponsor of terrorism. The UAE measures are taken as well based on Qatari authorities' hosting of terrorist elements and meddling in the affairs of other countries as well as their support of terror groups – policies which are likely to push the region into a stage of unpredictable consequences."[45]

2.7 These three statements, couched in similar terms, record Bahrain, Egypt and the UAE's considered assessments of Qatar's numerous and ongoing violations of international legal obligations. They reflect that over an extended period of time, Qatar has failed to suppress the activities of terrorists and extremists living within its borders and has failed to prosecute such terrorists and extremists; has systematically interfered in the internal affairs of the Appellants and other States; and has used its State-owned and -controlled media

[45] *Ibid.*

– in particular the *Al Jazeera* network – to incite hatred and violence[46]. The Appellants repeatedly put Qatar on notice that there would inevitably be consequences if it did not cease its wrongful conduct[47]. But Qatar persisted in its wrongful conduct, notwithstanding its obligations under international law, including the specific undertakings in the Riyadh Agreements[48].

2.8 In response, the Appellants severed diplomatic relations with Qatar and adopted countermeasures, including the airspace restrictions, in an attempt to induce Qatar to cease its wrongful conduct and comply with its obligations. Instead of putting an end to its wrongful conduct, Qatar initiated (*inter alia*) the proceedings before the ICAO Council that are at issue in this Appeal. In doing so, Qatar ignores the real dispute between the Parties, namely its own prior and

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[46] See also 2017 and 2018 statements at the United Nations General Assembly:

Bahrain: **Vol. V, Annex 80**, United Nations, Statement by H.E. Shaikh Khalid Bin Ahmed Bin Mohamed Al Khalifa, Minister of Foreign Affairs of the Kingdom of Bahrain, before the General Assembly, 72nd Session, 20th Plenary Meeting, 23 September 2017, document A/72/PV.20, p. 13; **Vol. V, Annex 83**, United Nations, Statement by H.E. Shaikh Khalid Bin Ahmed Bin Mohamed Al Khalifa, Minister of Foreign Affairs of the Kingdom of Bahrain, before the 73rd Session of the United Nations General Assembly, 29 September 2018.

Egypt: **Vol. V, Annex 78**, Statement of Reply of Mohamed El Shinawy, the Minister Plenipotentiary of the Permanent Mission of Egypt to the General Assembly, 22 September 2017; **Vol. V, Annex 79**, United Nations, 72nd session, 18th Plenary Meeting, document A/72/PV.18, 22 September 2017, p. 33.

UAE: **Vol. V, Annex 79**, United Nations, Statement by His Highness Sheikh Abdullah Bin Zayed Al Nahyan, Minister of Foreign Affairs and International Cooperation of the United Arab Emirates before the General Assembly, 72nd Session, 18th Plenary Meeting, document A/72/PV.18, 22 September 2017, p. 16; **Vol. V, Annex 84**, United Arab Emirates Ministry of Foreign Affairs & International Cooperation, "UAE Calls for Comprehensive Approach to Address Different Dimensions of Regional Threats", 30 September 2018.

[47] See, e.g. **Vol. V, Annex 64**, Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014; **Vol. V, Annex 59**, Statement of the Arab Republic of Egypt Ministry of Foreign Affairs, "The Egyptian Ministry of Foreign Affairs summons the Qatari Ambassador to Cairo", 4 January 2014.

[48] **Vol. II, Annexes 19-21**, Riyadh Agreements.

continuing internationally wrongful acts that resulted in the Appellants' adoption of various measures, including the airspace restrictions.

Section 2. Qatar's failure to confront terrorism and extremism prior to the Riyadh Agreements

2.9 Qatar has a long history of supporting extremist and terrorist groups in the Middle East and North Africa (***MENA***). These groups have been responsible for the intentional killing, maiming, enslavement, and forced displacement of countless innocent civilians, for extensive destruction of property (including cultural property) and infrastructure, and for political instability and armed conflict.

2.10 Qatar has supported and sheltered high-profile members of Al-Qaida, including the notorious figure Khalid Shaikh Mohammed. Qatar's Minister of Religious Endowments and Islamic Affairs, Sheik Abdullah bin Khalid al-Thani, reportedly helped Khalid Shaikh Mohammed evade a January 1996 arrest warrant issued by the United States for his terrorist activities relating to the 1993 World Trade Center bombing and a plot in 1995 to destroy several American airlines departing the Philippines[49]. Another example is Qatar's provision of safe haven to Al-Qaida-affiliated terrorist Zelimkhan Yandarbiyev, who was designated as such by the United Nations Security Council Al-Qaida Sanctions Committee[50], wanted under a 2001 Interpol Red Notice, and subject to a Russian extradition request. A report of the International Monetary Fund

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49 **Vol. VI, Annex 100**, "Threats and Responses: Counterterrorism; Qaeda Aide Slipped Away Long Before Sept. 11 Attack", *The New York Times*, 8 March 2003. Upon returning to Afghanistan, he began to work with Osama bin Laden, allegedly assisting with the financing and planning of several terrorist attacks including the 9/11 World Trade Center attack and the 2002 Bali Bombings. *Ibid*.

50 **Vol. VI, Annex 89**, United Nations Press Release SC/7803, "Security Council Committee Adds Names of 17 Individuals to Al-Qaida Section of Consolidated List", 26 June 2003.

concluded that it is "clear that from the moment of the designation by the United Nations Security Council 1267 Committee in June 2003, until the individual's death in February 2004, the [Qatari] authorities provided him with safe harbor and acted in violation of UNSC Resolution 1267."[51]

2.11 Qatar's support of terrorism and extremism extended well beyond Al-Qaida. In 2014, United States Under Secretary for Terrorism and Financial Intelligence, David Cohen, described Qatar as a "permissive jurisdiction" for terrorist financing generally, and stated specifically that Qatar "has for many years openly financed Hamas, a group that continues to undermine regional stability."[52]

2.12 In the period between 2011 and 2013, the threats posed by extremist groups reached a critical point in the MENA region. Those threats became especially aggravated in 2013 when, *inter alia*, there were widespread uprisings against the Muslim Brotherhood in Egypt, Islamic State (***ISIL (Da'esh)***) began its rise to prominence after seizing Raqqa in Syria, and sectarian tensions in Yemen began to escalate.

2.13 It was in this context that groups like Al-Qaida, Hamas, and the Muslim Brotherhood came to perform a central role in fuelling regional violence and upheaval. Qatar was pivotal in supporting the rise of these groups,

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51 **Vol. VII, Annex 130**, International Monetary Fund, *Qatar: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, 19 June 2018, published October 2008, pp. 46-47; **Vol. VI, Annex 87**, United Nations, Resolution 1267 (1999) adopted by the Security Council at its 4051st meeting on 15 October 1999, document S/RES/1267.

52 **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 19, Remarks of Under Secretary for Terrorism and Financial Intelligence David Cohen before the Center for a New American Security on "Confronting New Threats in Terrorist Financing", 4 March 2014.

including the Muslim Brotherhood, a matter of particular concern to Egypt[53]. Qatar allowed Muslim Brotherhood leadership figures to operate freely in Qatar, and the state-owned and -controlled media network *Al Jazeera* served as a platform for the group to propound its calls for extremism and violence, including especially against the Egyptian Government that emerged following the popular revolution against President Morsi's Muslim Brotherhood Government in 2013[54]. Following these events, Egypt, the UAE and Saudi Arabia officially designated the Muslim Brotherhood as a terrorist organization[55].

2.14 Qatar also refused to take action to suppress the terrorism-related activities of, or to prosecute, internationally designated terrorists based in Qatar.

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53 **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 19, Remarks of Under Secretary for Terrorism and Financial Intelligence David Cohen before the Center for a New American Security on "Confronting New Threats in Terrorist Financing", 4 March 2014; **Vol. VI, Annex 106**, E. Dickinson, "How Qatar Lost the Middle East", *Foreign Policy*, 5 March 2014.

54 **Vol. VI, Annex 103**, "Muslim Brotherhood Opponents and Al-Jazeera Employees Protest: The Channel Is Biased and Unprofessional", *Middle East Media Research Institute*, 12 July 2013.

55 See **Vol. V, Annex 58**, Note Verbale of 1 January 2014 from the Embassy of the Arab Republic of Egypt in Doha to the Ministry of Foreign Affairs of the State of Qatar; **Vol. V, Annex 61**, Note Verbale of 3 March 2014 from the Embassy of the Arab Republic of Egypt in Doha to the Ministry of Foreign Affairs of the State of Qatar, communicating to Qatar that the Muslim Brotherhood had been so designated by Egypt on 25 December 2013; **Vol. V, Annex 63**, Press Release issued by the Minister of Interior of the Kingdom of Saudi Arabia, "Injunctions on Security and Ideology for Citizens and Residents; and An Extra Grace Period of 15 Days for Those Taking Arms outside the Kingdom to Rethink Their Position and Return Home [to] Riyadh", 7 March 2014; **Vol. VI, Annex 107**, "UAE Cabinet Approves List of Designated Terrorist Organisations, Groups", *Emirates News Agency*, 16 November 2014; **Vol. VII, Annex 134**, United Arab Emirates, Cabinet Decree of Terrorist Organizations of 15 November 2014 pursuant to Federal Law No. 7 of 2014 on Combating Terrorism Offences, adopted on 31 August 2014. See also **Vol. V, Annex 77**, Kingdom of Bahrain Ministry of Foreign Affairs, "Minister of Foreign Affairs: Our next decisions regarding Qatar will be timely and thoroughly studied from all aspects", 5 July 2017.

These individuals included Khalifa Muhammad Turki Al-Subaiy, whom the United Nations Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee describes as "a Qatar-based terrorist financier and facilitator who has provided financial support to, and acted on behalf of, the senior leadership of Al-Qaida"[56]. In 2012, while living freely in Qatar, Al-Subaiy worked with Al-Qaida associates also based in Qatar to transfer significant sums of money to Al-Qaida and its senior leaders based in Pakistan[57]. Similarly, Qatar failed to prosecute Abd Al-Rahman Al-Nu'aymi, a United Nations-designated terrorist associated with Al-Qaida who participated in the "'financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of' and 'otherwise

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

57 **Vol. VII, Annex 135**, United States Department of Treasury Press Release, "Treasury Designates Twelve Foreign Terrorist Fighter Facilitators", 24 September 2014.

supporting acts or activities of'" Al-Qaida in Iraq[58]. That activity included transferring nearly US$600,000 to Al-Qaida representatives in Syria in 2013[59].

2.15 The violence and upheaval from which the region was suffering, and in which Qatar was centrally involved, demanded a collective regional response. That was the purpose of the Riyadh Agreements, legal instruments of salient significance.

Section 3. The Riyadh Agreements

2.16 The GCC was founded in 1981 to bring "cooperation and coordination" between its members – owing to their "special relations", "joint characteristics", "joint creed", "similarity of regimes", and "unity of heritage" – "within the framework of the Arab League Charter, which urges regional

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58 **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 16, Narrative Summary: QDi.334 'Abd al-Rahman bin 'Umayr al-Nu'aymi, United Nations sanctions list issued by the Security Council Committee pursuant to Security Council Resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh) Al-Qaida and Associated Individuals Groups Undertakings and Entities, last updated 13 May 2016; see also **Vol. VII, Annex 133**, United States Department of Treasury Press Release, "Treasury Designates Al-Qa'ida Supporters in Qatar and Yemen", 18 December 2013.

59 **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 16, Narrative Summary: QDi.334 'Abd al-Rahman bin 'Umayr al-Nu'aymi, United Nations sanctions list issued by the Security Council Commission pursuant to Security Council Resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh) Al-Qaida and Associated Individuals Groups Undertakings and Entities, last updated 13 May 2016. According to the UN, Al-Nu'aymi "has facilitated significant financial support to Al-Qaida in Iraq (AQI) (QDe.115), and served as an interlocutor between AQI leaders and Qatar-based donors". *Ibid*. He has also been designated as a terrorist and subjected to sanctions by the Appellants. **Vol. V, Annex 74**, Kingdom of Bahrain Ministry Foreign Affairs, "Statement by the Kingdom of Saudi Arabia, the Arab Republic of Egypt, the United Arab Emirates, and the Kingdom of Bahrain", 9 June 2017.

cooperation" to work "in a manner that serves the Arab and Islamic issues"[60]. The GCC's programme to "realize cooperation and coordination" in the field of regional security has been ongoing since at least July 1975, i.e., six years before the GCC's founding, and was manifested in the 2013-2014 period in a series of agreements known collectively as the Riyadh Agreements[61].

2.17 On 23 November 2013, Qatar, the State of Kuwait (***Kuwait***), and Saudi Arabia signed the First Riyadh Agreement. On 24 November 2013, the UAE, Bahrain and the Sultanate of Oman (***Oman***) signed an instrument acceding to it[62]. This Agreement imposed obligations on all six of the GCC countries, including Qatar. As noted in its Preamble, the Heads of State "held extensive deliberations in which they conducted a full revision of what taints the relations between the [Gulf Cooperation] Council states, the challenges facing [the GCC's] security and stability, and [the] means to abolish whatever muddies the relations"[63]. This unprecedented multilateral agreement laid the foundation "for

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60 Foreign Minister of Saudi Arabia, Saud al-Faisal's Statement on the Founding of the GCC (Riyadh Communique), 4 February 1981. See also Statement of Prime Minister and Crown Prince of Kuwait, Shaykh Jabir al-Ahmad al-Sabah, May 1976, who called for "the establishment of a Gulf Union with the object of realizing cooperation in all economic, political, educational and informational fields . . . to serve the interests and stability of the peoples of the region"; and GCC Secretary, General Abdallah Yaqub Bisharah's Press Conference, 27 May 1981: "We constitute an important power in the major course of Arab policy and believe that our council both strengthens and bolsters the Arab League." All collected in: **Vol. V, Annex 57**, R. K. Ramazani, *The Gulf Cooperation Council: Record and Analysis* (Virginia, 1988), pp. 1, 3, 12-13, 31-32; see also **Vol. II, Annex 8**, Charter of the Co-operation Council for the Arab States of the Gulf, concluded at Abu Dhabi on 25 May 1981, 1288 *UNTS* 151, Preamble.

61 See also **Vol. II, Annex 16**, Security Agreement Between the States of the Gulf Cooperation Council, signed at Riyadh on 13 November 2012.

62 See **Vol. II, Annex 19**, First Riyadh Agreement, 23 and 24 November 2013, Accession of the Kingdom of Bahrain and the United Arab Emirates to the Riyadh Agreement, 24 November 2013.

63 **Vol. II, Annex 19**, First Riyadh Agreement, 23 and 24 November 2013, Preamble.

a new phase of collective work" that would operate "within a unified political framework based on the principles included in the main system of the Cooperation Council"[64]. Accordingly, by its express terms, the First Riyadh Agreement sets forth a unified approach to address the threats to regional security, stability and peace. Consistent with international law, the GCC "agreed upon" the following three undertakings[65]. First, an undertaking of "[n]o interference in the internal affairs of the [GCC] states", which includes specific duties not to harbour or naturalize certain individuals, not to support certain groups and not to support certain media[66]. Second, an explicit undertaking to provide "*[n]o support to the Muslim Brotherhood* or any of the organizations, groups or individuals that threaten the security and stability of the [GCC] states through direct security work or through political influence."[67] Third, an undertaking "[n]ot to present any support to any faction in Yemen that could pose a threat to countries neighboring Yemen."[68]

2.18 Qatar, however, failed to comply with the obligations to which it had committed in the First Riyadh Agreement. It continued to act as a permissive jurisdiction for terrorist financing, persisted in its interference in the Appellants' internal affairs, and designated terrorists continued to live within its borders. Despite the express undertaking in the First Riyadh Agreement to refrain from supporting the Muslim Brotherhood, Qatar continued to embrace the organization, including by providing its leader Yusuf Al-Qaradawi with a platform for hate speech and incitement to violence on *Al Jazeera*. This was

64 *Ibid.*

65 *Ibid.*

66 *Ibid*, Art. 1.

67 *Ibid*., Art. 2 (emphasis added).

68 *Ibid.*, Art. 3.

despite Al-Qaradawi's history of making inflammatory statements on *Al Jazeera*, such as praising Hitler's "divine punishment" of the Jews and also endorsing suicide bombings[69]. On 25 December 2013, shortly after the conclusion of the First Riyadh Agreement, Egypt declared the Muslim Brotherhood a terrorist group, and formally conveyed that decision to Qatar in a Note Verbale on 1 January 2014[70]. Subsequently, Saudi Arabia and the UAE also designated the Muslim Brotherhood as a terrorist organization[71].

2.19 In response to Egypt's Note Verbale, on 3 January 2014, Qatar made hostile public statements condemning Egypt's designation of the Muslim Brotherhood as a terrorist organization[72]. The following day, Egypt summoned Qatar's Ambassador in Cairo to protest that "the content of the Qatari statement is considered a gross interference in the domestic affairs of our country",

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69 See **Vol. VI, Annex 101**, Video Excerpts of Yusuf Al-Qaradawi, *Al-Jazeera Television*, 28-30 January 2009; **Vol. VI, Annex 102**, Video Excerpt of Yusuf Al-Qaradawi, 'Sharia and Life', *Al-Jazeera Television*, 17 March 2013.

70 **Vol. V, Annex 58**, Note Verbale of 1 January 2014 from the Embassy of the Arab Republic of Egypt in Doha to the Ministry of Foreign Affairs of the State of Qatar; **Vol. V, Annex 61**, Note Verbale of 3 March 2014 from the Embassy of the Arab Republic of Egypt in Doha to the State of Qatar. These documents communicated to Qatar that the Muslim Brotherhood had been designated as a terrorist organization by Egypt on 25 December 2013.

71 See **Vol. V, Annex 63**, Press Release issued by the Minister of Interior of Saudi Arabia, "Injunctions on Security and Ideology for Citizens and Residents; and An Extra Grace Period of 15 Days for Those Taking Arms outside the Kingdom to Rethink Their Position and Return Home [to] Riyadh", 7 March 2014; **Vol. VI, Annex 107**, "UAE Cabinet Approves List of Designated Terrorist Organisations, Groups", *Emirates News Agency*, 16 November 2014; **Vol. VII, Annex 134**, United Arab Emirates, Cabinet Decree of Terrorist Organizations of 15 November 2014 pursuant to Federal Law No. 7 of 2014 on Combating Terrorism Offences, adopted on 31 August 2014. See also **Vol. V, Annex 77**, Kingdom of Bahrain Ministry of Foreign Affairs, "Minister of Foreign Affairs: Our Next Decisions Regarding Qatar Will Be Timely and Thoroughly Studied from All Aspects", 5 July 2017.

72 **Vol. VI, Annex 104**, "Qatar criticizes Egypt's designation of the Muslim Brotherhood as a terrorist organization", *BBC Arabic*, 4 January 2014; see also **Vol. VI, Annex 105**, "Update 2 – Egypt summons Qatari envoy after criticisms of crackdown", *Reuters*, 4 January 2014.

warning that Qatar would bear "full responsibility"[73]. On 3 February 2014, following further provocations by Qatar, Egypt recalled its Ambassador from Qatar, and it subsequently notified Qatar on 13 July 2015 that he would not return[74].

2.20 On 5 March 2014, Bahrain, Saudi Arabia, and the UAE also recalled their Ambassadors from Qatar. The joint statement issued by those three GCC States announced that their "efforts have not resulted, with great regret, in the consent of the State of Qatar to adhere to these procedures [under the Riyadh Agreement], so the three countries have to start taking whatever [action] they deem appropriate to protect their security and stability by withdrawing their ambassadors from the State of Qatar"[75]. The three States expressed their hope "that the State of Qatar takes immediate steps to respond to what had been agreed upon"[76]. The recalling of the Ambassadors was the first attempt by Egypt, Bahrain, Saudi Arabia and the UAE to introduce measures to induce Qatar's compliance with its international obligations.

2.21 In an attempt to resolve the impasse, and recognising the importance of securing full implementation of the obligations in the First Riyadh Agreement, on 17 April 2014 the GCC Member States (Bahrain, Kuwait, Oman, Saudi

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73 **Vol. V, Annex 59**, Statement of the Arab Republic of Egypt Ministry of Foreign Affairs, "The Egyptian Ministry of Foreign Affairs summons the Qatari Ambassador to Cairo", 4 January 2014.

74 **Vol. V, Annex 60**, Note Verbale of 3 February 2014 from the Embassy of the Arab Republic of Egypt in Doha to the Ministry of Foreign Affairs of the State of Qatar; **Vol. V, Annex 70**, Note Verbale of 13 July 2015 from the Embassy of the Arab Republic of Egypt in Doha to the State of Qatar.

75 **Vol. V, Annex 62**, Kingdom of Bahrain Ministry of Foreign Affairs News Details, "A Statement Issued by the Kingdom of Saudi Arabia, the United Arab Emirates and the Kingdom of Bahrain", 5 March 2014, p. 1.

76 *Ibid*., p. 2.

Arabia, the UAE and Qatar) signed the Mechanism Implementing the Riyadh Agreement (***Implementing Mechanism***) as a complementary international treaty. The Implementing Mechanism recorded "the urgency of the matter that calls for taking the necessary executive procedures to enforce [the] content" of the First Riyadh Agreement and "set a mechanism that shall guarantee [its] implementation"[77].

2.22 The Implementing Mechanism first provides that it is for "[t]he concerned party to monitor the implementation of the Agreement"[78]. In that context, the "[f]oreign ministers of the GCC Countries shall hold private meeting[s] [i]n the margins of annual periodic meetings of the ministerial council"[79]. At those meetings, "violations and complaints reported by any member country of the Council against any member country of the Council shall be reviewed by the foreign ministers to consider, and raise them to leaders."[80] The Implementing Mechanism goes on to state that the "[l]eaders of the GCC Countries . . . shall take the appropriate action towards what the Ministers of Foreign Affairs raise to them regarding any country that has not complied with the signed agreement by the GCC Countries."[81]

2.23 The Implementing Mechanism then reaffirmed the obligations undertaken in the First Riyadh Agreement, and defined specific actions needed to fulfil those obligations. For example, the Implementing Mechanism sets forth detailed obligations that elaborate and expand on the original commitment to

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77 **Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Preamble.

78 *Ibid.*

79 *Ibid.*

80 *Ibid.*

81 *Ibid.*

refrain from interfering in the internal affairs of other States, such as a commitment "[n]ot to shelter, accept, support, encourage or make its country an incubator to the activities of GCC citizens or other figures who are proven oppositionists to any country of [the] GCC", and "[n]ot to fund or support external organizations, groups or parties, that have hostile positions and incitements against the GCC Countries."[82] Again, the Implementing Mechanism includes an explicit commitment "[n]ot to support [the] Muslim Brotherhood with money or via media in the GCC Countries or outside" and to "[a]pprove the exit of Muslim Brotherhood figures, who are not citizens"[83].

2.24 Notably, the final paragraph of the Implementing Mechanism provides that "if any country of the GCC [States] failed to comply with this mechanism, the other GCC [States] shall have the right to take *any appropriate action* to protect their security and stability."[84]

2.25 In short, the Riyadh Agreements imposed collective obligations on every signatory. From the signing of the First Riyadh Agreement, each of the other GCC States, except Qatar, have taken steps to ensure they were in compliance with the specific undertakings contained in the Riyadh Agreements.

2.26 The other GCC States repeatedly called to Qatar's attention its failure to comply with its obligations. For example, at meetings of the Follow-up Committee set up pursuant to the Implementing Mechanism in June 2014, both Bahrain and the UAE called Qatar's attention to its continued support of certain banned individuals and organizations, including affiliates of Al-Qaida and the

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82 *Ibid*., Arts 1(b) and 1(d).

83 *Ibid*., Art. 2(a)-(b).

84 **Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Art. 3 (emphasis added).

Muslim Brotherhood respectively[85]. In August 2014, Bahrain and the UAE reported that Qatar remained in non-compliance. This led to a meeting of the Ministers of Foreign Affairs on 30 August 2014, at which the question of how to respond to Qatar's non-compliance with the First Riyadh Agreement and its Implementing Mechanism was the central issue[86]. The Operations Room was established by State representatives, including those of Qatar, in order to monitor and report on the implementation of the Riyadh Agreements[87].

2.27 In a parallel development, on 11 September 2014, Qatar joined the other GCC States and Egypt, Iraq, Jordan, Lebanon and the United States in issuing the Jeddah Communique in which these States agreed to counter the financing of ISIL (Da'esh) and other violent extremists, "repudiat[e] their hateful ideology", end impunity, and bring terrorists and extremists to justice[88].

2.28 Nevertheless, Qatar did not take its obligations seriously and failed to engage in good faith with the Riyadh process. This non-compliance led to the conclusion of the Supplementary Riyadh Agreement on 16 November 2014 (***Supplementary Riyadh Agreement***)[89].

2.29 The Supplementary Riyadh Agreement "stress[es] that non-committing to any of the articles of the [First] Riyadh Agreement and its [Implementing

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85 **Vol. V, Annex 64**, Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014.

86 **Vol. V, Annex 65**, Summary of Discussions in the Sixth Meeting of their Highnesses and Excellencies the Ministers of Foreign Affairs, Jeddah, 30 August 2014.

87 *Ibid.*

88 **Vol. V, Annex 66**, Jeddah Communique, 11 September 2014.

89 **Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, signed by Saudi Arabia, Kuwait, Bahrain, Qatar, and the UAE.

Mechanism] amounts to a violation of the entirety of them"[90]. It also underscored "the necessity of the full commitment to implementing everything stated in them within the period of one month from the date of the agreement."[91] It specifically provides that the signatories "are committed to the Gulf Cooperation Council discourse to support the Arab Republic of Egypt, and contributing to its security, stability and its financial support; and ceasing all media activity directed against the Arab Republic of Egypt in all media platforms, whether directly or indirectly, including all offenses broadcasted on Al Jazeera, Al Jazeera Mubashir Masr, and to work to stop all offenses in Egyptian media."[92] Thus, the Agreement recorded the parties' intention to undertake specific obligations, and to recognize corresponding rights with regard to Egypt[93].

2.30 The Supplementary Riyadh Agreement also obliged each State "[n]ot to give refuge, employ, or support whether directly or indirectly, whether domestically or abroad, to any person or a media apparatus that harbors inclinations harmful to any Gulf Cooperation Council [S]tate."[94] It proceeded to note that "[e]very State is committed to taking all the regulatory, legal and judicial measures against anyone who [commits] any encroachment against

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90 *Ibid.*, Art. 3(a).

91 *Ibid.*, Art. 3(b).

92 *Ibid.*, Art. 3(d).

93 See, e.g., Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, 1155 *UNTS* 331, Art. 36(1) ("A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.").

94 **Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, Art. 3(c).

Gulf Cooperation Council [S]tates, including putting him on trial and announcing it in the media."[95]

2.31 Following Qatar's pledges under the Supplementary Riyadh Agreement, Bahrain, Saudi Arabia, and the UAE immediately returned their Ambassadors to Qatar on 17 November 2014.

Section 4. Qatar's violations of the Riyadh Agreements and its other obligations under international law

2.32 Qatar continued to disregard its clear and binding commitments in the Riyadh Agreements and its other obligations under international law. It continued to support and provide a platform for extremist groups and their members that threaten the security and stability of the Appellants.

A. QATAR'S SUPPORT FOR THE MUSLIM BROTHERHOOD AND OTHER EXTREMIST GROUPS

2.33 Qatar expressly undertook in the Riyadh Agreements not to support the Muslim Brotherhood or other extremist groups. However, it continued to do so. For example, Egypt requested the extradition from Qatar of the Muslim Brotherhood leader Al-Qaradawi in 2015, pursuant to an Interpol red notice[96]. But instead of being extradited or prosecuted, Al-Qaradawi has been supported by the highest levels of the Qatari leadership. The Appellants officially

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95 *Ibid*.

96 **Vol. V, Annex 68**, Note Verbale from the Embassy of the Arab Republic of Egypt in Doha to the Ministry of Foreign Affairs of the State of Qatar, Extradition Request concerning Yusuf Abdullah Aly Al-Qaradawi, 21 February 2015.

designated Al-Qaradawi as a terrorist in 2017[97], yet, as recently as May 2018, he was photographed embracing Qatar's Head of State, Emir Tamim bin Hamad Al-Thani, at a banquet hosted by the Emir[98].

2.34 The Muslim Brotherhood presence in Qatar has had grave consequences. For example, on 11 December 2016, a suicide-bomber killed and injured numerous Copt Christian worshippers at the Church of Saints Paul and Peter, attached to Saint Mark cathedral in Abbaseya, Egypt. A statement from the Egyptian Ministry of Interior indicated that the culprit, Mohaab Mustafa al-Sayyid Qasim, had been radicalized after meeting with Muslim Brotherhood leaders in Qatar in 2015[99].

2.35 During the same period, Qatar also demonstrated its support for extremist groups in other contexts. For example, on 12 February 2015, ISIL (Da'esh) posted a video showing the beheading of 21 Egyptian Copt Christian migrant workers in Libya[100] in response to which Egypt conducted airstrikes

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97 **Vol. V, Annex 74**, Kingdom of Bahrain Ministry Foreign Affairs News Details, "Statement by the Kingdom of Saudi Arabia, the Arab Republic of Egypt, the United Arab Emirates, and the Kingdom of Bahrain", 9 June 2017; **Vol. V, Annex 75**, "Report: General Details on the Individuals and the Bodies related to Al-Qaeda on the List of Terrorist Organizations", *Emirates News Agency*, 9 June 2017. See also **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 13, Letter from the Kingdom of Saudi Arabia, the Arab Republic of Egypt, the United Arab Emirates, and the Kingdom of Bahrain to the United Nations Secretary General, UN/SG/Qatar/257, 16 June 2017.

98 **Vol. VI, Annex 118**, "Amir Hosts Iftar banquet for scholars, judges and imams", *Gulf Times*, 30 May 2018; **Vol. VI, Annex 119**, D. McElroy, "US Advisers Quit Qatar Role as Emir Dines with Muslim Brotherhood Leader", *The National*, 7 June 2018.

99 **Vol. V, Annex 71**, Official Statement of the Ministry of Interior of the Arab Republic of Egypt, 12 December 2016, paras 3-4.

100 See **Vol. VI, Annex 108**, "Islamic State: Egyptian Christians held in Libya 'killed'", *BBC*, 15 February 2015; **Vol. VI, Annex 109**, T. Kamal, "Thousands Mourn Egyptian Victims of Islamic State in Disbelief", *Reuters*, 16 February 2015.

against ISIL (Da'esh) targets in Libya[101]. On 18 February 2015, the Council of the Arab League strongly condemned "the heinous barbaric crime" committed by ISIL (Da'esh), expressed its "strong support" and "understanding" of Egypt's airstrikes – conducted with the full cooperation and coordination of the "legitimate authorities in Libya" – in the exercise of its right to self-defence[102]. It called on the Arab States to suppress financing of terrorist organizations, and "to present all forms of support and solidarity to Egypt in its war against terrorism."[103] Qatar was the sole member of the Arab League to express its reservations to this resolution, having condemned Egypt's airstrikes against ISIL (Da'esh) in Libya[104].

B. FAILURE TO EXTRADITE OR PROSECUTE TERRORISTS

2.36 The Riyadh Agreements contain express obligations not to shelter and provide support to individuals and groups engaged in terrorist activities or conducting subversive activities against other States[105]. Qatar is also a party to a number of additional international instruments that oblige Qatar to identify and prosecute or extradite terrorists and funders of terrorism, including: (i) the Arab

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101 **Vol. VI, Annex 110**, J. Malsin and C. Stephen, "Egyptian Air Strikes in Libya Kill Dozens of Isis Militants", *The Guardian*, 17 February 2015.

102 **Vol. V, Annex 67**, Press Release of the Arab League, "Consultative Meeting of the Council of the League at the level of Permanent Representatives on the condemnation of the barbaric terrorist act which killed twenty-one Egyptian citizens by ISIS in Libya", 18 February 2015, para. 2.

103 *Ibid*., para. 4.

104 *Ibid*., noting that Qatar reserved its position with respect to para. 2; **Vol. V, Annex 69**, Letter of 10 March 2015 from the Arab League, attaching letter of 10 March 2015 from the State of Qatar to the Arab League, p. 2: "The representative would like to amend the Qatari reservation on the resolution issued by the council in this regard and to record the Qatari reservation on the entire resolution."

105 **Vol. II, Annex 19**, First Riyadh Agreement, 23 and 24 November 2013, Art. 2; **Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Arts 1(b) and 1(d); **Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, Art. 3.

Convention on the Suppression of Terrorism[106]; (ii) the GCC Anti-Terrorism Agreement[107]; (iii) the Convention of the Organization of the Islamic Conference on Combating International Terrorism[108]; (iv) the International Convention for the Suppression of the Financing of Terrorism[109]; and (v) the Security Agreement Between the States of the GCC[110]. Qatar is also bound by counter-terrorism obligations arising under United Nations Security Council Resolutions adopted under Chapter VII of the United Nations Charter – in particular, Security Council Resolution 1373 (2001), which obliges all Member States: (i) to deny safe haven to those who finance, plan, support, or commit terrorist acts; (ii) to prevent the movement of terrorists or terrorist groups through the implementation of effective border controls; (iii) to ensure that any person who participates in the financing, planning, or perpetration of terrorist

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106 Under the Arab Convention on the Suppression of Terrorism, Qatar is unequivocally required to prevent terrorists from entering and using its territory as a "base for planning, organising, executing, attempting or taking part in terrorist crime and to prosecute or extradite any such individuals". **Vol. II, Annex 10**, League of Arab States, Arab Convention on the Suppression of Terrorism, adopted at Cairo on 22 April 1998, Arts 3, 4.II and 5.

107 **Vol. II, Annex 14**, GCC Anti-Terrorism Agreement, signed at Kuwait City on 4 May 2004, Art. 19. Pursuant to the GCC Anti-Terrorism Agreement, in addition to being under obligations to prevent the entrance or infiltration of terrorists into its territory, Qatar has an obligation to take steps to prevent its citizens from being induced to join illegal groups or to participate in terrorist activities. *Ibid*., Art. 6.

108 **Vol. II, Annex 11**, Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999, Art. 3.II(a), pursuant to which Qatar has committed to prevent its territory "from being used as an arena for planning, organizing, executing terrorist crimes or initiating or participating in these crimes in any form; including preventing the infiltration of terrorist elements or their gaining refuge or residence therein individually or collectively".

109 **Vol. II, Annex 12**, International Convention for the Suppression of the Financing of Terrorism, signed at New York on 9 December 1999, 2178 *UNTS* 197 (***ICSFT***), Arts 2, 7, 9, 10 and 18.

110 **Vol. II, Annex 16**, Security Agreement Between the States of the Gulf Cooperation Council, signed at Riyadh on 13 November 2012, Arts 2, 3 and 16.

acts is brought to justice; and (iv) to prevent, suppress, and criminalize terror financing[111].

2.37 Rather than complying with its international obligations, Qatar has provided a safe haven for individuals residing in its territory to plan terrorist activities and disseminate hate speech in violation of international law without facing any consequences[112]. For example, in December 2016, Al-Nu'aymi used *Twitter* to promote unrest in the region, calling on the Qatari public to "fulfil the needs of the mujahidin in equipment, men, and funds" in Syria, Iraq, and Yemen[113]. Al-Nu'aymi remains in close relations with the highest levels of

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111 **Vol. VI, Annex 88**, United Nations, Resolution 1373 (2001) adopted by the Security Council at its 4385th meeting, document S/RES/1373, 28 September 2001, para. 2(c), (d), (e) and (g); **Vol. VI, Annex 90**, United Nations, Resolution 1624 (2005), adopted by the Security Council at its 5261st meeting, document S/RES/1624, 14 September 2005. See also **Vol. VI, Annex 92**, United Nations, Resolution 2133 (2014) adopted by the Security Council at its 7101st meeting, document S/RES/2133, 27 January 2014; **Vol. VI, Annex 93**, United Nations, Resolution 2178 (2014), adopted by the Security Council at its 7272nd meeting, document S/RES/2178, 24 September 2014; **Vol. VI, Annex 98**, United Nations, Resolution 2396 (2017), adopted by the Security Council at its 8148th meeting document S/RES/2396, 21 December 2017.

112 See **Vol. V, Annex 80**, United Nations, Statement by H.E. Shaikh Khalid Bin Ahmed Bin Mohamed Al Khalifa, Minister of Foreign Affairs of the Kingdom of Bahrain, before the General Assembly, 72nd Session, 20th Plenary Meeting, 23 September 2017, document A/72/PV.20; **Vol. V, Annex 81**, United Nations, Statement of H.E. Adel Ahmed Al-Jubeir, Minister of Foreign Affairs of the Kingdom of Saudi Arabia before the General Assembly, 72nd Session, 20th Plenary Meeting, 23 September 2017, document A/72/PV.20.

113 **Vol. VI, Annex 112**, A. R. al-Nu'aymi (@binomeir), *Twitter*, 14 December 2016, 05:08 a.m.

Qatar's Government[114]. Qatar has also failed to prosecute Sa'd bin Sa'd Muhammad Shariyan Al-Ka'bi and 'Abd al-Latif Bin 'Abdallah Salih Muhammad Al-Kawari, both sanctioned by the United Nations as "major facilitators" of Al-Qaida and the Al Nusra Front, who have set up and run public donation campaigns unfettered in Qatar[115].

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114 For example, in April 2018, Qatar's Prime Minister Adbullah bin Nasser bin Khalifa Al-Thani attended Al-Nu'aymi's son's wedding and was photographed with Al-Nu'aymi and Hamas leader Khaled Mishaal. **Vol. VI, Annex 116**, "Qatar Must Improve Relations with Neighbors, Desist from Backing up Extremism, Terrorism, Regional Destabilization, Saudi Ambassador to UK Says", *Saudi Press Agency*, 25 April 2018; **Vol. VI, Annex 114**, D. McElroy, "Qatar's Top Terror Suspect Hosts Prime Minister at Wedding", *The National*, 17 April 2018. The Qatari government later admitted to the Prime Minister attending the wedding, but claimed that there was "no hypocrisy" in his attendance. **Vol. VI, Annex 115**, "Qatar Says 'No Hypocrisy', Admits to PM Attending Wedding of Terrorist's Son", *Al Arabiya*, 22 April 2018.

115 **Vol. VI, Annex 95**, Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning ISIL (Da'esh) Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, *Narrative Summaries of Reasons for Listing QDi.380 Abd al-Latif bin Abdallah Salih Muhammad al-Kawari*, United Nations Security Council Subsidiary Organs (last updated 21 September 2015); **Vol. VI, Annex 96**, Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning ISIL (Da'esh) Al-Qaida and Associated Individuals, Groups, Undertakings and Entities, *Narrative Summaries of Reasons for Listing QDi.382Sa'd bin Sa'd Muhammad Shariyan al-Ka'bi*, United Nations Security Council Subsidiary Organs (last updated 21 September 2015); **Vol. VII, Annex 136**, United States Department of Treasury Press Release, "Treasury Designates Financial Supporters of Al-Qaida and Al-Nusrah Front", 5 August 2015.

2.38 There can be no doubt that Qatar has persisted in allowing its territory to be a permissive jurisdiction for terrorism financing[116]. Despite international efforts to impose sanctions on private supporters of terrorism within the country, the Qatari Government has taken no significant steps to stop the flow of money to extremists[117].

C. STATE-SPONSORED DISSEMINATION OF HATE SPEECH AND INCITEMENT TO VIOLENCE ON *AL JAZEERA*

2.39 Security Council Resolution 1624 (2005) called upon all States to prohibit by law incitement to commit terrorist acts, prevent such conduct, and deny safe haven to anyone suspected to be guilty of such conduct[118].

2.40 Further, under the Riyadh Agreements, Qatar is under an obligation not to allow its media to be used as a platform to destabilize its GCC neighbours or Egypt[119]. Qatar specifically undertook not to allow its state-

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116 See **Vol. V, Annex 80**, United Nations, Statement by H.E. Shaikh Khalid Bin Ahmed Bin Mohamed Al Khalifa, Minister of Foreign Affairs of the Kingdom of Bahrain, before the General Assembly, 72nd Session, 20th Plenary Meeting, 23 September 2017, document A/72/PV.20; **Vol. V, Annex 81**, United Nations, Statement of H.E. Adel Ahmed Al-Jubeir, Minister of Foreign Affairs of the Kingdom of Saudi Arabia before the General Assembly, 72nd Session, 20th Plenary Meeting, 23 September 2017, document A/72/PV.20; **Vol. V, Annex 83**, United Nations, Statement by H.E. Shaikh Khalid Bin Ahmed Bin Mohamed Al Khalifa, Minister of Foreign Affairs of the Kingdom of Bahrain, before the 73rd Session of the United Nations General Assembly, 29 September 2018; **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 19, Remarks of Under Secretary for Terrorism and Financial Intelligence David Cohen before the Center for a New American Security on "Confronting New Threats in Terrorist Financing", 4 March 2014.

117 **Vol. V, Annex 76**, Saudi Arabia Fact Sheet, "Qatar's History of Funding Terrorism and Extremism", 27 June 2017.

118 **Vol. VI, Annex 90**, United Nations Security Council Resolution 1624 (2005), document S/RES/1624, 14 September 2005, para. 1.

119 **Vol. II, Annex 19**, First Riyadh Agreement, 23 and 24 November 2013, Art. 1; **Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Art. 1(a); **Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, Art. 3(d).

owned and -controlled media network *Al Jazeera* to be used for this purpose, including broadcasts by *Al Jazeera Mubashir Masr* in respect of Egypt[120]. Yet *Al Jazeera* has long been used as a platform for terrorist groups, and Qatar has taken no steps to end this.

2.41 In fact, *Al Jazeera* regularly features leadership figures of the Muslim Brotherhood and Hamas, who are given a platform to propound their calls for extremism and violence[121]. The network also continues to feature leaders and spokespersons from other designated terrorist organizations, including Al-Qaida's Syria branch, the Al Nusra Front[122].

2.42 The Appellants have denounced *Al Jazeera* and other Qatari media that continue to serve as platforms for extremist and terrorist groups[123]. They are not alone in exposing that, while purporting to be a "news outlet", *Al Jazeera* serves as an instrument to destabilize the region.

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120 *Ibid.*

121 See, e.g., **Vol. VI, Annex 101**, Video Excerpts of Yusuf Al-Qaradawi, *Al-Jazeera Television*, 28-30 January 2009; **Vol. VI, Annex 102**, Video Excerpt of Yusuf Al-Qaradawi, 'Sharia and Life', *Al-Jazeera Television*, 17 March 2013; see also **Vol. VI, Annex 113**, A. Tamimi, "Hamas' Political Document: What to Expect", *Al Jazeera*, 1 May 2017.

122 See, e.g., statements made by the leader of Al Nusra Front on Al Jazeera: **Vol. VI, Annex 111**, "Al-Nusra Leader Jolani Announces Split from al-Qaeda, *Al Jazeera*, 29 July 2016.

123 See **Vol. V, Annex 80**, United Nations, Statement by H.E. Shaikh Khalid Bin Ahmed Bin Mohamed Al Khalifa, Minister of Foreign Affairs of the Kingdom of Bahrain, before the General Assembly, 72nd Session, 20th Plenary Meeting, 23 September 2017, document A/72/PV.20; **Vol. V, Annex 81**, United Nations, Statement of H.E. Adel Ahmed Al-Jubeir, Minister of Foreign Affairs of the Kingdom of Saudi Arabia before the General Assembly, 72nd Session, 20th Plenary Meeting, 23 September 2017, document A/72/PV.20; **Vol. V, Annex 82**, United Nations, Statement of H.E. Adel Ahmed Al-Jubeir, Minister of Foreign Affairs of the Kingdom of Saudi Arabia before the General Assembly, 73rd Session, 28 September 2018.

D. VIOLATION OF THE PRINCIPLE OF NON-INTERVENTION

2.43 The principle of non-intervention in the internal affairs of States is well established in international law[124]. It is the corollary of the principles of sovereign equality, political independence, and self-determination enshrined in the Charter of the United Nations[125]. Qatar's purposeful and systematic intervention in the internal affairs of the Appellants, including through its support for terrorist groups and extremist ideologies, is a flagrant violation of this fundamental principle of general international law.

2.44 Qatar has continued to interfere in the internal affairs of its neighbouring States. Notably, a 16 September 2017 judgment of Egypt's Court of Cassation confirms that between 2011 and 2013, former President Morsi and

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124 See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 106, para. 202; **Vol. VI, Annex 86**, United Nations, General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, document A/RES/25/2625, 24 October 1970. See also **Vol. VI, Annex 85**, United Nations, General Assembly Resolution 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, document A/RES/20/2131, 21 December 1965, para. 2 ("no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State"); **Vol. II, Annex 3**, Pact of the League of Arab States, signed at Cairo on 22 March 1945, 70 *UNTS* 237, Art. 8 ("Every member State of the League shall respect the form of government obtaining in the other States of the League . . . and shall pledge itself not to take any action tending to change that form."); Charter of the Organization of African Unity, signed at Addis Ababa on 25 May 1963, 479 *UNTS* 39, Art. III ("The Member States . . . affirm and declare their adherence to the following principles: . . . [n]on-interference in the internal affairs of States."); Charter of the Organization of American States, signed at Bogotá on 30 April 1948, 119 *UNTS* 47, Art. 15 ("No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.").

125 Charter of the United Nations, 24 October 1945, 1 *UNTS* XVI, Arts 1(2), 2(1) and 2(4).

other leadership figures in the then Muslim Brotherhood Government were paid by Qatari intelligence agents to disclose military and other secret information vital to Egypt's national security[126].

2.45 In another example, Qatar offered lucrative financial incentives to selected Bahraini nationals, along with their entire families, to naturalize as Qatari citizens and emigrate to Qatar. These offers were targeted at Bahrainis who held or had held sensitive and high-level offices. This obviously raises a serious risk of compromising national security and interest. Bahrain strongly protested these practices on numerous occasions through diplomatic and other channels, including through the committees established to monitor compliance with the Riyadh Agreements[127].

E. QATAR'S REPUDIATION OF THE RIYADH AGREEMENTS

2.46 That Qatar was not willing to be bound by the obligations in the Riyadh Agreements, even formally, was made clear in a letter to the Secretary General of the GCC on 19 February 2017[128]. Qatar claimed that "the subject of this agreement has been exhausted" and called upon the GCC countries to "agree to terminate the Riyadh Agreement which has been overtaken by events at the international and regional levels."[129] It also claimed, for the first time, that the Riyadh Agreements constituted an "abandonment" of the GCC Charter and did not "serve the interests and objectives of the GCC", calling for a return

126 **Vol. VII, Annex 137**, *Morsi and others v. Public Prosecution*, Case No. 32611, Judgment of the Court of Cassation of the Arab Republic of Egypt (Criminal Chamber), 16 September 2017.

127 See, e.g., **Vol. V, Annex 64**, Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014.

128 **Vol. V, Annex 72**, Letter of 19 February 2017 from the Minister of Foreign Affairs of Qatar to the Secretary-General of the GCC.

129 *Ibid.*

to the GCC principles[130]. Seen as a whole, and in the context of Qatar's overall conduct, this letter amounted to a repudiation by Qatar of its obligations under the Riyadh Agreements. It also demonstrated Qatar's unwillingness to cease its hostile policy against Egypt, including Qatar's continuing support of the Muslim Brotherhood, in disregard of its express commitments.

F. RANSOM PAYMENTS TO TERRORISTS

2.47 Shortly thereafter, in April 2017, Qatar sent hundreds of millions of dollars to Iraq on a Qatar Airways jet, as a purported ransom payment for the release of the kidnapped members of the Qatari royal family[131]. Iraqi authorities seized the money on board the plane[132]. However, Qatar persisted in its efforts by brokering a deal with Qasem Soleimani – the leader of the Iranian Islamic Revolutionary Guard Corps (***IRGC***), designated as a sanctioned terrorist by,

130 *Ibid*.

131 **Vol. VI, Annex 120**, P. Wood, "'Billion Dollar Ransom': Did Qatar Pay Record Sum?", *BBC*, 17 July 2018; **Vol. VI, Annex 117**, J. Warrick, "Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages", *The Washington Post*, 28 April 2018.

132 **Vol. VI, Annex 117**, J. Warrick, "Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages", *The Washington Post*, 28 April 2018.

inter alia, the United Nations[133] – to release the kidnapped members of the royal family, partly in exchange for an influx of cash to Iran's IRGC and its affiliated sectarian militia, Iraq's Kata'ib Hezbollah, as well as Hayat Tahrir al-Sham, formerly known as Al-Nusra Front, an Al-Qaida affiliate[134]. Contemporaneous text and telephone messages from Qatari officials confirm the ransom payments[135]. Ultimately, Qatar was successful in delivering as much as US$1 billion[136]. In response, Egypt called on the United Nations Security

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133 Soleimani has been sanctioned by the UN, EU, and United States. See **Vol. VI, Annex 99**, United Nations Security Council, "The List established and maintained pursuant to Security Council res. 223 (2015)", generated on 23 November 2018https://scsanctions.un.org/fop/fop?xml=htdocs/resources/xml/en/consolidated.xml&xslt=htdocs/resources/xsl/en/iran.xsl; **Vol. VI, Annex 91**, Council Implementing Regulation (EU) No 611/2011 of 23 June 2011 Implementing Regulation (EU) No 422/2011 Concerning Restrictive Measures in View of the Situation in Syria, 2011 O.J. (L 164/1); **Vol. VII, Annex 132**, United States Department of Treasury Press Release, "Treasury Sanctions Five Individuals Tied to Iranian Plot to Assassinate the Saudi Arabian Ambassador to the United States", 11 October 2011; **Vol. VII, Annex 131**, United States Department of Treasury Press Release, "Administration Takes Additional Steps to Hold the Government of Syria Accountable for Violent Repression Against the Syrian People", 18 May 2011; **Vol. VII, Annex 129**, United States Department of Treasury Press Release, "Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism", 25 October 2007.

134 **Vol. VI, Annex 117**, J. Warrick, "Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages", *The Washington Post*, 28 April 2018. In one text, the Ambassador of Qatar to Iraq stated that US$50 million would be paid to Qassem Soleimani, US$50 million to a provincial government official who facilitated the negotiations, US$25 million to Kata'ib leader Abu Hussain, and US$20 million to an Iranian official. *Ibid*.

135 **Vol. VI, Annex 117**, J. Warrick, "Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages", *The Washington Post*, 28 April 2018. The Washington Post released the messages. **Vol. VI, Annex 121**, "Hacked Phone Messages Shed Light on Massive Payoff that Ended Iraqi Hostage Affair", *The Washington Post*, Undated.

136 **Vol. VI, Annex 117**, J. Warrick, "Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages", *The Washington Post*, 28 April 2018.

Council to open an investigation into Qatar's payment as a ransom to terrorist groups[137].

2.48 United Nations Security Council Resolution 2133 (2014) states that ransom payments to terrorist groups "create[] more victims and perpetuate[] the problem" and "are one of the sources of income which supports their recruitment efforts, strengthens their operational capability to organize and carryout terrorist attacks"[138]. Accordingly, the Resolution explicitly "[c]alls upon all Member States to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages"[139]. United Nations Security Council Resolution 2199 (2015), adopted under Chapter VII, reiterated this call and reaffirmed that the obligation to freeze assets of those designated under the ISIL Da'esh/Al-Qaida Sanctions Committee applies to the payment of ransoms to individuals, groups, undertakings or entities on that list, regardless of how or by whom the ransom is paid[140]. Similarly, the International Convention for the Suppression of the Financing of Terrorism (***ICSFT***) prohibits providing funds that may be used to carry out terrorist acts[141].

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137 **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 10, United Nations Security Council, 7962nd Meeting, document S/PV.7932, 8 June 2017, Statement of Egypt, p. 16. See also **Vol. VI, Annex 97**, United Nations Security Council, 8007th Meeting, document S/PV.8007, 20 July 2017.

138 **Vol. VI, Annex 92**, United Nations Security Council Resolution 2133 (2014), document S/RES/2133, 27 January 2014.

139 *Ibid*.

140 **Vol. VI, Annex 94**, United Nations Security Council Resolution 2199 (2015), adopted by the Security Council at its 7395th meeting, document S/RES/2199, 12 February 2015.

141 The ICSFT prohibits "provid[ing] or collect[ing] funds . . . in the knowledge that they are to be used, in full or in part, in order to carry out" terrorist acts. **Vol. II, Annex 12**, ICSFT, Art. 2.

2.49 In short, the payment of the ransom merely confirmed that Qatar was intent on unlawfully supporting extremists and terrorist groups.

Section 5. The Appellants have reacted lawfully to Qatar's violations of international law

2.50 Faced with Qatar's multiple and continued breaches of its international obligations, and after years of diplomatic efforts, the Appellants were left with little choice but to take action in order to induce Qatar to comply with its international obligations.

2.51 The measures that the Appellants took in June 2017, including those outlined in this Chapter, were the culmination of a lengthy deliberative process conducted through the framework of the Riyadh Agreements and other diplomatic exchanges.

A. THE AIRSPACE RESTRICTIONS WERE ADOPTED BY THE APPELLANTS AS LAWFUL COUNTERMEASURES

2.52 On 5 June 2017, the Appellants severed diplomatic relations with Qatar and adopted a number of other measures, including the airspace restrictions that form the basis for Qatar's claims in its Applications to the ICAO Council. Those measures were intended to induce Qatar to comply with its international obligations, and thus constitute lawful countermeasures under customary international law[142].

2.53 By notices to airmen (***NOTAMs***) issued on 5 June 2017, the Appellants restricted the airspace over their respective territories in respect of

[142] The preliminary objections made by the Appellants before the ICAO Council, including their good faith invocation of countermeasures, are entirely without prejudice to the Appellants' position on the merits of the claim made by Qatar under the IASTA. See also **Vol. III, Annex 24**, ICAO Preliminary Objections, para. 8.

overflight by Qatar-registered aircraft. The NOTAMs were revised later that week after coordination between the ICAO Middle East Regional Office (***ICAO MID Office***) in Cairo and the States concerned. The revised NOTAMs clarified that the airspace restrictions applicable to Qatar-registered aircraft were limited to the Appellants' airspace – i.e., the airspace over the territory of each of the Appellants, including their respective territorial seas within the relevant flight information region(s) (***FIR(s)***) – and did not apply to international airspace over the high seas[143].

2.54 The Appellants cooperated extensively and in a timely manner with both ICAO and Qatar to agree to and implement contingency routes and related contingency arrangements and to avoid unnecessary disruption of air traffic as a result of the airspace restrictions. Notably, the Appellants worked in close collaboration with the ICAO MID Office in Cairo to adopt urgent contingency measures to ensure the continuing safety, regularity, and efficiency of air traffic. Further, the Appellants have made it clear that their airspace and airports remain open to Qatar-registered aircraft in cases of emergency. In any event, the airspace over the high seas within the FIR of each of the Appellants remains available to Qatar-registered aircraft, subject to normal procedures relating to air traffic services route connectivity and successful safety assessment.

B. COUNTERMEASURES AS A CIRCUMSTANCE PRECLUDING WRONGFULNESS UNDER GENERAL INTERNATIONAL LAW

2.55 International law permits a State to adopt countermeasures in response to a breach by another State of its international obligations. Countermeasures

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143 **Vol. V, Annex 35**, ICAO, Working Paper presented by the Secretary General, Council – Extraordinary Session, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, ICAO document C-WP/14639, 14 July 2017, para. 2.1.

are non-forcible measures consisting of the temporary suspension of the performance of one or more international obligations, adopted with a view to inducing the wrongdoing State to comply with its international obligations. The wrongfulness of conduct of a State is precluded to the extent that it constitutes a lawful countermeasure.

2.56 The right of States under international law to adopt countermeasures in response to a violation of obligations by another State has been repeatedly and consistently affirmed by both the Court and international arbitral tribunals:

(a) In *Gabčíkovo-Nagymaros Project*, having found that Czechoslovakia had committed an internationally wrongful act (i.e., breached its international obligations), the Court turned to consider:

> "whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary's prior failure to comply with its obligations under international law."[144]

In that regard, the Court held that "in order to be justifiable, a countermeasure must meet certain conditions"[145]. Although it ultimately concluded that, on the facts before it, those conditions had not been fulfilled, the Court recognized that the wrongfulness of conduct that would otherwise constitute a breach of a State's

144 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 55, para. 82.

145 *Ibid*., para. 83.

international obligations could in principle be precluded to the extent that it qualified as a lawful countermeasure[146].

(b) The Court in *Application of the Interim Accord* also accepted the possibility that valid countermeasures, in principle, may afford a defence to a claim of breach of obligation. In particular, it discussed (and eventually dismissed on its merits), Greece's argument that any non-compliance by it with its obligations under the Interim Accord by reason of its objection to the admission of Macedonia to NATO "could be justified . . . as a countermeasure under the law of State responsibility"[147]; in doing so, it made reference to "the law governing countermeasures"[148].

(c) Previously, the Arbitral Tribunal in the *Air Services Agreement* case had recognized the legality of countermeasures, explaining that:

> "Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another

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146 *Ibid*. In a similar fashion, in *Military and Paramilitary Activities in and against Nicaragua*, the Court observed that the internationally wrongful acts of which Nicaragua was accused—if proven and found to be attributable to it—might "have justified proportionate counter-measures on the part of the State which had been the victim of these acts . . .": *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 127, para. 249.

147 *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, I.C.J. Reports 2011*, p. 680, para. 114, and see *ibid*., p. 682, paras 120 and 121.

148 *Ibid*., p. 692, para. 164.

> State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'counter-measures'."[149]

2.57 Relying on relevant international precedents prior to 2001, the United Nations International Law Commission (***ILC***), in the context of its work on the law of State responsibility likewise recognized that, to the extent that non-performance of an obligation is undertaken by way of valid countermeasure, in principle it may constitute a circumstance precluding wrongfulness. Article 22 of the *Articles on Responsibility of States for Internationally Wrongful Acts* (***ARSIWA***) provides:

> "The 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."[150]

2.58 As a matter of customary international law, there is no requirement that countermeasures should involve suspension of the same or a closely related obligation, or an obligation arising under the same treaty as the obligation breached (so-called "reciprocal countermeasures")[151].

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149 *Air Service Agreement of 27 March 1946 between the United States of America and France*, Award, 9 December 1978, *RIAA*, Vol. XVIII, p. 443, para. 81.

150 **Vol. II, Annex 13**, International Law Commission (***ILC***), 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) (***ARSIWA***), Art. 22.

151 *Ibid.*, *Introductory Commentary to Part Three*, Chapter II, para. 5. The term "reciprocal countermeasures" refers to "countermeasures which involve suspension of performance of obligations towards the responsible State 'if such obligations correspond to, or are directly connected with, the obligation breached'". *Ibid.* (internal reference omitted).

2.59 Before the ICAO Council, Qatar did not dispute the availability, in principle, of countermeasures as a circumstance precluding the wrongfulness of the airspace restrictions under general international law. Instead, it took the narrow position that the question of whether or not the airspace restrictions adopted by the Appellants constitute valid countermeasures could have no impact on the jurisdiction of the ICAO Council, and it was instead a matter for the merits[152].

2.60 Further, Qatar did not seek to suggest that the IASTA precludes States parties from resorting to countermeasures involving the suspension of performance of their obligations in response to a breach by another Contracting Party of its international obligations.

2.61 As such, it is common ground that the States parties to the IASTA in principle retain their sovereign rights under customary international law to adopt measures involving the suspension of performance of their obligations owed to another State party under the Convention by way of countermeasure in response to a prior breach of international obligations by that State[153].

C. IMPLEMENTATION AND ENFORCEMENT OF THE RIYADH AGREEMENTS

2.62 Quite apart from the undoubted (and undisputed) availability of countermeasures as a circumstance precluding wrongfulness under general

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152 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, paras 76-78.

153 In respect of Egypt, the measures were imposed to induce Qatar's compliance with its general international law obligations, including under the applicable international treaties and United Nations Resolutions on terrorism and were justified on this basis alone. In addition, they were also aimed at inducing compliance with the obligations owed to Egypt under the Riyadh Agreements as a third-party beneficiary. See Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, 1155 *UNTS* 331, Art. 36; **Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014, Art. 2; and **Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, Art. 3(d).

international law, the Riyadh Agreements expressly foresee and recognize the possibility that, in the event of a breach by one State party, the other States parties would be entitled to take action in response.

2.63 In particular, the Implementing Mechanism provides for periodic meetings of the Foreign Ministers of the States parties in order to monitor the implementation of the Riyadh Agreement (and the reiteration of the obligations undertaken in the Implementing Mechanism itself). In this regard, the Foreign Ministers are to report to the Heads of State, and it was stipulated that:

> "The leaders shall take the appropriate action towards what the Ministers of Foreign Affairs raise to them regarding any country that has not complied with the signed agreement by the GCC Countries."[154]

2.64 The final provision of the Implementing Mechanism puts beyond any doubt that the States parties thereto envisaged that action might be taken to induce compliance in the event of a breach of the obligations undertaken. It provides that:

> "[i]f any country of the GCC Countries failed to comply with this mechanism, the other GCC Countries shall have the right to take any appropriate action to protect their security and stability."[155]

2.65 The possibility of action to ensure the due implementation of the obligations undertaken in the Riyadh Agreement and the Implementing Mechanism was reiterated in the Supplementary Riyadh Agreement adopted in November 2014. Article 3(a) of the Supplementary Riyadh Agreement built on and linked the specific obligations undertaken therein to the obligations under

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154 **Vol. II, Annex 20**, Implementing Mechanism, 17 April 2014.

155 *Ibid*.

the preceding agreements, stipulating that "non-committing to any of the articles of the Riyadh Agreement and its executive mechanism amounts to a violation of the entirety of them."[156] Further, Article 4 of the Supplementary Riyadh Agreement – in respect of which Egypt is also a beneficiary[157] – stressed that the First Riyadh Agreement, the Implementing Mechanism and the Supplementary Riyadh Agreement itself:

> "requires the full commitment to its implementation. The leaders have tasked the intelligence chiefs to follow up on the implementation of the results of this supplementary agreement and to report regularly to the leaders, *in order to take the measures they deem necessary to protect the security and stability of their countries*."[158]

2.66 The States parties to the Riyadh Agreements thus expressly recognized the possibility that any breach of the obligations undertaken in the Riyadh Agreements, including the specific obligations in respect of non-intervention in the internal affairs of Egypt, would permit the other States parties to respond by adopting measures in order to induce compliance. In such circumstances, Qatar could have been in no doubt that, if it failed to cease its internationally wrongful conduct and comply with the obligations it had undertaken, it was possible, and indeed likely, that the other States would adopt countermeasures .

Section 6. Summary

2.67 Qatar's Application to the ICAO Council seeks to focus on the narrow question of whether the airspace restrictions are consistent with the Appellants'

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156 **Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, Art. 3(a).

157 See above, para. 2.61, note 153.

158 **Vol. II, Annex 21**, Supplementary Riyadh Agreement, 16 November 2014, Art. 4 (emphasis added).

obligations under the Chicago Convention and the IASTA. In framing its Applications in this manner, however, Qatar improperly seeks to isolate only one element of the wider dispute between the Parties, and ignores the real issue in dispute, which concerns Qatar's own internationally wrongful acts. Qatar similarly fails to acknowledge that its own conduct provoked the severance of relations and the adoption by the Appellants of the measures of which Qatar now complains.

2.68 Having repudiated the obligations undertaken in the Riyadh Agreements and repeatedly violated multiple other obligations under international law, Qatar refused to make any good-faith efforts to discuss these issues with the Appellants, and refused to put an end to and remedy its breaches of its international obligations. Instead, Qatar has continued its internationally wrongful conduct and maintained its position that it will not cease these internationally wrongful acts.

2.69 This is the wider context of the artificially narrow matter that Qatar has sought to bring before the ICAO Council, which relates to one of the measures adopted by the Appellants with a view to inducing Qatar to cease its internationally wrongful conduct. As is explained below in Chapter V, this course of events forms the necessary background that must be taken into account in ascertaining the competence of the ICAO Council to adjudicate the disagreements submitted by Qatar in its Applications.

CHAPTER III
FIRST GROUND OF APPEAL: LACK OF DUE PROCESS

3.1 The first ground of appeal against the Decision relates to the procedure followed by the ICAO Council. The ICAO Council failed to uphold fundamental principles of due process, which also constitute general principles of law, to the detriment of the Appellants (who were the respondents before the ICAO Council). These failures were so grave and so widespread as to denude the proceedings and the Decision of any judicial character.

3.2 This may be seen from the following summary:

(a) Patently insufficient time was allocated to the Appellants to present their case before the ICAO Council; what is more, the Appellants were given the same length of time as Qatar, although each of the three States in respect of Application (B) was appearing as a respondent party in its own right and although presenting a collective case required additional time as compared to that needed by Qatar as a single party;

(b) The Decision was taken by secret ballot despite a request by the Appellants for a roll call vote with open voting;

(c) The ICAO Council incorrectly required 19 votes to uphold the Preliminary Objections, out of 33 members entitled to participate in the vote, even though Article 52 of the Chicago Convention provides only that a simple "majority" is needed (i.e., 17 votes);

(d) The ICAO Council disposed of the two Preliminary Objections raised by the Appellants as a single plea, even though they were being advanced as separate grounds, each being of itself dispositive of the

ICAO Council's competence to hear the dispute before it. The ICAO Council thus took its Decision on the wrong premise that there was a single objection;

(e) The Decision failed to comply with the fundamental requirement to state reasons, which is also an express requirement under ICAO's own procedural rules;

(f) Indeed, reasons could not be provided at all, as there was no deliberation or even discussion in the ICAO Council, but instead a (secret) vote was taken immediately after oral argument, this constituting an abdication by the ICAO Council of its collegial judicial function; and

(g) The fact that a decision was taken without any discussion or deliberation indicates that the Decision had been pre-determined, quite possibly because the ICAO Council representatives were acting on instructions from their governments.

3.3 This Chapter starts with a description of the ICAO Council's elementary duty to uphold due process (Section 1). It proceeds to describe the chronology of the proceedings before the ICAO Council (Section 2), and then turns to the defects in the procedures adopted by the ICAO Council and ultimately its Decision (Section 3). The Appellants respectfully invite the Court to find that, tainted as it is by numerous and grave irregularities, the Decision of the ICAO Council is a null and void (Section 4).

Section 1. The judicial function of the ICAO Council

3.4 In carrying out the judicial functions conferred upon it by Article II, Section 2 of the IASTA, the ICAO Council was required to respect the

Appellants' fundamental rights of due process. In this case, the ICAO Council not only failed to follow the ICAO Rules, but it also adopted a procedure which, viewed in its totality, was inimical to a properly conducted judicial process. What is more, it failed to include the safeguards necessary to preserve the integrity of the process. In particular, the ICAO Council failed to take notice of or act upon the fact that a member of ICAO's Legal and External Relations Bureau who advised the ICAO Council during the Article 54 proceedings brought by Qatar, subsequently advised and acted for Qatar before the ICAO Council in the IASTA proceedings arising out of the *same dispute*[159]. It is to be noted in that connection that the Legal and External Affairs Bureau of ICAO was on occasion entrusted with judicial duties by the ICAO Council. By failing to identify and treat this appearance before it as a conflict of interest, the ICAO Council failed to instil confidence in the process for all parties involved.

3.5 That the ICAO Council was required in this case to exercise a judicial function – i.e., the binding resolution of a legal dispute concerning the interpretation or application of the IASTA – appears to be common ground between the Parties[160]. Under Chapter XVIII of the Chicago Convention, the

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159 See **Vol. V, Annex 34**, Article 54(n) Record, ICAO Council – 211th Session, Summary Minutes of the Tenth Meeting of 23 June 2017, ICAO document C-MIN 211/10, 11 July 2017, (where Mr Augustin is listed as a member of the Secretariat in the Article 54 proceedings) and compare **Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, p. 2 (where Mr Augustin is listed as an advisor for Qatar in the subsequent IASTA proceedings).

160 Cf. **Vol. III, Annex 24**, ICAO Preliminary Objections, paras 17-21; **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, paras 12-15. Before the ICAO Council, Qatar, whilst disputing that the Council acted in a "judicial capacity" when performing its functions under Article 84, accepted that it, at the least acted in a "quasi-judicial capacity". As a consequence, it took the position that it was not "necessary to decide whether the Council, when performing its functions under Article 84 of the Chicago Convention and Article II, Section 2 of the IASTA, acts in a judicial or quasi-judicial capacity nor what difference would practically entail". *Ibid*., para. 15.

ICAO Council is empowered to adjudicate any disagreement relating to the interpretation or application of the Convention between two or more Contracting States. Article II, Section 2 of the IASTA provides that:

> "If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation, the provisions of Chapter XVIII of the above-mentioned [Chicago] Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the above-mentioned Convention."

3.6 It should also be uncontroversial that when rendering a decision in performance of the judicial functions conferred on it by Article II, Section 2 of the IASTA and, in turn, Article 84 of the Chicago Convention, the ICAO Council must proceed with respect for the fundamental rules of due process which "lie at the very foundation of the legal system"[161] and are inherent to any judicial proceeding[162].

3.7 Without compliance with fundamental guarantees of due process, there can be no judicial process nor decision to speak of. Thus, the Court has held that "a fundamental error in procedure which has occasioned a failure of justice" or "a fundamental fault in the procedure followed" by a United Nations

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161 B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (2006), p. 390; H. Lauterpacht, *The Development of International Law by the International Court* (reprinted ed., 1982), p. 39.

162 R. Kolb, "General Principles of Procedural Law", in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm and C. Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2012), pp. 872, 876 and 877.

specialized agency may be grounds for review of a decision[163]. In addition, several international instruments provide for the setting-aside of arbitral awards tainted by a failure to follow due process. These include the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)[164], the ICSID Convention (1966)[165], and the UNCITRAL Model Law (1985 and 2006)[166]. Similarly, in its 1955 Draft Convention on Arbitral Procedure (which ultimately took the form of Model Rules on Arbitral Procedure to be adopted by States) the ILC gave effect to the rule that "a serious departure from a fundamental rule of procedure" is a ground for nullification of an award[167]. Among such "fundamental" rules are the right to a reasoned decision and the right to equal and impartial treatment[168].

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163 *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 209, para. 92; *Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, pp. 23-24, paras 30-31, quoting the grounds for review included in the Statute of the United Nations Administrative Tribunal and the Statute of the International Labour Organization Administrative Tribunal.

164 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 *UNTS* 38, Art. V.

165 ICSID Convention, adopted on 18 March 1965, 575 *UNTS* 159, entered into force on 14 October 1966, Art. 52(1)(d).

166 **Vol. II, Annex 15**, UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, Arts 34(2)(a)(iv) and 36(1)(a)(iv).

167 **Vol. II, Annex 5**, ILC, Draft Convention on Arbitral Procedure adopted by the ILC at its Fifth Session, document A/CN.4/92 (1955), Art. 30(c); **Vol. II, Annex 7**, ILC, Model Rules on Arbitral Procedure adopted by the ILC at its Tenth Session, document A/CN.4/SER.A/1958/Add.l (1958), Art. 35(c).

168 **Vol. II, Annex 5**, ILC, Draft Convention on Arbitral Procedure adopted by the ILC at its Fifth Session, document A/CN.4/92 (1955), Art. 30 and commentary thereto; **Vol. II, Annex 7**, ILC, Model Rules on Arbitral Procedure adopted by the ILC at its Tenth Session, document A/CN.4/SER.A/1958/Add.l (1958), Art. 35 and commentary thereto.

3.8 The ICAO Council, from its inception, appears to have been aware of the structural difficulties it would face in acquitting itself of its judicial function under Chapter XVIII of the Chicago Convention[169].

3.9 The first Chairman of the ICAO Council, Edward Warner, observed in an article published in 1946, that the ICAO Council:

> "was not shaped for a primarily judicial function. It is large; its membership is subject to change at any time at the discretion of the states which the members represent; and, above all, it is a group of national representatives, whereas true international economic regulation could be better operated by a tribunal of individuals whose sole and direct responsibility would be to the international organization and to the common interest of the international community."[170]

3.10 Even after the adoption in 1957 of the ICAO Rules, which lay down the procedure to be followed by the ICAO Council in its consideration of disagreements submitted under Article 84 of the Chicago Convention and Article II, Section 2 of the IASTA[171], doubts lingered, with commentators taking the view that the ICAO Council was equipped to resolve disputes of a

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169 See **Vol. VI, Annex 126**, G. F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", (1974) 12 *Canadian Yearbook of International Law* 153, p. 157.

170 **Vol. VI, Annex 128**, E. Warner, "Notes from PICAO Experience", (1946) 1 *Air Affairs* 30, p. 37.

171 **Vol. II, Annex 6**, ICAO Rules, Art. 1(1) and Parts I and III. The Rules also laid down the procedure to be followed in respect of a complaint submitted under Art. II, Sec. I of the IASTA and Art. IV, Sec. 2 of the International Air Transport Agreement: *ibid*., Art. 1(2) and Parts II and III.

technical nature only[172]. In September 2018, the ICAO Secretariat directed the ICAO Legal Committee to consider whether the ICAO Rules needed to be revised and "aligned with the current ICJ Rules"[173].

3.11 As noted by the Court in the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, the "appeal to the Court contemplated by the Chicago Convention and [the IASTA] must be regarded as an element of the general regime established in respect of ICAO" and was designed to ensure "a certain measure of supervision by the Court"[174]. In his declaration appended to the Court's Judgment, Judge Lachs noted, with specific reference to the functions of the ICAO Council under Article 84 of the Chicago Convention (and in, turn, Article II, Section 2 of the IASTA), that "in view of its limited experience on matters of procedure, and being composed of experts in other fields than law, [the ICAO Council] is no doubt in need of guidance, and it is surely this Court which may give it."[175] It is indeed the function of the Court to set and supervise judicial decision-making standards in the international legal system: "[t]he Court is the principal judicial organ of the organised

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172 **Vol. VI, Annex 125**, T. Buergenthal, *Law-making in the International Civil Aviation Organization* (1969), pp. 195-197; **Vol. VI, Annex 126**, G. F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", (1974) 12 *Canadian Yearbook of International Law* 153, p. 155; **Vol. VI, Annex 122**, R. I. R. Abeyratne, "Law Making and Decision Making Powers of the ICAO Council – A Critical Analysis", (1992) 41 *Zeitschrift für Luft- und Weltraumrecht* 387, p. 394; **Vol. VI, Annex 123**, J. Bae, "Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication", (2013) 4(1) *Journal of International Dispute Settlement* 65, p. 70.

173 **Vol. V, Annex 54**, 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.

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

175 *Declaration of Judge Lachs, Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), I.C.J. Reports 1972*, p. 75.

international community as a whole, and not less than that"[176]. As the guardian of the integrity of the international judicial process, it falls to the Court to exercise its supervisory authority in respect of procedural deficiencies by the ICAO Council.

3.12 Such alleged deficiencies were at issue before the Court in the *India v. Pakistan* case. On the facts of that case, however, the Court rejected India's complaints, holding that the alleged irregularities, if established, did not rise to the level of "prejudic[ing] in any fundamental way the requirements of a just procedure."[177] By contrast, as described in more detail below, in the present case the ICAO Council *did* prejudice the requirement of a just procedure in a manner that is manifest, fundamental and comprehensive. The wholly inadequate and inappropriate procedure followed by the ICAO Council in hearing and adjudicating upon the disagreement submitted to it by Qatar calls for the Court to exercise its supervisory function and to find that the Decision of the ICAO Council is null and void.

Section 2. The proceedings before the ICAO Council

A. QATAR'S APPLICATIONS

3.13 On 5 June 2017, Bahrain, Egypt, Saudi Arabia and the UAE adopted certain measures in respect of Qatar-originating and -destined air traffic. On the

176 J. Crawford, "The International Court of Justice, Judicial Administration and the Rule of Law", in D. W. Bowett and others, *The International Court of Justice, Process, Practice and Procedure* (1997), p. 113.

177 *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), I.C.J. Reports 1972*, pp. 69-70, paras 44-45.

same day, Qatar submitted a letter to ICAO's Secretary-General regarding those measures[178].

3.14 By a series of letters sent between 5 and 17 June 2017[179], Qatar requested the initiation of certain procedures against the Appellants concerning alleged violations of provisions of the Chicago Convention, the IASTA, as well as ICAO Assembly Resolution A39-15. In particular, Qatar requested that a special session of the ICAO Council be convened under Article 54(n) of the Chicago Convention to consider the "matter of the actions of the [Appellants] to close their airspace to aircraft registered in the State of Qatar"[180]. The Article 54(n) process refers to the consideration by the ICAO Council of any matter referred to it relating to the Convention by any contracting State, and is not a judicial proceeding subject to the Court's appellate jurisdiction. In an extraordinary session held on 31 July 2017 pursuant to Article 54(n) of the Chicago Convention, the ICAO Council considered the issue of measures taken by Egypt, Bahrain, Saudi Arabia and the UAE to close their airspace to aircraft registered to the State of Qatar. It made a determination that the States involved

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178 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 2, Letter from Qatar dated 5 June 2017, ref. QCAA/ANS.02/502/17, to the Secretary General.

179 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 2, Letter from Qatar dated 5 June 2017, ref. QCAA/ANS.02/502/17, to the Secretary General; Exhibit 3, letter of the Qatar Civil Aviation Authority to the President of the Council, dated 8 June 2017, ref. 2017/15984; Exhibit 4, Letter from the Minister of Transport and Communications of Qatar dated 13 June 2017 to the Secretary General, ref. 2017/15993; and Exhibit 5, Letter to the Secretary General from the Chairman of the CAA of Qatar dated 13 June 2017, ref. 2017/15994. See also **Vol. V, Annex 31**, Request of the State of Qatar for Consideration by the ICAO Council under Article 54(n) of the Chicago Convention, 15 June 2017.

180 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 3, letter of the Qatar Civil Aviation Authority to the President of the Council, dated 8 June 2017, ref. 2017/15984. Acceding to this request, the ICAO Council convened an extraordinary meeting to consider Qatar's request on 31 July 2017. The record relating to Qatar's application under Article 54(n) of the Chicago Convention can be found at **Vol. V, Annexes 33-41 and 56**.

had developed and put in place contingency arrangements to facilitate the flow of traffic over the high seas airspace in the Gulf region for the safe operation of civil aviation[181].

3.15 At the same time, Qatar also stated its intention to initiate judicial proceedings before the ICAO Council under Article 84 of the Chicago Convention and Article II, Section 2 of the IASTA[182].

3.16 On 15 June 2017, two applications and accompanying memorials were submitted by Qatar, one purported to be an application under Article 84 of the Chicago Convention, whilst the other purported to be a "complaint" under Article II, Section 1 of the IASTA[183]. As the ICAO Secretariat identified certain

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181 **Vol. V, Annex 41**, ICAO Council – Summary Minutes of the Meeting of the Extraordinary Session of 31 July 2017, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, 22 August 2017, para. 60.

182 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 2, Letter from Qatar dated 5 June 2017, ref. QCAA/ANS.02/502/17, to the Secretary General of ICAO, pp. 1 and 6, penultimate paragraph; **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 4, Letter from the Minister of Transport and Communications of Qatar dated 13 June 2017 to the Secretary General of ICAO, ref. 2017/15993, p. 2; **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 5, Letter to the Secretary General from the Chairman of the CAA of Qatar dated 13 June 2017, ref. 2017/15994.

183 **Vol. III, Annex 22**, Request for the Intervention of the ICAO Council in the Matter of the Actions of the Arab Republic of Egypt, the Kingdom of Saudi Arabia, the United Arab Emirates and the Kingdom of Bahrain to close their Airspace to aircraft registered in the State of Qatar, attaching Application (1) of the State of Qatar, Complaint Arising under the International Air Services Transit Agreement done in Chicago on December 7, 1944, and Application (2) of the State of Qatar, Disagreement Arising under the Convention on International Civil Aviation done in Chicago on December 7, 1944, 8 June 2017; cf. **Vol. V, Annex 41**, ICAO Council – Summary Minutes of the Meeting of the Extraordinary Session of 31 July 2017, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, 22 August 2017, paras 65 and 66.

deficiencies in these pleadings, however, Qatar was requested to rectify them and submit fresh applications[184].

3.17 By letter dated 21 October 2017, delivered to ICAO on 30 October 2017, Qatar submitted two new applications and memorials[185].

3.18 The ICAO Application and the accompanying ICAO Memorial named the Appellants as Respondents, invoking various violations of the IASTA as a result of the airspace restrictions adopted by the Appellants on 5 June 2017[186]. In particular, Qatar alleged that:

> "[o]n 5 June 2017, the Government of the [Appellants] announced, with immediate effect and without any previous negotiation or warning, that Qatar-registered aircraft are not permitted to fly to or from the airports within their territories and would be barred not only from their respective national air spaces."[187]

Qatar's request for relief, amongst other things, invited the ICAO Council to "determine that the Respondents violated by their actions against the State of Qatar their obligations under the International Air Services Transit Agreement (IASTA) and other rules of international law"[188].

3.19 By letter dated 17 November 2017, received by the Appellants on 20 November 2017, the ICAO Council set a deadline of twelve weeks (i.e.,

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184 **Vol. V, Annex 41**, ICAO Council – Summary Minutes of the Meeting of the Extraordinary Session of 31 July 2017, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, 22 August 2017, paras 65 and 66.

185 **Vol. III, Annex 23**, ICAO Application, p. 1.

186 See above, Chapter II.

187 **Vol. III, Annex 23**, ICAO Application, p. 1, paras 2 and 3.

188 **Vol. III, Annex 23**, ICAO Application, last paragraph, repeated in ICAO Memorial, Sec. (f).

until 12 February 2018) for the submission of Counter-Memorials in respect of the two Applications, as envisaged by Article 3(1)(c) of the ICAO Rules[189].

3.20 On 16 January 2018, Egypt, on behalf of the Appellants, sought an extension of the time limit for submission of the Counter-Memorials "to allow for sufficient time and ensure fair treatment of the Respondents"[190]. The request was granted by the ICAO Council on 9 February 2018, acting pursuant to Article 28(2) of the ICAO Rules; the time limit for submission of the Counter-Memorials was thus extended to 26 March 2018[191].

B. The Appellants' Preliminary Objections

3.21 On 19 March 2018, in compliance with Article 5(1) and (2) of the ICAO Rules, the Appellants raised two separate and distinct Preliminary Objections[192]. The Appellants thereby contested the jurisdiction of the ICAO Council to adjudicate the claims formulated by Qatar in its Application or, in the alternative, the admissibility of those claims.

3.22 The two Preliminary Objections may be summarized as follows:

(a) The Appellants have adopted a suite of measures in response to Qatar's multiple, grave, and persistent breaches of its international obligations relating to matters essential to the security of the Appellants, and constitute (as stated from their inception) lawful countermeasures

189 **Vol. V, Annex 43**, Letter of 17 November 2017 from the Secretary-General of ICAO to the Appellants.

190 **Vol. V, Annex 44**, Letter of 16 January 2018 from the Permanent Representative of the Arab Republic of Egypt on the ICAO Council to the President of the ICAO Council.

191 **Vol. V, Annex 45**, Letter of 9 February 2018 from the Secretary-General of ICAO to the Appellants.

192 **Vol. III, Annex 24**, ICAO Preliminary Objections.

seeking to induce compliance by Qatar with its obligations under international law. Thus, resolution of the claims submitted by Qatar would necessarily require the ICAO Council to assess all of Qatar's conduct and the totality of the three States' measures (including their proportionality), while part thereof may be said to relate to aviation matters that are within the scope of Article II, Section 2 of the IASTA. Accordingly, were it to pronounce upon the set of issues which comprise the real dispute between the Parties, the ICAO Council would perforce have to rule on matters falling outside the narrow scope of its jurisdiction in respect of interpretation or application of the IASTA (the ***First Preliminary Objection***).

(b) Qatar had not complied with a necessary precondition to the jurisdiction of the ICAO Council, contained in Article II, Section 2 of the IASTA, of first attempting to resolve the disagreement regarding airspace restrictions through negotiations with the Appellants, prior to submitting its claims to the ICAO Council; and Qatar had also failed to comply with the attendant procedural requirement in Article 2(g) of the ICAO Rules of establishing in its Memorials that negotiations to settle the disagreement had taken place but were unsuccessful (the ***Second Preliminary Objection***).

3.23 In accordance with Article 5(3) of the ICAO Rules, the proceedings on the merits in respect of Qatar's ICAO Application were suspended pending the decision of the ICAO Council on the Preliminary Objections[193].

3.24 On 30 April 2018, Qatar filed its Response[194].

3.25 On 28 May 2018, in accordance with Article 28 of the ICAO Rules, the ICAO Council acceded to a request by the Appellants to file a rejoinder[195]. Qatar protested against this decision[196]. In accordance with the brief, two-week time limit set by the ICAO Council, the Rejoinder was filed on 12 June 2018[197]. Qatar did not seek a right of reply.

3.26 On 13 June 2018, the President of the ICAO Council informed the Parties that the ICAO Council would consider the Preliminary Objections in a half-day session to be held on 26 June 2018[198].

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193 **Vol. II, Annex 6**, ICAO Rules, Art. 5(3); see also *ibid*., Art. 5(4), which provides that "[i]f a preliminary objection has been filed, the Council, after hearing the Parties, shall decide the question as a preliminary issue before any further steps are taken under these Rules".

194 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections.

195 **Vol. V, Annex 49**, Letter of 28 May 2018 from the Secretary-General of ICAO to the Appellants; **Vol. V, Annex 47**, Email of 24 May 2018 from the President of the ICAO Council to all Council Delegations. See **Vol. V, Annex 46**, Letter of 17 May 2018 from the Permanent Representative of the Arab Republic of Egypt to the President of the ICAO Council.

196 **Vol. V, Annex 48**, Letter of 28 May 2018 from the Secretary-General of ICAO to the Appellants, attaching Email of 25 May 2018 from the Delegation of Qatar to the Secretary-General of ICAO.

197 **Vol. IV, Annex 26**, ICAO Rejoinder.

198 **Vol. V, Annex 50**, Letter of 13 June 2018 from the President of the ICAO Council to the Appellants, attaching Working Paper in respect of Application (B), ICAO document C-WP/14779, 23 May 2018.

3.27 The scheduling of only one half-day session for the hearing of their Preliminary Objections was met with strong objections by the Appellants, who indicated that it would not permit them sufficient time properly to co-ordinate and present their case. This matter was discussed in an informal meeting with the President of the ICAO Council on 19 June 2018, of which no official note exists. At that stage, the President informed the Parties that the three Appellants would be treated as one side, and that each side would be given 20 minutes to present its case on the Preliminary Objections in respect of each Application. In any event, the precise schedule and format of the hearing remained in a state of flux until 26 June 2018, the day of the hearing.

C. The hearing on the Preliminary Objections

3.28 The process for the hearing was elucidated and fixed only hours before the hearing. The President of the ICAO Council orally conveyed, in a meeting held immediately prior to the hearing, that each side should present its case as to both Applications (A) and (B) simultaneously. This was notwithstanding the fact that Saudi Arabia was not a party to the proceedings relating to Application (B). In the dispute between Pakistan and India, which involved only one State on each side, the ICAO Council held *five* meetings (from 27 to 29 July 1971) to hear the Parties, deliberate, and decide on a single preliminary objection lodged by India. In stark contrast, the Parties here—the Appellants being treated as a single Party—were provided a total of 80 minutes to present their position on the two separate and distinct Preliminary Objections. Each side was afforded 25 minutes for first-round submissions and 15 minutes for rebuttal, on Applications (A) and (B). The ICAO Council heard both sides, held a vote, and reached a decision on the dispute before it in just one afternoon.

3.29 At the eighth meeting of its 214th Session on 26 June 2018, the ICAO Council heard brief oral arguments by the Parties. Immediately thereafter,

without the benefit of any transcript (only summary records are made available, months after the event), without asking any questions, and expressly forsaking any deliberations, the ICAO Council proceeded to a vote[199]. That vote was by way of secret ballot (despite the Appellants' request for a roll call with open votes) on a single question, namely whether to accept what the ICAO Council characterized as "the Preliminary Objection" in respect of each Application[200].

3.30 Despite an oral intervention by the Appellants to clarify that there were in fact two separate Preliminary Objections, each of which was capable of being dispositive of Qatar's Applications, the question put to a vote and the ICAO Council Decision refer only to a single "preliminary objection". As described in more detail below, this demonstrates a fundamental misunderstanding by the ICAO Council of the objections before it and of the manner in which they should have been determined, each separately from the other. It is also inconsistent with the Council's own previous practice of ruling separately on each preliminary objection raised by a respondent before it[201].

3.31 The ICAO Council proceeded with a secret ballot on the question "Do you accept the Preliminary Objection?". Prior to the vote, two Council members separately requested clarification as to the meaning of a "yes" or "no" vote on the question as posed. The result of the secret ballot, in which 33 votes were cast by the Members of the Council considered eligible to vote, was

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199 **Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, paras 120 *et seq*.

200 *Ibid*., para. 126.

201 See, e.g., **Vol. V, Annex 28**, Decision of the ICAO Council on the Preliminary Objections in the Matter "United States and 15 European States", 16 November 2000, in which the Council ruled on each of the three preliminary objections separately.

4 votes in favour, 23 votes against, and 6 abstentions. The end result was the rejection of "the Preliminary Objection" and affirmation of the Council's competence to consider the Applications of Qatar on the merits.

D. THE DECISION OF THE ICAO COUNCIL

3.32 The ICAO Council formally adopted its "Decision . . . on the Preliminary Objection" three days after the hearing, on 29 June 2018[202].

3.33 The ICAO Council's Decision does not contain any reasons—nor could it, of course, given the wholesale absence of deliberation. It amounts to no more than a short, negative answer to the Preliminary Objections, stating simply that "the preliminary objection of the Respondents is not accepted"[203].

Section 3. The procedure adopted by the ICAO Council violated fundamental requirements of due process and the ICAO Rules

3.34 The procedure followed by the ICAO Council in discharging its judicial functions was not in keeping with fundamental standards applicable in any international judicial proceeding. The defects from which the procedure suffered, while legally distinct, may be grouped into the following three categories:

(a) Grave and manifest violations of principles so fundamental to the very essence of any judicial process that their absence entails that there was no judicial process to speak of—in particular, failure to hold

202 **Vol. V, Annex 52**, ICAO Council Decision.

203 *Ibid*.

deliberations and render a reasoned decision, and violation of the principle of equality of arms (Subsection A)[204];

(b) Egregious abdication by the ICAO Council of its judicial functions, in violation of the Chicago Convention (Subsection B)[205]; and

(c) Violation by the ICAO Council of its duty to act in conformity with the ICAO Rules (Subsection C)[206].

3.35 These violations, individually and cumulatively, demonstrate ICAO's failure to discharge its judicial function in this case and render the Decision in respect of the ICAO Application null and void.

A. GRAVE AND MANIFEST VIOLATIONS OF FUNDAMENTAL PRINCIPLES OF DUE PROCESS

1. Requirement to hold deliberations as a collegial formation

3.36 The requirement to hold deliberations after having heard the Parties—where a hearing is held, as was the case in the ICAO Council here—is essential for judicial bodies to function in a collegial manner: collective debate is inherent in a plurality decision[207]. A collegial judicial formation cannot be reduced into as many individual opinions, separately formed, of its members. Rather, there must be a deliberative process. That is what differentiates judicial proceedings from a public opinion poll.

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204 See below, paras 3.36-3.58.

205 See below, paras 3.59-3.63.

206 See below, paras 3.64-3.65.

207 See, e.g., **Vol. VI, Annex 124**, D. Bowett, J. Crawford, I. Sinclair & A. Watts, "Efficiency of Procedures and Working Methods: Report of the Study Group established by the British Institute of International and Comparative Law as a contribution to the UN Decade of International Law", (1996) 45 *The International Court of Justice: Efficiency of Procedures and Working Methods* 1, paras 46 and 47.

3.37 Yet, as the minutes of the ICAO Council meeting of 26 June 2018 show, the ICAO Council failed to engage in any deliberations before proceeding to vote by secret ballot.

3.38 As already described at paragraph 3.22 above, the Appellants had raised two separate and *distinct* Preliminary Objections.

3.39 At the ICAO Council session of 26 June 2018, the Representative of Mexico "proposed that the ICAO Council proceed directly to a vote by secret ballot in order to take a decision *on each of the Respondents' preliminary objections* with respect to Application (A) and Application (B)"[208].

3.40 Reacting to the suggestion by the President that the question to be put to a vote would conflate the two distinct objections into one, counsel for the Appellants sought to clarify the importance for the ICAO Council of properly understanding, and ruling on, each Preliminary Objection separately and in turn:

> "As accepting either one of those preliminary objections had the effect of disposing of the case here and now, [counsel] suggested that the appropriate wording of the question for the secret ballot . . . would be 'Do you accept either one of the two preliminary objections formulated by the Respondents in respect of each of the Applications?"[209]

3.41 Yet, the President, directing the decision-making process, ultimately conflated into one the two Preliminary Objections. He did so on the basis that

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208 **Vol. V, Annex 53**, 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 (emphasis added).

209 *Ibid*., para. 121.

Article 5(1) of the ICAO Rules, as read out to the ICAO Council by the Director of the ICAO Bureau of Legal and External Affairs, referred to "a preliminary objection" (singular)[210]. On this basis, the President, acting alone, concluded—*without any further discussion, decision or vote by the ICAO Council*—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"[211].

3.42 Immediately thereafter, and expressly eschewing any deliberations, the ICAO Council proceeded to a vote by way of secret ballot (despite the Appellants' request for a roll call with open votes) on what the ICAO Council characterized as "the Preliminary Objection"[212] (singular).

3.43 By proceeding in this fashion, the ICAO Council failed to take any clear position on Qatar's argument (extensively debated in the written pleadings, and discussed further below in Chapter IV) that to the extent that the Appellants' Preliminary Objections related to the admissibility of Qatar's claims, they could not be considered as a preliminary matter at all, and could only be considered at the stage of the ICAO Council's consideration of the merits[213]. This further confirms that the ICAO Council failed to grasp or engage with the legal character of the objections before it.

3.44 Both at the hearing and in the written pleadings, the arguments presented on both sides were extensive, complex, and undoubtedly novel for the ICAO Council. In these circumstances, that a decision was taken immediately

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210 *Ibid*., para. 122.

211 *Ibid*., para. 123.

212 *Ibid*., para. 124.

213 **Vol. IV, Annex 25,** ICAO Response to the Preliminary Objections, paras 23-33.

after hearing the Parties and without *any* deliberations at all (or so much as asking questions of the Parties) may only indicate that the result had been pre-judged, possibly because the ICAO Council representatives were acting on instructions from their governments rather than exercising a judicial function[214].

3.45 Unsurprisingly in light of the procedure followed, as discussed below, no reasons were provided by the ICAO Council in its Decision. Indeed, no reasons *could* be provided by the ICAO Council given the absence of any deliberation between members of the ICAO Council on the Preliminary Objections.

2. Requirement to deliver a reasoned decision

3.46 A fundamental requirement of due process is that judicial bodies give the necessary reasons in support of their decisions. This serves as a safeguard against arbitrary decisions: "Absence of reasons—or of adequate reasons—unavoidably creates the impression of arbitrariness"[215]. A reasoned decision serves to show the parties that their case has effectively been considered. And only a reasoned decision is susceptible to permit an appellate court properly to understand the essence of the decision below.

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214 This possibility is borne out by the minutes of the Council proceedings concerning the dispute between India and Pakistan, which reveal that some members of the Council wanted to defer rendering a decision because they wished to await instructions from their governments: **Vol. V, Annex 27**, ICAO Council – 74th Session, Minutes of the Fifth Meeting, ICAO document 8987-C/1004, 28 July 1971, pp. 42-46. That members of the Council might in the decision-making process seek instructions from their governments is something that commentators point to in assessing the judicial functions of the Council: **Vol. VI, Annex 126**, G. F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", (1974) 12 *Canadian Yearbook of International Law* 153, p. 169.

215 H. Lauterpacht, *The Development of International Law by the International Court* (reprinted ed., 1982), p. 39, see generally pp. 37-43.

3.47 One might say that the requirement to provide reasons is even more important in the case of the ICAO Council than it is for full-time, exclusively judicial bodies. The requirement that reasons be provided serves to dispel the risk that judicial decisions rendered under Article II, Section 2 are taken in an arbitrary manner or for reasons which do not withstand legal scrutiny.

3.48 Various international rules of procedure treat the absence of reasons as a ground of invalidity of an offending decision. Thus, the ILC Draft Convention on Arbitral Procedure describes a failure to state reasons as a "serious departure from a fundamental rule of procedure", denial of which is a ground for nullification[216]. Likewise, under the ICSID Convention[217], a failure to provide reasons is a ground for nullification of an award.

3.49 The elementary duty to provide reasons is also embodied in the ICAO Rules themselves, which do not permit the ICAO Council to arrive at a decision without providing reasons. Article 5 of the ICAO Rules provides that "if a preliminary objection has been filed, the ICAO Council, after hearing the parties, shall decide the question as a preliminary issue"[218]. This must be read together with Article 15 of the Rules, which states that decisions of the ICAO Council "shall be in writing and *shall* contain . . . the conclusions of the ICAO Council together with its reasons for reaching them"[219]. This fundamental duty

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216 **Vol. II, Annex 5**, ILC, Commentary on the Draft Convention on Arbitral Procedure adopted by the ILC at its Fifth Session, document A/CN.4/92 (1955), Art. 30 and commentary thereto.

217 ICSID Convention, adopted on 18 March 1965, 575 *UNTS* 159, entered into force on 14 October 1966, Art. 52(1)(e).

218 **Vol. II, Annex 6**, ICAO Rules, Art. 5(4).

219 *Ibid*., Art. 15(2)(v).

has been complied with in recent decisions of the ICAO Council[220]. That this duty applies to decisions on preliminary objections and decisions on the merits alike was expressly confirmed in a working paper circulated by the Secretary-General of ICAO to the members of the ICAO Council before the hearing of the Appellants' Preliminary Objections[221].

3.50 The ICAO Council did not provide any reasons in its Decision as to why or how it came to the conclusion that the Appellants' Preliminary Objections should be rejected; nor did it explain how or why the ICAO Council took the view that the dispute between the Parties came within its jurisdiction. To the contrary, the ICAO Council rendered a one-line decision devoid of any statement of grounds or reasons to support it.

3.51 The Decision consists solely of a conclusory declaration to the effect that "the Preliminary Objection" (in the singular) "of the Respondents is not accepted". It is not even possible to ascertain from the face of the Decision what the substance of the two Preliminary Objections raised by the Appellants was, since the Decision merely records that the Appellants' position was "that the Council lacks jurisdiction to resolve the claim raised . . . or in the alternative that [their] claims are inadmissible"[222].

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220 See, e.g., **Vol. V, Annex 28**, Decision of the ICAO Council on the Preliminary Objections in the Matter "United States and 15 European States", 16 November 2000.

221 **Vol. V, Annex 50**, Working Paper in respect of Application (A), ICAO document C-WP/14778, 23 May 2018, para. 5.3; see also **Vol. V, Annex 51**, ICAO Presentation, "Informal briefing of the Council on the Settlement of Differences", by Dr. Jiefang Huang, Director of ICAO Legal and External Relations Bureau, 19 June 2018, p. 8.

222 **Vol. V, Annex 52**, ICAO Council Decision, p. 2.

3.52 Given the absence of any deliberations within the ICAO Council before voting, the rationale and legal reasoning underlying the ICAO Council's Decision to reject the Appellants' Preliminary Objections are simply unknown.

3.53 Each of the two Preliminary Objections was capable of disposing of Qatar's complaint at the threshold. On the face of the record, the ICAO Council failed to comprehend this. In any event, there is no indication that it took it into account or even considered it in determining the Preliminary Objections. The approach adopted is not just inconsistent with the ICAO Council's own previous practice[223], but also serves to underline the wholly deficient character of the proceedings.

3. The principle of equality of the parties and respect for the right to have a reasonable opportunity to be heard

3.54 The principle of equality of arms is of foundational importance from a due process perspective. It is also of universal reach, applying to all types of judicial and arbitral proceedings[224].

3.55 The principle is articulated in many sources of international law, including for example in the ILC Draft Convention on Arbitral Procedure and Model Rules on Arbitral Procedure[225], as well as in Article 14(1) of the International Covenant on Civil and Political Rights, which guarantees the

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223 See **Vol. V, Annex 28**, Decision of the Council on the Preliminary Objections in the Matter: United States and 15 European States, 16 November 2000, in which the Council ruled on each of the three preliminary objections separately.

224 B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (2006), p. 290.

225 **Vol. II, Annex 5**, ILC, Draft Convention on Arbitral Procedure adopted by the ILC at its Fifth Session, document A/CN.4/92 (1955), Art. 14 and see Art. 30 and commentary thereto; **Vol. II, Annex 7**, ILC, Model Rules on Arbitral Procedure adopted by the ILC at its Tenth Session, document A/CN.4/SER.A/1958/Add.l (1958), Preamble.

principle of equality in judicial proceedings by providing that "all persons shall be equal before the courts and tribunals"[226]. The principle requires in particular that:

> "the same rights be granted to all parties, and there must be a constant drive to equalize eventual unevenness among the Parties to the extent that it may influence the possibility of a fair outcome of the trial. . . . The principle of equality *in judicio* is so evident and indispensable for modern legal thinking that it could well be termed a principle of 'natural law of judicial proceedings."[227]

3.56 In its Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO*, the Court observed that this principle "follows from the requirements of good administration of justice"[228]. Subsequently, the Court held that "the equality of the parties to the dispute must remain the basic principle for the Court"[229]. Most recently, the Court has recognized that "the principle of equality in the proceedings before the Court [is] required by its inherent judicial character and by the good administration of justice"[230].

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226 International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 *UNTS* 171, entered into force on 23 March 1976, Art. 14(1).

227 R. R. Kolb, "General Principles of Procedural Law", in A. Zimmerman and C. Tomuschat (eds) *Statute of the International Court of Justice* (2nd ed., 2012), p. 877.

228 *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against U.N.E.S.C.O., Advisory Opinion, I.C.J. Reports 1956*, p. 86.

229 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 26, para. 31.

230 *Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 30, para. 47.

3.57 The principle requires a fair balance between the parties, which should be given equal, sufficient opportunities to present their case[231]. This applies with equal force to multiparty proceedings such as the present one. In some instances, fairness may compel a degree of differential treatment as between the parties[232]. Thus, where a claim is brought by one State against more than one State (as was the case with Qatar's claims before ICAO), particular attention is required to the proper balancing of the written pleadings allowed and the time for oral presentations. In these circumstances, the practice of the Court has been to require the applicant / claimant to speak first, followed by the individual respondents, each of whom is given sufficient time to address the complaint[233].

3.58 By contrast, in the present case, the three Appellants, treated as a single party, together with the four Respondent States in respect of Application (A), were given the same portion of a (very limited) envelope of time as Qatar to present oral argument. This was notwithstanding the fact that each of the States was appearing as a respondent in its own right and was represented by its own Agent. Moreover, the Appellants were required to address Applications (A) and (B) together, although Saudi Arabia was not even a party in Application (B).

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231 See **Vol. II, Annex 18**, UNCITRAL Arbitration Rules 2013, Art. 17, which provides that an "arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case".

232 R. R. Kolb, "General Principles of Procedural Law", in A. Zimmerman and C. Tomuschat (eds) *Statute of the International Court of Justice* (2nd ed., 2012), p. 877.

233 S. Talmon, "Article 43", in A. Zimmerman and C. Tomuschat (eds) *Statute of the International Court of Justice* (2nd ed., 2012), p. 1133, para. 108.

B. THE ICAO COUNCIL'S ABDICATION OF ITS DUTY TO INTERPRET THE CHICAGO CONVENTION

3.59 The ICAO Council incorrectly required 19 votes to uphold the Preliminary Objections, out of 33 members entitled to vote. That is more than a majority of the eligible votes (which properly totals 17).

3.60 Article 52 of the Chicago Convention provides that "[d]ecisions of the Council shall require approval by a majority of its members". This requirement presupposes that all members of the Council are entitled to vote. Indeed, this provision is to be read in the light of Articles 53 and 84 of the same Convention and Article 15(5) of the ICAO Rules, which provide—entirely properly—that no member of the ICAO Council can vote in the consideration of a dispute to which it is a party.

3.61 These provisions read together properly mean that the majority required in the present case was of ICAO Council Members entitled to vote (17 of 33 States entitled to vote), not of all ICAO Council Members (19 of 36 States). A contrary interpretation runs counter to the plain terms of Article 52 of the Chicago Convention, which requires only a "majority", not a "super-majority" (in circumstances where several States are not eligible to vote), or a "quasi unanimity" (in circumstances where only 20 States are entitled to vote for example). A contrary interpretation would also mean that the ICAO Council might find itself unable to render a decision in circumstances where fewer than 19 States were eligible to vote. In such circumstances, Article 52 of the Chicago Convention would have no *effet utile*; in fact the provision would be deprived

of any *effet* at all. An interpretation that deprives a treaty provision of its effectiveness is obviously to be avoided[234].

3.62 In the present case, in taking the position that the majority of all members of the ICAO Council would be required, the ICAO Council acknowledged, but effectively abdicated, its duty to rule on the requests for clarification formulated by the Appellants, who expressly called for a decision on this point[235]. Instead, the President deferred to the Director of the Bureau of Legal Affairs, who read out Article 52 of the Chicago Convention and "recited to the Council the factual historical records of previous Council decisions", while expressly *disclaiming* that it was the role of the Bureau "to provide its interpretation of the relevant rules"[236] but rather the ICAO Council's duty to do so in accordance with Article II, Section 2 of the IASTA. Yet, there was no discussion, deliberation, or indeed decision by members of the Council on the point. Rather, the Council immediately proceeded to the holding of a secret ballot.

3.63 In requiring 19 votes in that manner, the ICAO Council abdicated its judicial function by entrusting its duty to interpret Article 52 of the Chicago

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234 See *Lighthouses Case between France and Greece, Judgment, 1934, P.C.I.J., Series A/B, No 62*, p. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 35, para. 66; *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, p. 22, para. 52; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51.

235 **Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, paras 111 *et seq*.

236 **Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, paras 112 and 114. See **Vol. II, Annex 1**, Chicago Convention, Art. 84.

Convention to a unit of the ICAO Secretariat, the Bureau of Legal and External Affairs—and this notwithstanding a specific motion for a decision submitted by the Appellants to the ICAO Council. This is yet another example of the Council's misapprehension of the duties entailed by its judicial function under the Chicago Convention.

C. REQUIREMENT TO ACT IN CONFORMITY WITH APPLICABLE PROCEDURAL RULES

3.64 As noted by Judge Lachs in his Declaration in the *India v. Pakistan* case, "contracting States have the right to expect that the Council will faithfully follow these [procedural] rules", which he noted "are enacted to be complied with"[237].

3.65 The ICAO Council nevertheless departed from a number of procedural requirements set forth in the Chicago Convention and the ICAO Rules:

(a) As described above, the ICAO Council incorrectly required 19 votes to uphold the Preliminary Objections, out of 33 members entitled to participate in the vote, even though Article 52 of the Chicago Convention provides only that a mere "majority" is needed[238].

(b) As also described above, the ICAO Council failed to give any reasons for the decision it had taken, in contravention of Article 15 of the Rules.

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237 *Declaration of Judge Lachs in Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, pp. 74-75.

238 See above, paras 3.59-3.63.

(c) The ICAO Council also incorrectly applied its own rules of procedure[239]. Rule 40 provides that "[a]ny Member of the Council may introduce a motion or amendment". Rule 45 further provides that "with the exception of motions and amendments relative to nominations, no motion or amendment shall be voted on, unless it has been seconded". At the ICAO Council session of 26 June 2018, the Representative of Mexico proposed that the ICAO Council proceed to a vote "*on each of the Respondents' preliminary objections* with respect to Application (A) and Application (B)"[240]. That proposal was seconded by the Representative of Singapore[241] and approved by the ICAO Council[242]. As already discussed, however, the ICAO Council then proceeded to a secret ballot on a supposed "preliminary objection" as a single plea, and not as two separate preliminary objections as set forth in the motion. The President's decision to put to a vote a question relating to a "preliminary single objection" was neither introduced nor seconded by a Member of the ICAO Council as required by the ICAO Rules. The Decision is accordingly vitiated at its foundation.

Section 4. Conclusion: The Decision is null and void *ab initio*

3.66 As the facts set out above demonstrate, there can be no doubt that the ICAO Council failed to proceed in accordance with fundamental principles of judicial procedure and due process.

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239 **Vol. II, Annex 17**, ICAO, Rules of Procedure for the Council, ICAO document 7559/9, 2013.

240 **Vol. V, Annex 53**, 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 (emphasis added).

241 *Ibid*., para. 107.

242 *Ibid*., para. 108.

3.67 Unlike the earlier *India v. Pakistan* case, the procedural irregularities that vitiated the Decision here are such as to prejudice in a "fundamental way the requirements of a just procedure"[243]. These irregularities were grave, fundamental, and widespread, such that the Decision may be regarded as non-existent. The Court is respectfully invited to make a declaration to that effect.

3.68 Indeed, the manner in which a decision is reached by the ICAO Council is fundamental to assessing its validity, quite separately from the merits. President Nagendra Singh put it as follows:

> "If the Council reached a decision in utter disregard of all proper norms which go to the root of the functioning of international organizations, apart from violating the mandatory requirements for arriving at a judicial decision, it would be legitimate to draw the conclusion that the Council's decision was void."[244]

3.69 That is precisely the contention of the Appellants: the ICAO Council Decision is null and void *ab initio*, as the procedure adopted by the ICAO Council was manifestly flawed and in violation of fundamental principles of due process.

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

244 *Dissenting Opinion of Judge Nagendra Singh, Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 166, para. 7.

CHAPTER IV
THE ICAO COUNCIL IS ABLE TO RULE UPON OBJECTIONS TO ADMISSIBILITY AS A PRELIMINARY MATTER

4.1 When exercising judicial functions pursuant to Article II, Section 2 of the IASTA, the ICAO Council is obliged to approach issues of its competence in the same way as any other international judicial body. As the Court observed in *Border and Transborder Armed Actions* in respect of the exercise of its own functions as a judicial organ, certain conditions must exist in order that it may exercise jurisdiction over a dispute:

> "[F]irst, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible."[245]

As that passage demonstrates, it is well-established in international law that an international court, adjudicatory body or other entity exercising judicial functions must, in assessing at the threshold its competence (i.e., its ability as a matter of law) to adjudicate upon a dispute submitted to it, not only ascertain that it possesses jurisdiction over the dispute, but also must consider the admissibility of the claims submitted to it.

4.2 The two requirements of the existence of jurisdiction and the admissibility of claims are thus an inherent and integral part of the international judicial function in international law. Where a court or tribunal finds that it is without jurisdiction over a claim, it must dismiss the application. Likewise, to

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245 *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52.

the extent that a court or tribunal concludes that a claim is inadmissible for whatever reason affecting the possibility or propriety of its deciding a dispute, it may be compelled to decline to exercise such jurisdiction as it may possess to decide the dispute[246]. This power of a court or tribunal to determine its own jurisdiction, and the admissibility of claims before it, is part of its inherent power as a judicial body and thus requires no articulation in any rule or Statute.

4.3 As already discussed in Chapter I, above, in the proceedings before the ICAO Council, the Appellants raised two Preliminary Objections in accordance with Article 5 of the ICAO Rules as to the lack of competence of the ICAO Council to adjudicate upon Qatar's claims. Each objection was made on the basis that the ICAO Council was without jurisdiction over Qatar's claims, and in the alternative, that Qatar's claims were inadmissible.

4.4 In its Response before the ICAO Council, Qatar did not attempt to suggest that a respondent State is entirely precluded from raising objections to the admissibility of a claim submitted to the ICAO Council, but argued that, under Article 5 of the Rules, to the extent that the Appellants' Preliminary Objections went to the admissibility of Qatar's claims, they could not be raised as a preliminary matter, but could only be raised when the merits of those claims were being considered by the ICAO Council.

4.5 It took the position that Article 5(1) of the Rules "mandates that preliminary objections shall lie only to jurisdiction. It does not permit

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[246] J. Crawford, *Brownlie's Principles of Public International Law* (8th ed., 2012), p. 693; see also Y. Shany, "Chapter 36: Jurisdiction and Admissibility", in C. Romano *et al* (eds.), *The Oxford Handbook of International Adjudication* (2012), p. 787; R. Jennings and R. Higgins, "General Introduction", in A. Zimmerman et al (eds.), *The Statute of the International Court of Justice* (2nd ed., 2012), pp. 12-13.

preliminary objections to admissibility"[247], and, as a consequence, argued that the Appellants' objections to the admissibility of Qatar's claims could only be raised in the merits phase:

> "The ICAO Rules for the Settlement of Differences do not give the Council the authority to consider issues of admissibility at the preliminary objection phase. The Respondents are not, of course, precluded from making admissibility submissions in their counter-memorials . . ."[248]

4.6 As discussed further below, that interpretation of the Rules, and Qatar's restrictive view as to the limited ability of respondent States to raise – and of the ICAO Council to rule upon – all matters relating to its competence as a matter of both jurisdiction and admissibility by way of preliminary objection, is fundamentally flawed.

4.7 As discussed in Chapter III above, however, in light of the summary manner in which the ICAO Council dealt with the preliminary objections raised by the Appellants, it did not take any position in this regard. That is a result of the ICAO Council's decision to subsume all of the objections raised into a single issue, put to a single vote in its Decision on each Application[249]. By doing so, the ICAO Council failed to differentiate between either the two separate Preliminary Objections raised, or as between the Appellants' invocation of objections to both jurisdiction and admissibility in respect of each Preliminary Objection.

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247 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 15.

248 *Ibid*., para. 22.

249 See above, paras 3.29-3.31.

4.8 As set out in Chapters V and VI below, the Appellants maintain their objections to the competence of the ICAO Council to adjudicate upon the merits of the disagreements submitted to it by Qatar. Those objections continue to be made both as a matter of the limits of the ICAO Council's jurisdiction and as regards the admissibility of Qatar's claims.

4.9 To the extent that Qatar maintains its position that questions of admissibility cannot be resolved as preliminary objections, this issue will arise and may require resolution by the Court *in limine* as a logically prior question to its consideration of the substance of the Appellants' objections to the competence of the ICAO Council. This is so notwithstanding the ICAO Council's complete failure in its Decision to engage or grapple with the issue.

4.10 By way of introduction to the issue (and also as background to the discussion of the substance of the Appellants' objections to jurisdiction and admissibility in Chapters V and VI), Section 1 discusses the distinction between objections to jurisdiction and objections to admissibility. Section 2 then explains why Qatar's position that the ICAO Council is unable to deal with objections to admissibility by way of preliminary objection is fundamentally flawed.

Section 1. The distinction between objections to jurisdiction and objections to admissibility in international procedural law

4.11 In international procedural law, the distinction between objections to jurisdiction and objections to admissibility as matters challenging the competence of an international court, tribunal or adjudicative body to adjudicate on claims submitted to it is well established and well developed. The notions of objections to jurisdiction (Subsection A) and objections to admissibility

(Subsection B) are examined in turn, before attention turns to the manner in which the Court has applied the distinction in practice (Subsection C).

A. The notion of objections to jurisdiction

4.12 Taking first the notion of objections to jurisdiction, it is elementary that the contentious jurisdiction of the Court, and of every international court or tribunal or other body exercising jurisdiction over inter-State disputes, is based upon the consent of the parties.

4.13 As has been consistently recognized by the present Court and the Permanent Court before it, it is a fundamental and well-established principle of international law that the jurisdiction of an international court or tribunal is based on consent and that such a body may only adjudicate a dispute between States insofar as they have consented to the exercise of such jurisdiction.

4.14 That principle was recognized from early in its existence by the Permanent Court in its decision in *Mavrommatis Palestine Concessions*, where it observed that: "its jurisdiction is limited, . . . is invariably based on the consent of the respondent and only exists in so far as this consent has been given"[250].

4.15 The consensual nature of its own contentious jurisdiction has likewise been repeatedly affirmed by the current Court. For example, in *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, the Court reaffirmed the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise

[250] *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, p. 16.

jurisdiction over a State with its consent."[251] Similarly, in its decision on preliminary objections in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Court reiterated that its jurisdiction under its Statute "is always based on the consent

[251] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32; see also *ibid*., p. 33 ("Where . . . the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue"). See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 25, para. 40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 114-116, paras 54-56 and p. 122, para. 73; and *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 259-262, paras 50-55. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71: "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases"; part of that passage was quoted and referred to as representing a "fundamental principle" in the *Application for Revision and Interpretation of the Judgment of 24 February 1982 in Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 216, para. 43; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 24, para. 31; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 157, para. 47. In *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 23, para. 28, the Court referred to "the fundamental rule, repeatedly reaffirmed in the Court's jurisprudence, that a State cannot, without its consent, be compelled to submit its disputes with other States to the Court's adjudication."

of the parties"[252], and stated that it "has jurisdiction in respect of States only to the extent that they have consented thereto"[253].

4.16 The principle applies not only to the Court, but equally to all courts and tribunals exercising jurisdiction over disputes between States on the international plane. It applies fully to the ICAO Council insofar as it exercises judicial functions under Article II, Section 2 of the IASTA. Its logical and necessary corollary is that a State is not obliged to allow its disputes to be submitted to international judicial settlement without its consent.

4.17 A further important consequence of the fundamental principle of consent as the basis for international jurisdiction is that where the jurisdiction of a court or tribunal is based on a compromissory clause in a treaty, its jurisdiction is necessarily limited and circumscribed by the terms of the relevant provision. It is that provision which constitutes and embodies the consent of

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252 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 31-32, para. 64; and see similarly *ibid*., pp. 51-52, para. 125, where the Court referred to "the principle that its jurisdiction always depends on the consent of the parties"; see also *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*, pp. 124-125, para. 131. Similarly, in *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. 456, para. 120, the Court observed that "the jurisdiction of the Court derives from the consent of the parties".

253 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 65; and see *ibid*., p. 39, para. 88: "[The Court's] jurisdiction is based on the consent of the parties and is confined to the extent accepted by them . . ."; *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, Judgment, I.C.J. Reports 2003*, pp. 182-183, para. 42; Cf. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 23, para. 43 ("the Court's jurisdiction can only be established on the basis of the will of the Parties, as evidenced by the relevant texts").

those States parties bound by it to the exercise of jurisdiction by the relevant body. In this regard, in *Armed Activities on the Territory of the Congo*, the Court emphasized that:

> "its jurisdiction is based on the consent of the parties *and is confined to the extent accepted by them* . . . When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject *must be regarded as constituting the limits thereon*".[254]

4.18 As a result of the fundamental principle that consent is the basis of jurisdiction, it is always open to a respondent State in a contentious case to raise (whether as a preliminary matter, or otherwise) an objection on the basis that a dispute falls outside the scope of the jurisdiction of the court or tribunal to which it has been submitted. Such an objection turns on whether the objecting State has consented to the settlement by the court or tribunal of the particular dispute[255]. The key question is thus the scope of the consent to jurisdiction of the parties.

4.19 Such objections to jurisdiction are often made on the basis that the dispute in question falls outside the scope of the objecting State's consent to jurisdiction *ratione materiae* (i.e., that the subject-matter of the dispute is not

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254 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 39, para. 88 (emphasis added). See also *ibid.*, p. 32, para. 65 ("When a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and within the limits set out therein").

255 *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. 456, para. 120.

one which falls within the limits placed on the scope of disputes which the State has consented to have adjudicated)[256].

B. Objections to admissibility

4.20 In addition to the category of objections to jurisdiction in the narrow sense, it is well-established in international judicial practice that there exists a further category of objections ("objections to admissibility") which may be raised by a respondent State[257]. If upheld, such objections constitute a reason for the relevant court, tribunal, or body to refrain from exercising jurisdiction over a dispute that it would otherwise possess.

4.21 As regards this latter category of objections, in *Oil Platforms*, the Court observed that they:

> "normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."[258]

4.22 The Court's understanding of the scope of the category of objections to admissibility has evolved over the years. For instance, in *Northern Cameroons*, a decision rendered prior to the adoption of the Court's 1972 Rules of Court, the Court appeared to envisage the existence of a tri-partite division of

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256 See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J. Reports 1996*, pp. 614-617, paras 27-33.

257 Or, in an exceptional case, by an applicant – see *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 29.

258 *Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, Judgment, I.C.J. Reports 2003*, p. 177, para. 29.

preliminary objections, referring to "objections to jurisdiction or to admissibility or based on other grounds."[259]

4.23 Similarly, in the *Lockerbie* cases, the Court again appeared to envisage the existence of three categories of preliminary objections. Relying upon the distinction drawn in Article 79(1) of the current (1978) Rules of Court to objections to "the jurisdiction of the Court or to the admissibility of the application, *or other objection . . . the decision upon which is requested before any further proceedings on the merits*", the Court observed that the "field of application *ratione materiae* [of Article 79(1)] is thus not limited solely to objections regarding jurisdiction or admissibility."[260]

4.24 In more recent cases, the category of objections to admissibility has been framed by the Court as encompassing all objections to the exercise of jurisdiction by the Court that do not as such directly concern a lack of jurisdiction of the Court in the narrow sense. In its judgment on preliminary objections in *Croatian Genocide*, the Court observed that the difference between objections to jurisdiction and objections to admissibility "is well

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259 *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 27. See also *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 10; *Pajzs, Csáky, Esterházy, Judgment, 1936, P.C.I.J., Series A/B, No. 68*, p. 51; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 216, para. 43.

260 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 47; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, I.C.J. Reports 1998*, p. 131, para. 46 (emphasis added).

recognized in the practice of the Court,"[261] and went on to discuss the similarities between the two categories, and the particular factors which distinguish them. The Court explained, that:

> "In either case, the effect of a preliminary objection to a particular claim is that, if upheld, it brings the proceedings in respect of that claim to an end; so that the Court will not go on to consider the merits of the claim. If the objection is a jurisdictional objection, then since the jurisdiction of the Court derives from the consent of the parties, this will most usually be because it has been shown that no such consent has been given by the objecting State to the settlement by the Court of the particular dispute. A preliminary objection to admissibility covers a more disparate range of possibilities."[262]

4.25 In that latter regard, having quoted the passage from its earlier decision in *Oil Platforms* set out at paragraph 4.21, above, the Court explained that:

> "Essentially such an objection [as to admissibility] consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein. Such a reason is often of such a nature that the matter should be resolved *in limine litis* . . ."[263]

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261 *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. 456, para. 120.

262 *Ibid*.

263 *Ibid*., quoted in part in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 123, para. 48. A similar conclusion had previously been reached by the Permanent Court: see *Panevezys-Saldutiskis Railway, 1939, P.C.I.J., Series A/B, No. 29*, p. 16.

4.26 The examples of objections to admissibility given by the Court include objections based on the rules applicable in the context of claims brought by way of diplomatic protection as to nationality of claims or requiring the prior exhaustion of local remedies[264], circumstances in which the parties had agreed "to use another method of pacific settlement" and considerations relating to the "mootness of the claim"[265], such as those which were found to exist in *Northern Cameroons*, and the *Nuclear Tests* cases, such that it would be improper for the court or tribunal to exercise its judicial function. To these examples can be added objections to the competence of the court or tribunal based on the *res judicata* effect of a prior judgment[266], and abuse of process[267].

C. Objections to Jurisdiction and Admissibility in International Judicial Practice

4.27 Accordingly, as recognized by the Court in *Croatian Genocide*, a clear theoretical distinction can thus be drawn between objections to jurisdiction and objections to admissibility. The former relate to the scope of the jurisdiction of the relevant adjudicatory body (which in turn takes as its lodestar the consent of

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264 *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. 456, para. 120; see e.g., *Nottebohm Case, Second Phase, Judgment, I.C.J. Reports 1955*, p. 16; *Interhandel Case, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, pp. 599-601, paras 40-48.

265 *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. 456, para. 120.

266 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 123, para. 48 and p. 124, para. 53.

267 *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, p. 42, paras 150 and 151.

the parties). By contrast, objections as to the admissibility of a claim go to the wider question of whether, in the circumstances of the case, the court or tribunal or other relevant body can (or should, as a matter of judicial discretion) exercise such jurisdiction as it in fact possesses, whether over a particular claim, or over the dispute as a whole.

4.28 The Court has not always regarded it as necessary to clearly state whether a particular objection is one implicating its jurisdiction (in the narrow sense) over a particular claim, or one which raises an issue of admissibility, or belongs to some inchoate third category[268]. In *Northern Cameroons* for instance, the Court did not find it "necessary to consider all the objections, nor to determine whether all of them are objections to jurisdiction or to admissibility or based on other grounds"[269].

4.29 Nevertheless, the Court has had no hesitation where appropriate in re-characterizing an objection and examining its substance, without dwelling on any error of characterization which the objecting State might have committed[270]. For instance, in *Armed Activities on the Territory of the Congo*,

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[268] See, e.g., *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, I.C.J. Reports 1963*, p. 27; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, I.C.J. Reports 1995*, para. 43. For the practice of the Permanent Court, see e.g., *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, p. 10; and *Pajzs, Csáky,Esterházy, Judgment, 1936, P.C.I.J., Series A/B, No. 68*, p. 51.

[269] *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 27.

[270] See in particular *Interhandel Case, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 177, para. 29; *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. 456, para. 120; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 123, para. 48.

the Court made clear its view that an objection based on failure to comply with a requirement of negotiation contained in a compromissory clause – and indeed any objection "based on non-fulfilment of the preconditions set out in the compromissory clauses"[271] relied upon to found its jurisdiction to hear a particular dispute – was one going to jurisdiction, rather than the admissibility of the application[272].

4.30 Finally, it bears noting that the two categories of objections to jurisdiction and objections to admissibility are not mutually exclusive; there is no reason of principle why the same considerations may not give rise to issues as to the competence of a tribunal to adjudicate a dispute both from the viewpoint of jurisdiction and from that of admissibility. For instance, in *Croatian Genocide*, the Court observed that Serbia's objection based on the applicability *ratione temporis* of the Genocide Convention was "presented as relating both to the jurisdiction of the Court and to the admissibility of the claim"[273].

4.31 Accordingly, even if an objection raised by a party is not regarded as one affecting the existence of the jurisdiction of a particular court or tribunal to

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271 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88.

272 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88; See also *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, p. 42, paras 150-151 (an objection of abuse of process is one of admissibility).

273 *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. 457, para. 121 and p. 460, para. 129; see previously, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J. Reports 1996*, p. 612, para. 23.

adjudicate upon a particular dispute as such, it is nevertheless still necessary to examine whether it gives rise to concerns as to the admissibility of the claims submitted.

Section 2. The proper scope of preliminary objections before the ICAO Council

4.32 Article 5 ("Preliminary Objection") of the ICAO Rules expressly regulates and sets out a procedure for the raising of preliminary objections by a respondent State. It provides:

> "1. If 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 such objection.
>
> 2. Such preliminary objection shall be filed in a special pleading at the latest before the expiry of the time-limit set for delivery of the counter-memorial.
>
> 3. Upon a preliminary objection being filed, the proceedings on the merits shall be suspended and . . . time shall cease to run from the moment the preliminary objection is filed until the objection is decided by the Council.
>
> 4 If a preliminary objection has been filed, the Council, after hearing the parties, shall decide the question as a preliminary issue before any further steps are taken under these Rules."

4.33 Pursuant to this article, the ICAO Council is empowered, indeed required, to rule upon objections as to its jurisdiction and as to the admissibility of claims submitted to it as a preliminary issue, without requiring a specific basis in the ICAO Rules to do so.

4.34 First, simply as a matter of the ordinary words of Article 5 of the Rules, there is no basis for Qatar's suggestion that the ICAO Council can, at the preliminary objections phase, decide only objections to jurisdiction. Pursuant to Article 5(1), the preliminary objection procedure foreseen by Article 5 is applicable whenever a respondent "*questions* the jurisdiction of the Council to handle the matter presented by the applicant"[274].

4.35 On their face, those words are apt to cover objections as to both jurisdiction and admissibility. It is significant in this connection that elsewhere in Article 5, the category of objections by which a respondent State "questions the jurisdiction of the Council to handle" a particular matter submitted to it is referred to using the entirely generic term "preliminary objection".

4.36 Article 5 thus provides no support for the position taken by Qatar before the ICAO Council[275], that only objections to jurisdiction must be dealt with as a preliminary issue and that, by contrast, objections to admissibility can only be considered at the merits stage. In particular, there is no textual foothold for Qatar's position; tellingly, the only argument it was able to invoke in support of its position was the absence in Article 5 of the ICAO Rules of any express reference to questions of admissibility[276].

4.37 As a consequence, before the ICAO Council, Qatar sought to invoke in aid of its position the different formulation of Article 79(1) of the current Rules of Court[277], which refers to objections "to the jurisdiction of the Court or to the

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274 **Vol. II, Annex 6**, ICAO Rules, Art. 5(1) (emphasis added).

275 See above, paras 4.4 and 4.5.

276 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 15.

277 *Ibid*., para. 15.

admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits".

4.38 Qatar's argument in this regard is flawed, however.

4.39 The superficial comparison of the ICAO Rules and the Court's Rules of Court ignores the fact that Article 36(6) of the Court's Statute, which forms the underpinning for Article 79(1) of the Rules of Court, refers only to the Court's ability to decide on a dispute as to whether the Court has *jurisdiction*, and makes no reference to objections to the admissibility of a claim. In this regard, although the formulation is different, it is analogous to Article 5(1) of the Rules.

4.40 It further bears emphasis that the distinction between jurisdiction and admissibility was only introduced into the Rules of Court in 1972[278]. Prior to 1972, Article 62(1) of the original 1946 Rules of Court provided only that "[a] preliminary objection must be filed by a party at the latest before the expiry of the time-limit fixed for the delivery of its first pleading".

4.41 Notwithstanding the lack of any initial reference in the Rules of Court to objections to admissibility, however, the Court has, since its inception, considered that it was empowered to address all objections to admissibility or

[278] The equivalent provision of the Court's 1946 Rules of Court (Art. 62(1)), provided that, "A preliminary objection must be filed by a party at the latest before the expiry of the time-limit fixed for the delivery of its first pleading".

which otherwise have a preliminary character as preliminary matters before any further proceedings on the merits[279].

4.42 In taking this course, the Court followed the practice of the Permanent Court. For instance, in *Panevezys-Saldutiskis Railway*, decided under Article 62(1) of the 1936 Rules of the Permanent Court[280] (which in this regard was in substantially similar form to Article 62 of the Court's 1946 Rules) the Permanent Court observed that Article 62:

> "covers more than objections to the jurisdiction of the Court. Both the wording and the substance of the Article show that it covers any objection of which the effect will be, if the objection is upheld, to interrupt further proceedings in the case, and which it will therefore be appropriate for the Court to deal with before enquiring into the merits."[281]

4.43 It further bears underlining that, as Milde observes, the ICAO Rules, as originally adopted by the ICAO Council in 1957 and unchanged since (save for minor amendments to Article 29 adopted in 1975 relating to languages), were "drafted in close alignment"[282] with the Court's Rules of Court. The version in force at the relevant time was the 1946 edition, which simply referred to

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279 See, e.g., *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, pp. 19 and 27-30; *Nottebohm, Second Phase, I.C.J. Reports 1955*, p. 16.

280 Rules of Court of the PCIJ, Article 62; *Statute and Rules of Court, P.C.I.J., Series D, No. 1 (4th ed.)* (1940).

281 *Panevezys-Saldutiskis Railway, 1939, P.C.I.J., Series A/B, No. 29*, p. 16. See also previously, *Certain German Interests in Polish Upper Silesia, Preliminary Objections, 1925, P.C.I.J., Series A, No. 6*, pp. 18-19 and 26.

282 **Vol. VI, Annex 127**, M. Milde, *International Air Law and ICAO* (3rd ed., 2016), p. 201.

preliminary objections; the drafters of the ICAO Rules must be taken to have been aware of the Court's consistent practice in this regard.

4.44 The position adopted by Qatar before the ICAO Council was in any case internally contradictory and incoherent. Qatar did not dispute (indeed it accepted) a respondent's right to raise an objection to the admissibility of a claim. Further, and notably, Qatar did not seek to ground the ability to raise objections to admissibility at the merits stage in any other provision of the Rules. Nor did it provide any other explanation of why the ICAO Council should be regarded as barred from considering objections to admissibility as a preliminary matter. Given that considerations of admissibility, if upheld, prevent any determination of the merits[283], in principle, it is appropriate that an objection to admissibility be determined as a "preliminary issue" in accordance with Article 5(4) of the ICAO Rules, in the same way as an objection to jurisdiction.

4.45 Second, and quite apart from the clear words of Article 5 of the ICAO Rules, the past practice of the ICAO Council shows that it has previously treated objections to the admissibility of claims as preliminary objections and decided them as preliminary issues under Article 5 of the ICAO Rules.

4.46 For instance, in *United States v. 15 European Union Member States* (2000), an objection based on an alleged failure to exhaust local remedies was raised by the respondent States as a preliminary objection[284]. Such an objection

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283 Cf. *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. 456, para. 120.

284 *United States v. 15 European Union Member States* – Preliminary Objections presented by the Member States of the European Union, 18 July 2000, paras 20 and 28.

is undoubtedly one going to the admissibility of a claim, and not to jurisdiction[285].

4.47 The objection was considered by the ICAO Council as a preliminary matter pursuant to Article 5 of the ICAO Rules, and rejected[286]. At no point was it suggested by either the applicant or the ICAO Council that it was improper for the ICAO Council to adopt such an approach in relation to an objection going solely to the admissibility of the claim[287].

4.48 A further example is provided by the recent decision of the ICAO Council on preliminary objections in *Brazil v. United States* (2017), in which, in response to Brazil's claims of breach of the Chicago Convention, the United States raised a preliminary objection under Article 5 of the ICAO Rules on the basis of time bar/extinctive prescription[288]. Again, an objection on this basis is

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285 Cf. *Interhandel Case, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; and see the *dispositif, ibid*., p. 30, by which the Court upheld the Third Preliminary Objection of the United States based on non-exhaustion, and held that the Swiss application was "inadmissible" on that basis. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, I.C.J. Reports 2008*, p.456, para. 120; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J. Reports 2007*, p. 601, para. 48. See previously *Panevezys-Saldutiskis Railway Case, 1939, P.C.I.J., Series A/B, No. 29*, p. 30 (in particular the authoritative French text of the *dispositif*).

286 **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 1, Summary Minutes of the Council, Sixth Meeting 161st Session, ICAO document C-MIN 161/6, 16 November 2000, p. 104, operative para. 2.

287 Qatar's suggestion in its Response before the ICAO Council that the decision of the Council to consider the objection to admissibility based on failure to exhaust local remedies as a preliminary matter was an "error of law" (see **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 23) was unsupported and is without any foundation.

288 **Vol. V, Annex 29**, Preliminary Objections of the United States In Re the Application of the Federative Republic of Brazil Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on December 7, 1944, 24 March 2017, pp. 25-26.

properly characterized as one concerning the admissibility of a claim[289]. The United States characterized it as such[290], and Brazil did not contest that the objection was properly regarded as one going to the admissibility of its claims[291].

4.49 The United States' objection was dealt with by the ICAO Council under the procedure for preliminary objections foreseen by Article 5 of the ICAO Rules[292]. Although disputing the factual and legal basis for that objection[293], Brazil did not make any point to the effect that the objection was improperly raised as a preliminary matter or that it could not be dealt with and decided by the ICAO Council as a preliminary matter in accordance with Article 5 of the ICAO Rules.

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289 See, e.g., *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1995*, p. 253, para. 32; and see the formulation of the *dispositif*, *ibid*., p. 268, para. 72(1)(d).

290 **Vol. V, Annex 29**, Preliminary Objections of the United States In Re the Application of the Federative Republic of Brazil Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on December 7, 1944, 24 March 2017, pp. 25-26; see also **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 2, ICAO Council 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO document C-MIN 211/9, 5 July 2017, paras 26 and 40.

291 **Vol. V, Annex 30**, Comments by the Federative Republic of Brazil In Re the Preliminary Objection of the United States relting to the Disagreement arising under the Convention on International Civil Aviation done at Chicago on December 7, 1944, 19 May 2017, pp. 11-12; and see **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 2, ICAO Council – 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO document C-MIN 211/9, 5 July 2017, paras 51 and 54.

292 **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 2, ICAO Council – 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO document C-MIN 211/9, 5 July 2017, paras 49 and 92-93.

293 *Ibid*., para. 52.

4.50 In any event, the decision in *Brazil v. United States* is not authority for the proposition that preliminary objections as to admissibility cannot be decided by the ICAO Council as a preliminary issue[294].

4.51 In particular, the ICAO Council did not decline to rule upon the objection as to the admissibility of Brazil's claim on the basis that it was improperly raised as a preliminary objection. Rather, it in fact proceeded first to vote on whether to accept the preliminary objection[295]. That course of action was taken despite the suggestion of the delegate of the United Kingdom that the ICAO Council should decide that "statements and arguments made by the United States in its Preliminary Objection did not possess, in the circumstances of the case, an exclusively preliminary character and that they may be joined to the merits of the case"[296], and that this question should be disposed of prior to considering whether to accept the Preliminary Objection[297].

4.52 It was only after having voted upon whether to accept the preliminary objection as to the admissibility of Brazil's claims raised by the United States (and rejected it by 4 votes to 19, with 11 abstentions)[298], that the ICAO Council,

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294 Cf. Qatar's suggestion that in *Brazil v. United States*, the ICAO Council "reverted to the proper application of Article 5 of the Rules for the Settlement of Differences, did not consider the substance of the arguments based on extinctive prescription, [and] did not accept the preliminary objection": **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 24.

295 **Vol. V, Annex 32**, Decision of the ICAO Council on the Preliminary Objection of the United States in the Matter "Brazil v. United States", 23 June 2017, para. 1; **Vol. III, Annex 24**, ICAO Preliminary Objections, 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. 96.

296 **Vol. III, Annex 24**, ICAO Preliminary Objections, 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.

297 *Ibid*., para. 94.

298 *Ibid*., paras 98-99.

after further debate[299], and having sought the views of the parties[300], then decided (unanimously), by separate vote, that

> "the statements and the arguments made in the Respondent's preliminary objection and in the Applicant's comments in response did not possess, in the circumstances of the case, an exclusively preliminary character, they may be joined to the merits of the case and included in the Respondent's Counter-Memorial and any additional pleadings."[301]

4.53 As such, the ICAO Council did not join the objection as to admissibility to the merits[302]; rather, having considered and rejected the objection as a preliminary issue, as required by Article 5(4) of the Rules, it proceeded to make clear that the same arguments could be raised in due course during the merits phase of the proceedings.

4.54 In this connection, it bears noting that Article 5(4) is unequivocal in mandating that all preliminary objections must be decided "as a preliminary issue before any further steps are taken". In this regard, it differs from the procedural rules of other bodies, for instance Article 79(9) of the Court's Rules of Court, which permit objections to be dealt with together with the merits where they are found not to "possess, in the circumstances of the case, an exclusively preliminary character".

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299 *Ibid*., paras 100-103.

300 *Ibid*., paras 104-106.

301 *Ibid*., para. 107; and see **Vol. V, Annex 32**, Decision of the ICAO Council on the Preliminary Objections in the Matter "Brazil v. United States (2016)", 23 June 2017, para. 2.

302 Cf. **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 25.

4.55 In its Response, Qatar highlighted this particular characteristic of the Rules[303]. Similarly, at the hearing before the ICAO Council, it expressly accepted the Appellants' position that Article 5(4) of the ICAO Rules "did not give the Council the option of joining preliminary objections to the merits"[304].

4.56 Article 5(4) of the ICAO Rules must thus be understood as requiring that the ICAO Council decide all preliminary objections, whether going to jurisdiction or to admissibility, as a preliminary issue before entering into the merits.

Section 3. Conclusion

4.57 In light of the above considerations, the Appellants submit that the ability of the ICAO Council to deal with preliminary objections pursuant to Article 5 of the ICAO Rules extends not only to "pure" jurisdictional objections, but also encompasses objections as to the admissibility of the dispute, or of the claims submitted. In accordance with the ICAO Rules, all objections questioning the "jurisdiction of the Council to handle" a particular disagreement must be decided by the ICAO Council "as a preliminary issue before any further steps are taken" in the proceedings.

303 *Ibid*., *para.* 16.

304 **Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 50.

CHAPTER V
SECOND GROUND OF APPEAL: THE ICAO COUNCIL ERRED IN FACT AND IN LAW IN NOT ACCEPTING THE FIRST PRELIMINARY OBJECTION

Section 1. Introduction

5.1 The Appellants' second ground of appeal against the Decision of the ICAO Council of 29 June 2018 is that, in the circumstances of the present case, the ICAO Council is not competent to rule upon the disagreement submitted to it by Qatar in the ICAO Application relating to the IASTA, and that the ICAO Council accordingly erred in its Decision of 29 June 2018 in not accepting the Appellants' First Preliminary Objection and thereby affirming its jurisdiction to proceed to hear the merits of the dispute.

5.2 As noted above in Chapter IV, a single situation may give rise to issues both as to the jurisdiction of the relevant body over the claims submitted to it, and as regards the admissibility of those claims[305]. The First Preliminary Objection is put in two alternative ways, each based on the fact that the jurisdiction of the ICAO Council under Article II, Section 2 of the IASTA is limited to disagreements relating to the interpretation or application of the IASTA:

(a) First, it is raised as an objection to the jurisdiction of the ICAO Council, insofar as, when properly characterized, the real issue in dispute between the Parties cannot be confined to matters relating to the interpretation or application of the IASTA, but concerns the wider dispute between the Parties. That dispute necessarily implicates matters extending far beyond the scope of the IASTA, and therefore

[305] See above, paras 4.30-4.31.

beyond the limited jurisdiction of the ICAO Council. Issues falling outside that jurisdiction include whether the airspace restrictions adopted by the Appellants are properly characterized as legitimate countermeasures, which in turn inexorably raises the question as to whether Qatar has breached its international obligations.

(b) Second, and in the alternative, the First Preliminary Objection is raised as going to the admissibility of Qatar's claims. The objection to admissibility is made on the basis that, insofar as final adjudication by the ICAO Council of Qatar's claims would necessarily involve the Council adjudicating upon matters that fall outside the narrow scope of its jurisdiction under the IASTA, as to which the Appellants have not consented to it deciding, it would be incompatible with the fundamental principle of the consensual basis of international jurisdiction, and therefore incompatible with judicial propriety and the ICAO Council's judicial function under Article II, Section 2 of the IASTA for the ICAO Council to exercise jurisdiction over Qatar's claims.

5.3 Under Article II, Section 2 of the IASTA, jurisdiction is conferred on the ICAO Council to adjudicate only disagreements relating to the interpretation or application of the IASTA. In light of the well-established principle that the contentious jurisdiction of international courts and tribunals over inter-State disputes is consensual, that jurisdiction is limited.

5.4 The dispute submitted by Qatar to the ICAO Council under the ICAO Application, which relates to the alleged breach by the Appellants of their obligations under the IASTA as a result of the airspace restrictions, however, are only a consequence and manifestation of the underlying dispute between the

Parties, as described in Chapter II. As a result, any adjudication by the ICAO Council on Qatar's claims would necessarily require it to adjudicate on matters which do not relate to the interpretation and application of the IASTA within the meaning of its Article II, Section 2, and as to which the Appellants (and indeed, Qatar) have manifestly not consented to the ICAO Council (a specialized body concerned principally with safety and standardization in international civil aviation) exercising jurisdiction. Those matters relate in particular to the Appellants' defence that the airspace restrictions were adopted as valid countermeasures under international law, which in turn implicates Qatar's prior breaches of other international obligations relating to non-intervention, measures to combat extremism and terrorism, including its financing, and commitments to refrain from using state-owned media to propagate hate speech and foment instability in the region.

5.5 These broader issues, which are an essential pre-condition to the final disposal of the artificially narrow dispute under the IASTA which Qatar has sought to submit to the ICAO Council for adjudication, mean that the ICAO Council does not have jurisdiction to rule on Qatar's claims; or, in the alternative, that those claims are inadmissible.

5.6 The remainder of the present Chapter is structured as follows: Section 2 discusses the limited scope of the jurisdiction *ratione materiae* of the ICAO Council pursuant to Article II, Section 2 of the IASTA. Section 3 then examines in greater detail why adjudication of the disagreement submitted by Qatar to the ICAO Council on its merits would necessarily require the ICAO Council to adjudicate upon matters falling outside its jurisdiction, and which the Appellants have not consented to submit for adjudication by the ICAO Council.

5.7 Sections 4 and 5 then expand upon the two alternative reasons why the ICAO Council is not competent to adjudicate upon Qatar's claims, such that the ICAO Council should have found either that it was without jurisdiction, or that Qatar's claims are inadmissible.

5.8 Section 4 sets out the Appellants' objection to the ICAO Council's jurisdiction on the basis the "real issue" in dispute is in fact the wider dispute between the Appellants and Qatar relating to Qatar's breach of its international obligations relating to non-intervention and support of terrorism and extremism, a dispute over which the ICAO Council undoubtedly does not have jurisdiction.

5.9 Section 5 then explains why even if the ICAO Council were to be held to have jurisdiction over Qatar's narrow claims of breach of the IASTA, it nevertheless is unable to exercise that jurisdiction for reasons of judicial propriety and related to the character of its judicial function, such that it should have declared Qatar's claims inadmissible.

Section 2. The limited jurisdiction of the ICAO Council under Article II, Section 2 of the IASTA

5.10 As already noted, the jurisdiction of the Council to consider disagreements between States parties derives from Article II, Section 2 of the IASTA, which provides:

> "If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation, the provisions of Chapter XVIII of the [Chicago] Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the above-mentioned Convention."

5.11 The jurisdiction of the ICAO Council under Article II, Section 2 of the IASTA is limited and circumscribed *ratione materiae* to matters relating to the "interpretation or application" of the IASTA. That is so, first and foremost, based on the express terms of Article II, Section 2, read in the light of the consensual basis for the jurisdiction by international courts and tribunals over inter-State disputes (Subsection A). That interpretation of the ICAO Council's jurisdiction is confirmed by considerations relating to the narrow and limited functions of ICAO, as defined in its constitutive charter, and its status as a United Nations specialized agency (Subsection B).

A. The limited jurisdiction of the ICAO Council pursuant to the text of Article II, Section 2 of the IASTA

5.12 An important consequence of the fundamental principle of consent as the basis for international jurisdiction is that where the jurisdiction of a court or tribunal is based on a compromissory clause in a treaty, it is necessarily limited and circumscribed by the terms of the relevant provision, which constitutes and embodies the consent of those States parties bound by it to the exercise of jurisdiction. As discussed in Chapter IV, in A*rmed Activities on the Territory of the Congo*, the Court emphasized that:

> "[w]hen a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and *within the limits set out therein*."[306]

[306] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 65 (emphasis added).

Similarly, the Court later observed that:

> "its jurisdiction is based on the consent of the parties *and is confined to the extent accepted by them . . .* When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject *must be regarded as constituting the limits thereon.*"[307]

5.13 It follows that, in light of the express terms of Article II, Section 2 of the IASTA, the jurisdiction of the ICAO Council is limited to disagreements between States parties which a) relate to the "interpretation or application of the [IASTA]" and which b) "cannot be settled by negotiation". These limitations, which derive from the clear terms of Article II, Section 2 itself, and thus circumscribe the jurisdiction of the ICAO Council, constrain the scope of the ICAO Council's jurisdiction *ratione materiae*. In addition, seen in the context of the IASTA as a whole, it is clear that Article II, Section 2 is restricted to disputes concerning the matters covered by the IASTA, namely, international civil aviation.

5.14 Conversely, it is elementary that the jurisdiction *ratione materiae* of the ICAO Council does not extend to matters outside those expressly referred to in Article II, Section 2. In particular, as regards the first limitation identified above, the jurisdiction of the ICAO Council does not extend to disagreements or disputes between States which do not relate to the interpretation or application of the IASTA[308].

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307 *Ibid*., p. 39, para. 88 (emphasis added).

308 As a consequence, it is manifest that the ICAO Council is without jurisdiction over the claims made by Qatar in its Application and Memorial of breach of "other principles of international law" and "other rules of international law", including the Charter of the United Nations; see **Vol. III, Annex 23**, ICAO Application, pp. 1-2; **Vol. III, Annex 23**, ICAO Memorial, Secs (e) and (f).

B. THE LIMITED SCOPE OF JURISDICTION OF THE ICAO COUNCIL UNDER ARTICLE II, SECTION 2 OF THE IASTA IS CONFIRMED BY THE NARROW AND SPECIALIZED FUNCTIONS OF ICAO

5.15 The narrow and specific role of ICAO as the United Nations specialized agency with responsibility for matters of civil aviation further confirms the existence of limitations upon the jurisdiction of the ICAO Council in adjudicating upon disagreements submitted to it under Article II, Section 2 of the IASTA.

5.16 As noted by the Court in response to the request by the World Health Organization (***WHO***) for an advisory opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the limits of the powers of an international organization which is a United Nations specialized agency fall to be ascertained:

> "by taking due account not only of the general principle of speciality, but also of the logic of the overall system contemplated by the Charter."[309]

5.17 As regards the principle of speciality, the Court had earlier explained that:

> "international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[310]

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309 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 80, para. 26.

310 *Ibid*., p. 78, para. 25.

5.18 Where, as here, the international organization concerned is a United Nations specialized agency, the principle is of paramount importance.

5.19 As the Court went on to explain, any assessment of the powers of a United Nations specialized agency must also take account of the overall system under the United Nations Charter:

> "the Charter of the United Nations laid the basis of a 'system' designed to organize international co-operation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The exercise of these powers by the organizations belonging to the 'United Nations system' is co-ordinated, notably, by the relationship agreements concluded between the United Nations and each of the specialized agencies."[311]

5.20 The Chicago Convention, the constitutional document of ICAO, sets out a limited role for ICAO in the field of civil aviation. Pursuant to Article 44, the aims and objectives of ICAO essentially centre around air navigation, the safety of civil aviation, and the promotion of civil aeronautics:

> "Article 44 Objectives
>
> The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:
>
> (a) Insure the safe and orderly growth of international civil aviation throughout the world;

311 *Ibid*., p. 80, para. 26.

(b) Encourage the arts of aircraft design and operation for peaceful purposes;

(c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;

(d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;

(e) Prevent economic waste caused by unreasonable competition;

(f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;

(g) Avoid discrimination between contracting States;

(h) Promote safety of flight in international air navigation;

(i) Promote generally the development of all aspects of international civil aeronautics."

5.21 The specific aims and objectives of ICAO also form the basis for the relationship of ICAO with the wider United Nations system and define its role within that system. Pursuant to Article 1 of the Relationship Agreement between ICAO and the United Nations, the United Nations recognizes ICAO as "the specialized agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein."[312] In other words, the proper functioning of the United

312 **Vol. II, Annex 4**, Agreement between the United Nations and the International Civil Aviation Organization, signed at New York on 1 October 1947, 8 *UNTS* 315, Art. 1.

Nations recognizes ICAO (and other agencies) not acting beyond their specific powers as prescribed in their constitutional instrument.

5.22 The constitutional constraints placed upon ICAO as a whole, and therefore upon the ICAO Council, are thus clear and unchallengeable. The ICAO Council cannot exceed its functional bounds.

5.23 Accordingly, in light of the specialized and technical field of operation of ICAO as a whole, the specific jurisdiction of the ICAO Council when exercising judicial functions under Article II, Section 2 of the IASTA must be regarded as circumscribed and as limited to matters falling within its particular area of specialization.

5.24 Precisely such limitations are reflected in Article II, Section 2 of the IASTA, insofar as the jurisdiction conferred on the ICAO Council is defined as extending only to disagreements relating to the interpretation or application of the IASTA.

5.25 That conclusion is also supported by pragmatic considerations relating to the composition of the ICAO Council and the experience and expertise of the representatives of its Members. In this regard, in his declaration in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judge Lachs observed that the ICAO Council is "composed of experts in other fields than law"[313]. In light of the specialized role of the ICAO Council, and of ICAO as a whole, the representatives of the States members of the ICAO Council are predominantly individuals with experience and expertise in the field of international civil aviation. As a consequence, they normally have no judicial

313 *Declaration of Judge Lachs, Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 75.

experience or wider experience in general international law and are thus ill-equipped to resolve complex legal disputes between States in areas falling outside the narrow and specialist compass of the rules of international law relating to international civil aviation.

5.26 In conclusion, the jurisdiction conferred on the ICAO Council under Article II, Section 2 of the IASTA must, in accordance with its express terms, and in light of the specialized functions of ICAO, be interpreted as being strictly restricted to matters relating to the interpretation and application of the IASTA. Conversely, the jurisdiction of the ICAO Council under Article II, Section 2 of the IASTA self-evidently does not extend to matters falling outside that narrow compass.

Section 3. The disagreement submitted by Qatar to the ICAO Council would necessarily require the Council to adjudicate upon matters falling outside its jurisdiction

5.27 Whilst on its face raising issues of the interpretation and application of the IASTA, the claim submitted to the ICAO Council by Qatar in the ICAO Application concerns only one element of the real dispute between the Parties. As set out in Chapter II above, that dispute involves matters extending far beyond questions relating to the interpretation or application of the IASTA, and which undoubtedly go beyond the constitutional limitations of ICAO's competencies resulting from its aims and purposes.

5.28 The real subject-matter of the dispute between the Parties concerns Qatar's failure to abide by – and indeed Qatar's conduct in reneging on – fundamental obligations of a completely different character, namely those violated by Qatar's ongoing support for and harbouring of terrorists and extremists, its interference in the internal affairs of other States, and its propagation of hate speech through its State-owned and -controlled media. This

conduct violates numerous international obligations, including customary international law, United Nations Security Council Resolutions, and relevant treaties, including the Riyadh Agreements.

5.29 Those matters fall outside the scope of the ICAO Council's jurisdiction under Article II, Section 2 of the IASTA.

5.30 Qatar's claims in the ICAO Application are admittedly carefully framed so as only to allege breaches by the Appellants of their obligations under the IASTA as a result of their adoption of the airspace restrictions[314]. Any final adjudication on those claims by the ICAO Council, however, would necessarily and inevitably require the ICAO Council to consider and rule upon matters which undoubtedly fall outside its limited jurisdiction *ratione materiae* under Article II, Section 2 of the IASTA, and to venture into areas which extend far beyond the narrow and specialized field of civil aviation. That is because, as also discussed above in Chapter II, the airspace restrictions were adopted by the Appellants as lawful countermeasures in response to Qatar's prior breaches of multiple international obligations arising under customary international law, Security Council Resolutions, and relevant treaties, including the Riyadh Agreements. The applicable law to determine the real dispute between the Parties is thus not within the ICAO Council's competence, nor its expertise; yet the Council would necessarily have to consider these other obligations in order to resolve the dispute before it. Neither is the Council equipped to hear a dispute of this character under its current procedural rules.

5.31 As was discussed in Chapter II, it is well-established in international law that, to the extent that the non-performance of an obligation by State A

314 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 46.

constitutes a valid countermeasure adopted in response to a prior internationally wrongful act of State B, then the wrongfulness of that non-performance is precluded as against State B[315]. As such, in order to adjudicate upon Qatar's claims in the ICAO Application that the Appellants have breached their obligations under the IASTA through adoption of the airspace restrictions, the ICAO Council would necessarily have to rule upon core elements of that underlying dispute, and in particular the Appellants' defence to Qatar's claims on the merits, namely whether, if the airspace restrictions constitute conduct which is inconsistent with their obligations under the IASTA, they constitute lawful countermeasures under customary international law, such that any wrongfulness is precluded.

5.32 However, ruling on the issue of the validity of the Appellants' claim that the airspace restrictions were adopted as countermeasures would unavoidably require the ICAO Council to rule upon whether the conditions for valid countermeasures under customary international law were fulfilled, first and most obviously the question of whether the airspace restrictions and other measures were adopted in response to a prior internationally wrongful act insofar as Qatar had breached its relevant international obligations.

5.33 Accordingly, the dispute between the Parties raised by Qatar's claims goes far beyond the limited field of civil aviation, and falls outside the ICAO Council's limited jurisdiction under Article II, Section 2 of the IASTA over disagreements relating to the "interpretation or application" of the IASTA. As such, it is not a dispute over which the Appellants have consented to the ICAO Council exercising jurisdiction.

315 See above, paras 2.55-2.61.

5.34 Before the ICAO Council, Qatar did not suggest that there existed no dispute between the Parties in relation to the Appellants' assertions that Qatar had breached its various international obligations relating to non-interference and support of terrorism and extremism. Nor did it suggest that there existed no dispute as to whether the airspace restrictions were capable of justification on the basis that they constituted lawful countermeasures.

5.35 On the contrary, Qatar's Response before the ICAO Council clearly demonstrates that a dispute undoubtedly exists in both regards. Indeed, Qatar appeared to take the position that the dispute was one that the ICAO Council was competent to adjudicate. Qatar first argued that the question of countermeasures was one for the merits and further appeared to envisage that the ICAO Council would be competent to rule upon that issue at the merits phase:

> "the issue of countermeasures and their lawfulness or otherwise is one to be examined on the merits of the case. . . . The State of Qatar submits that the arguments [the Appellants] have raised, and all the exhibits they have provided, in this regard, fall to be considered on the merits, and not at the preliminary objection phase. It goes to their defence on the merits, not to their preliminary objection.
>
> The State of Qatar has already highlighted that [the] Council cannot examine the merits now, and that in any event the Council can examine any wider question at the stage of the merits."[316]

316 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, paras 76-77 (emphasis in original omitted).

5.36 In the very next paragraph, whilst purporting not to respond at that stage to "the allegation that [it] supports terrorism, or terrorism financing, etc", Qatar went on to outline its position in that regard, as follows:

> "At the appropriate later stage of the proceedings (merits) the State of Qatar will provide a robust defence on the facts and in law to the claim of the Respondents, which will show that the actions taken by the Respondents are not lawful countermeasures, or otherwise lawful in international law."[317]

5.37 Qatar then engaged in a truncated discussion of some of the preconditions for lawful countermeasures under customary international law (as reflected in the work of the ILC on State responsibility)[318], although it conspicuously omitted to mention the fundamental requirement that countermeasures must be adopted in response to a prior internationally wrongful act, or to explain on what basis the ICAO Council would have jurisdiction to consider this matter[319]. Qatar reiterated, however, that it would

> "show, at the stage of the merits, on the facts and in law, that the conditions for the imposition and continuation of the alleged countermeasures by the Respondents have not been met."[320]

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317 *Ibid*., para. 78 (emphasis in original omitted).

318 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, paras 79-82; citing **Vol. II, Annex 13**, ARSIWA, p. 31.

319 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 79, although cf. *ibid*., the quotation of the ILC's Commentary to the effect that countermeasures are "a response to internationally wrongful conduct".

320 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 83 (emphasis in original omitted).

5.38 At the hearing before the ICAO Council on 26 June 2018, Qatar maintained its position that the ICAO Council could and should rule on the issues relating to countermeasures, suggesting that:

> "based on the documents which the Respondents had unfortunately produced as exhibits and the statements they had made in their Statements of preliminary objections and Rejoinders, the matter would be one of the easiest for the Council to decide at that session when it would examine the merits . . ."[321]

5.39 As such, at the very least, Qatar does not deny (and in light of the position adopted by it before the ICAO Council, it is not open to it to deny) that there exists a disagreement between the Parties as to whether the airspace restrictions constitute lawful countermeasures. Yet it has failed to put forward any jurisdictional basis that would permit the ICAO Council to consider and adjudicate these necessary aspects of the dispute between the Parties.

5.40 Further, and despite its efforts to avoid taking a position in this regard, insofar as Qatar asserted that it would in due course "provide a robust defence on the *facts*"[322], Qatar likewise implicitly acknowledged that there exists a dispute between the Parties as to whether it has breached its other international obligations outside the IASTA. Indeed, given the character of the obligations in question, and the gravity of the breaches alleged by the Appellants as justifying the adoption of countermeasures, it would be surprising if Qatar were to deny that there existed any dispute in that regard, and thereby accept that it had committed the serious breaches of fundamental obligations under international

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321 **Vol. V, Annex 53**, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para. 62.

322 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 78 (emphasis added).

law relied upon by the Appellants as the basis for the adoption of countermeasures.

5.41 Neither the question of Qatar's prior breaches of its relevant international obligations, nor the issue as to whether the airspace restrictions qualify as valid countermeasures, falls within the circumscribed and specialist scope of the jurisdiction of the ICAO Council under Article II, Section 2 of the IASTA. As a result, and in any event, final resolution of Qatar's claim submitted to the ICAO Council would necessarily and inevitably involve the ICAO Council ruling on the dispute between the Parties relating to matters clearly falling outside the limited jurisdiction conferred upon it pursuant to the IASTA.

5.42 That consideration has necessary implications for the competence of the ICAO Council to adjudicate upon the claims submitted by Qatar. It was not appropriate for the ICAO Council simply to disregard its manifest lack of jurisdiction over key elements of the dispute, notably its lack of jurisdiction *ratione materiae* over the Appellants' claims of breach by Qatar of its international obligations arising otherwise than under the IASTA. As already noted, those issues form the basis for the Appellants' defence that the airspace restrictions, relied upon by Qatar as in breach of the IASTA, constitute lawful countermeasures such that any wrongfulness is precluded.

Section 4. The law applicable in determining the jurisdiction *ratione materiae* of the ICAO Council

A. INTRODUCTION

5.43 Central to the Appellants' Preliminary Objection in this regard is the question of whether, properly characterized, the dispute between the Parties is one falling within the jurisdiction *ratione materiae* of the ICAO Council. As

explained above, the jurisdiction of the ICAO Council is extremely narrow and is limited by the express terms of Article II, Section 2 of the IASTA and its object and purpose to "any disagreement between two or more contracting States relating to the interpretation or application of [the IASTA]".

5.44 As this section explains, it is a requirement for the ICAO Council – and hence now for the Court – to determine the subject-matter of the dispute before it, and then to determine whether that subject-matter falls within the narrow scope of the compromissory clause in Article II, Section 2 of the IASTA. In so doing, the ICAO Council must ascertain for itself the "real issue" in dispute. In undertaking that assessment, the ICAO Council is not bound by the characterization of the dispute put forward by the claimant party.

5.45 The "real issue" doctrine recognizes that the proper characterization of a dispute is a matter for objective assessment; as of course it must be in order to achieve its objective, which is of paramount jurisdictional importance. It is intended, for instance, to prevent a dispute from being broken artificially into discrete morsels that happen to suit the jurisdictional needs of the complaining party; or to prevent a party from portraying as a mere incidental issue what is in fact the core of the dispute but lies outside the confined jurisdictional mandate of the forum.

5.46 The Appellants' position is that the ICAO Council erred in dismissing the Preliminary Objections before it. The ICAO Council has no jurisdiction to rule upon the real issue between the Parties, which, as is explained in Chapter II above and further in Subsection D below, concerns Qatar's failure to comply with its international obligations, and the measures taken by the Appellants in order to seek to induce Qatar to comply with those obligations.

B. THE "REAL ISSUE" TEST REQUIRES AN OBJECTIVE CHARACTERIZATION OF THE SUBJECT-MATTER OF THE DISPUTE

5.47 Before determining that it had jurisdiction, the ICAO Council ought to have ascertained and legally characterized the subject-matter of the dispute before it and determined whether this dispute fell within its jurisdiction *ratione materiae* under Article II, Section 2 of the IASTA. Such an approach is required by the Court's consistent jurisprudence, which characterizes the subject matter of a dispute according to the objective "real issue" test, and which is applicable in determining whether a dispute falls within the relevant jurisdiction *ratione materiae*. The object of the inquiry is to determine whether or not the dispute is within the subject-matter(s) in respect of which States have given their consent to jurisdiction.

5.48 In its early cases, the Court did not need to go further than the claimants' pleadings in determining the subject-matter of the dispute before it. Thus in the *Interhandel* case, the Court held that "the subject of the present dispute is indicated in the Application and in the Principal Final Submission of the Swiss Government."[323] Similarly, in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, the Court considered the content of Pakistan's Application and Complaint to the ICAO Council, concluding that "there can . . . be no doubt about the character of the case presented by Pakistan to the Council."[324] In many cases, this will be a sufficient inquiry.

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323 *Interhandel Case (Switzerland v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 21. See also *Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960*, pp. 33-34.

324 *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 59, para. 22 and p. 66, para. 36.

5.49 In the *Nuclear Tests* cases, the Court did not have the benefit of pleadings from all parties before it (since the respondent did not participate in either proceeding). The Court proceeded to analyse the submissions of the applicants in each case in order to ascertain the "real issue" in dispute, while making clear that the test was an objective one:

> "Thus, it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions."[325]

5.50 The Court went on to explain that:

> "In the circumstances of the present case, although the Applicant has in its Application used the traditional formula of asking the Court 'to adjudge and declare' . . . the Court must ascertain the true object and purpose of the claim and in doing so it cannot confine itself to the ordinary meaning of the words used; it must take into account the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court's attention, and public statements made on behalf of the applicant Government."[326]

5.51 In those cases, the Court's enquiry was for the limited purpose of ascertaining that the applicants were not in fact seeking declaratory judgments.

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325 *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30.

326 *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 263, para. 30; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 467, para. 31.

The Court went on to hold that the claims were inadmissible as their object had been rendered moot by subsequent developments.

5.52 In two later cases, the Court was called upon to characterize the dispute before it in order to ascertain whether that dispute was excluded by reservations to the compulsory jurisdiction of the Court under Article 36(2) of the Statute. In both cases, the Court was not content to limit its inquiry to the applicants' submissions only.

5.53 In *Aegean Sea (Greece v. Turkey)*, Greece requested the Court to determine its entitlement to a continental shelf arising from certain islands. But the Court did not accept the subject-matter of the claim as it was put in Greece's Application. In that case, the limits of the Court's jurisdiction were set out by Greece's reservation in case of disputes "relating to the territorial status of Greece", which Turkey had invoked[327]. Greece sought to characterize the dispute narrowly as being merely one of delimitation of the continental shelf, and not one relating to "territorial status"[328]. The Court rejected Greece's characterization of the dispute, finding that the "very core of the present dispute", its "basic character" and the "very essence" of it, concerned questions of the territorial status of certain islands that Greece claimed would generate a continental shelf[329]. While the Court may not have used the language of "real issue" from the *Nuclear Tests* cases, it nevertheless applied the test in substance. In doing so, the Court took into account not only Greece's Application, but also the diplomatic correspondence, and it noted the position

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327 *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, pp. 16-17 and 34, paras 39-40 and 81. Greece's reservation is reproduced at pp. 20-21, para. 48.

328 *Ibid*., pp. 34-35, para. 82.

329 *Ibid*., pp. 35-37, paras 83, 87 and 88.

of Turkey, that Greece's Application concerned a territorial dispute, was "evident from the documents before the Court"[330]. The Court thus held that its jurisdiction over the whole dispute was excluded by Turkey's invocation of Greece's reservation.

5.54 That the "real issue" test was to be used in considering whether a dispute was excluded by a reservation was then confirmed in the *Fisheries Jurisdiction* case, which relied on the *Nuclear Tests* formulation[331]. The Court was called upon to determine whether the matter in dispute fell within the terms of Canada's reservation[332], as Spain had sought to characterize the dispute in such a way as to avoid its effect. The Court explained that ascertaining the "subject of the dispute" should begin with an examination of the Application. It went on to hold:

> "However, it may happen that uncertainties or disagreements arise with regard to the real subject of the dispute with which the Court has been seised, or to the exact nature of the claims submitted to it. In such cases the Court cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by claims of the Applicant."[333]

Rather than being confined to Spain's Application and submission, the Court considered that it was required to determine "on an objective basis the dispute

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330 *Ibid*.

331 *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 448-449, para. 30.

332 *Ibid*., p. 448, para. 29.

333 *Ibid*.

dividing the parties", taking into account the oral and written pleadings of both parties[334].

5.55 The Court has thus made it clear that its role in determining the real issue in dispute is an objective one. The articulation of the subject-matter of the dispute in the application will provide the starting point, but the Court must also take into account the respondent's characterization and arguments, as well as other relevant material. This approach has continued to be followed in the most recent decisions of the Court.

C. THE "REAL ISSUE" TEST MAY DETERMINE JURISDICTION *RATIONE MATERIAE*

5.56 Where the parties disagree as to the "real issue" of the dispute, the court or tribunal – and in this case the ICAO Council – has a positive duty to determine objectively what the dispute before it is, and then to decide whether that dispute falls within its jurisdiction. If the "real issue" falls outside the court or tribunal's jurisdiction *ratione materiae*, it must determine that it does not have jurisdiction over the dispute, even if on the claimant's characterization alone the dispute would fall within its jurisdiction. It is not enough merely to ask whether the claim as formulated falls within the four corners of a jurisdictional instrument. For to do so would unduly ignore that a dispute, as it actually exists and not as one party alone would have it, involves facts, rights, and obligations, asserted by all litigants, not just the claimant.

5.57 The most straightforward application of the "real issue" test is to determine the subject-matter of a claim for the purposes of determining whether it falls within the compromissory clause giving rise to the court or tribunal's

334 *Ibid*., pp. 448-450, paras 30 and 33.

jurisdiction. This was the case in a number of recent proceedings before the Court[335].

5.58 To take one of those cases, in its decision in *Bolivia v. Chile* the Court reiterated and applied the "real issue" test in order to determine its subject-matter jurisdiction, holding that:

> "It is for the Court itself, however, to determine on an objective basis the subject-matter of the dispute between the parties, that is, to 'isolate the real issue in the case and to identify the object of the claim' (*Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests* (*New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30). In doing so, the Court examines the positions of both parties, 'while giving particular attention to the formulation of the dispute chosen by the [a]pplicant' (*Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30; see also *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38). . . . To identify the subject-matter of the dispute, the Court bases itself on the application, as well as the written and oral pleadings of the parties. In particular, it takes account

335 See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 602 para. 26; see also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, pp. 26-27, para. 50 ("'[W]hether there exists an international dispute is a matter for objective determination' by the Court . . . [which] 'must turn on an examination of the facts.'"); *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, p. 17, para. 48 ("it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim").

> of the facts that the applicant identifies as the basis for its claim."[336]

5.59 In that case, Chile had submitted that Bolivia had framed the Application in an artificially narrow fashion, because the relief sought by Bolivia would lead to negotiations with a judicially predetermined outcome on matters falling outside of the Court's jurisdiction. However, the Court determined that the subject-matter of the dispute concerned whether Chile was obligated to negotiate in good faith Bolivia's sovereign access to the Pacific Ocean, holding that this could be determined without touching on the question of Bolivia's substantive right to sovereign access to the sea[337]. Accordingly, Chile's preliminary objection was rejected.

5.60 In some cases, however, the application of the "real issue" test will result in the court or tribunal declining jurisdiction. That was the case in the *Aegean Sea* case discussed above. It also occurred in the *Chagos Islands* case between Mauritius and the United Kingdom[338], in which the "real issue" test was applied by a tribunal constituted under Part XV of the United Nations Convention on the Law of the Sea (***UNCLOS***). The tribunal declined to exercise jurisdiction in respect of certain claims by Mauritius, determining that

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336 See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 602, para. 26.

337 *Ibid*., pp. 604-605, paras 33-34.

338 *In the matter of the Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland)*, PCA Case No. 2011-03, Award, 18 March 2015, p. 90 para. 220. Pursuant to **Vol. II, Annex 9**, United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, 1833 *UNTS* 3, Art. 288, the jurisdiction of a court or tribunal constituted under Part XIV is limited to "any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with [Part XV]".

the "real issue" between the parties concerned a dispute over territorial sovereignty, rather than the interpretation or application of the Convention[339].

5.61 Mauritius brought arbitral proceedings seeking to contest the Marine Protection Area created by the United Kingdom under UNCLOS on the basis that the United Kingdom was not the competent "coastal State", because (so Mauritius argued) it lacked sovereignty over the islands. The tribunal concluded that the parties' disagreement was "simply one aspect of a larger dispute" concerning sovereignty over the Chagos archipelago[340]. The Tribunal observed that:

> "[W]here a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it (*see Certain German Interests in Polish Upper Silesia, Preliminary Objections, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6*, p. 4 at p. 18). Where the 'real issue in the case' and the 'object of the claim' (*Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 457 at p. 466, para. 30) do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).

339 *In the matter of the Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland)*, PCA Case No. 2011-03, Award, 18 March 2015, pp. 69, 74-75 and 88, paras 158, 170, 172 and 212.

340 *Ibid*., p. 88, para. 212.

> . . . The Parties' dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention."[341]

5.62 Accordingly, the tribunal found that it did not have jurisdiction to address the dispute before it.

5.63 The "real issue" test has most recently been applied by the UNCLOS Annex VII tribunal in the *South China Sea* case between the Philippines and China[342]. It held that:

> "Where a dispute exists between parties to the proceedings, it is further necessary that [the dispute in question] be identified and characterised. The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable. Here again, an objective approach is called for, and the Tribunal is required to 'isolate the real issue in the case and to identify the object of the claim.' [*Nuclear Tests* (*New Zealand v. France*), para. 30.] In so doing it is not only entitled to interpret the submissions of the parties, but bound to do so."[343]

5.64 The *Chagos Islands* and *South China Sea* cases illustrate that it is not uncommon for a dispute to have different constituent parts, particularly in the context of the law of the sea. The possibility that such a dispute may fall outside a tribunal's competence under UNCLOS is expressly recognized by Article

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341 *Ibid*., p. 90, paras 220-221.

342 *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 October 2015, p. 58, para. 150.

343 *Ibid*.

298(1)(a)(i) of UNCLOS, pursuant to which a State may opt to exclude entirely from the scope of application of the dispute resolution provisions in Section 2 of Part XV of that Convention, including the otherwise applicable obligation to submit the dispute to conciliation in accordance with Section 2 of Annex V to the extent that the dispute is one "that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory"[344].

5.65 Nevertheless, that provision does not purport to answer the question as to whether a tribunal has jurisdiction to determine a dispute touching upon UNCLOS that involves consideration of a territorial dispute not otherwise covered by the Convention. That question falls to be resolved by application of the "real issue" test, which is of general application.

5.66 In the *South China Sea* award, the tribunal considered that the Philippines' claims, which concerned certain Chinese activities in the South China Sea and certain maritime features occupied by China, were properly characterized as claims not concerning sovereignty[345]. Since the tribunal considered it was able to determine the dispute without resolving questions of sovereignty, whether implicitly or explicitly, it considered that it had jurisdiction[346]. In this respect, the tribunal explained that the case was different from the *Chagos Islands* decision, where determination of certain of

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344 **Vol. II, Annex 9**, United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, 1833 *UNTS* 3, Art. 298(1)(a)(i).

345 *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 October 2015, p. 59, para. 152.

346 *Ibid*., pp. 59-60, para. 153.

Mauritius's claims would have required an implicit decision on sovereignty, which was, indeed, on analysis, the true object of Mauritius's claim[347].

5.67 There will of course be cases in which the Court or a tribunal determines that the real issue in dispute continues to fall within its jurisdiction although it implicates other aspects in a peripheral or ancillary fashion[348].

5.68 In other cases, it may be possible to interpret the compromissory clause providing the basis of the Court's jurisdiction under Article 36(1) of the Statute as extending to the whole dispute. This was the case in the *Oil Platforms* case, in which the Court held that its jurisdiction extended to the determination of whether the United States had carried out an unlawful use of force, since the language of "essential security interests" in Article XXI of the Treaty of Amity was sufficiently broad to capture what the United States claimed was an act of self-defence[349]. But the Court was careful not to determine matters falling outside the strict boundaries of its jurisdiction under the Treaty of Amity, which was confined to the interpretation and application of the Treaty[350].

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347 *Ibid*.

348 See *Certain German Interests in Polish Upper Silesia (Germany v. Poland), Preliminary Objections, Judgment, 1925, P.C.I.J., Series A, No. 6*, p. 18.

349 *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, pp. 182-183, para. 42; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 811, para. 20.

350 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 810, para. 16 ("[t]he Court . . . must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.").

5.69 But those cases are to be distinguished from the claims that Qatar has sought to bring before the ICAO Council. The fact remains that an "incidental connection" with the claimed basis of jurisdiction is not sufficient to bring an entirely different dispute within the scope of a court or tribunal's jurisdiction[351]. As Judge Koroma put it in his Separate Opinion in the *Georgia v. Russia* case:

> "[a] link must exist between the substantive provisions of the treaty invoked and the dispute. This limitation is vital. Without it, States could use the compromissory clause as a vehicle for forcing an unrelated dispute with another State before the Court."[352]

5.70 Such considerations are particularly important in the case of a specialized body, such as the ICAO Council, when faced with a dispute falling well outside its ordinary subject-matter jurisdiction.

D. APPLICATION OF THE "REAL ISSUE" TEST IN THE CIRCUMSTANCES OF THIS CASE

5.71 In the circumstances of the present case, the question before the Court is accordingly to determine on an objective basis the "real issue" in dispute between Qatar and the Appellants. No assistance is to be found in this regard in the Decision of the ICAO Council, since it did not seek to identify the subject-matter of the dispute in its Decision. Neither does the Decision disclose whether the ICAO Council accepted the Appellants' characterization of the dispute (but considered it could nevertheless exercise jurisdiction), or indeed, whether it even determined the Preliminary Objections separately. This manifest lack of

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351 *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, Arbitral Award of 18 March 2015, p. 90, para. 220.

352 Separate Opinion of Judge Koroma, *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. 185, para. 7.

reasoning reinforces the conclusion that the Court must itself determine the subject-matter of Qatar's claims *de novo*, on the basis of the pleadings and materials filed before the ICAO Council and before it in this proceeding, while giving particular attention to the formulation of the dispute as chosen by Qatar in filing its ICAO Application and accompanying Memorial[353].

5.72 In its ICAO Application, Qatar stated that the dispute concerns the facts whereby:

> "On 5 June 2017 the Governments of the Respondents announced, with immediate effect and without any previous negotiation or warning, that Qatar-registered aircraft are not permitted to fly to or from the airports within their territories and would be barred not only from their respective national air spaces."[354]

5.73 Qatar further made clear that it considers its claim to be broader than the question only of the interpretation and application of the IASTA, both as a matter of fact and law. It called on the ICAO Council "[t]o determine that the Respondents violated by their actions against the State of Qatar their obligations under the International Air Services Transit Agreement (IASTA) and other rules of international law."[355] The accompanying Memorial also went on to cite the Charter of the United Nations[356].

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353 *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 448-489, para. 30; see also *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38.

354 **Vol. III, Annex 23**, ICAO Application, p. 1. The accuracy of this statement of facts is not a matter for the Court at this stage, and the Appellants reserve their rights in this regard.

355 *Ibid*., p. 2.

356 **Vol. III, Annex 23**, ICAO Memorial, Sec. (e).

5.74 Importantly, Qatar also recognized that the factual dispute arose following the Appellants' decision to impose countermeasures on it, noting that the Appellants "repeatedly gave an ultimatum to the State of Qatar on matters unrelated to air navigation and air transport" and that "the [Appellants] declared all Qatar's citizens and resident[s] 'undesirable' (*persona non grata*) in their territories and ordered them to leave the Respondents' territories within 14 days."[357]

5.75 Once Qatar received the ICAO Preliminary Objections, it sought to modify the way it had characterized the dispute, arguing that "[t]he 'real' issue before the Council is the breach by the Respondents of the IASTA; this is what the Applicant has put before the Council in the Application and the Memorial and it is plain and clear what the State of Qatar is requesting from the Council."[358] Yet notwithstanding these attempts to modify and restrict the scope of its ICAO Application, Qatar continued to assert that the ICAO Council should consider matters that manifestly did not fall within the IASTA.

5.76 Thus Qatar asserted that it "does not respond now to the allegations that is [sic] supports terrorism, or terrorism financing, etc. At the appropriate later stage of the proceedings (merits) the State of Qatar will provide a robust defence on the facts and in law to the claim of the [Appellants], which will show that the actions taken by the [Appellants] are not lawful countermeasures, or otherwise lawful in international law."[359]

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357 *Ibid*., Sec. (g).

358 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 45.

359 *Ibid*., para. 78.

5.77 Accordingly, even on a characterization based only on Qatar's pleadings, it is clear that the dispute before the ICAO Council concerns matters falling beyond the scope of the IASTA.

5.78 That this is the case is confirmed by the positions taken by the Appellants before the ICAO Council. In their Preliminary Objections, the Appellants in good faith invoked the doctrine of countermeasures to explain the measures they had imposed, confirming that:

> ". . . insofar as they require any justification, the measures adopted by them, which form the subject of Qatar's complaints in Application (B), are lawful countermeasures under customary international law, taken in response to Qatar's failure to comply with its international obligations, unrelated to civil aviation, owed to the [Appellants]. The legality of the countermeasures cannot be adjudicated without ruling upon the legality of Qatar's actions. The real issue in the present case lies outside of international civil aviation."[360]

5.79 The Preliminary Objections explained that:

> "The Council thus has no jurisdiction to adjudicate upon the wider dispute between the parties unrelated to international civil aviation, in particular, Qatar's non-compliance with the Riyadh Agreements, other instruments relating to counter-terrorism and its obligations relating to non-interference in the internal affairs of other States . . . which constitute the centre of gravity and the 'real issue' of the dispute. It also has no jurisdiction to adjudicate upon the legality of the actions taken by the Respondents as

[360] **Vol. III, Annex 24**, ICAO Preliminary Objections, para. 6.

> countermeasures in response to Qatar's violation of its obligations."[361]

5.80 Similarly, in the ICAO Rejoinder, the Appellants confirmed that:

> "[T]he 'real issue' in dispute . . . concerns Qatar's multiple, grave, and persistent breaches of international obligations essential to the security of the Respondents, which compelled the Respondents to enact a basket of lawful countermeasures, including the measures of which Qatar now complains. The 'real issue' in this case . . . concerns matters such as the principle of non-intervention, subversion and terrorism . . . [The ICAO Council's determination of this issue] would, in turn, require the Council to conduct a detailed factual inquiry into Qatar's activities in relation to certain terrorist organizations and interference in the domestic affairs of its neighbours and to assess the lawfulness of Qatar's activities against its obligations under, among others, the Riyadh Agreements, the International Convention for the Suppression of the Financing of Terrorism, Security Council Resolution 1373(2001) and customary international law."[362]

5.81 That the real issue in dispute between the Parties in fact concerns Qatar's non-compliance with other obligations under international law is also manifest from other sources. For instance, the statements that Qatar asserts show that it satisfied the precondition of negotiation – which, as is explained below in Chapter VI, do not evidence that it made a genuine attempt to negotiate – evidence beyond doubt that the real matter in dispute concerns matters other than civil aviation. Not one of the many media articles and other

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361 *Ibid*., para. 35.

362 **Vol. IV, Annex 26**, ICAO Rejoinder, p. iii, Executive Summary, paras 2 and 3.

public statements Qatar referred to concern the airspace restrictions, but all concern the wider dispute.

5.82 Instead, as the Appellants have consistently asserted, and have set out again in Chapter II of this Memorial, the real issue in dispute between the Parties concerns Qatar's long-standing violations of its obligations under international law other than under the IASTA. The dispute concerns Qatar's ongoing support for and harbouring of terrorists and extremists, its interference in the internal affairs of other States and its propagation of hate speech through its State-owned and -controlled media. These actions constituted breaches of numerous international obligations, including the general international law principle of non-intervention in other States' domestic affairs, obligations arising under the Riyadh Agreements, the ICSFT, and Security Council Resolutions. In response to these violations, the Appellants took a set of measures, including the airspace restrictions that form the basis of Qatar's claim, which, even if they are inconsistent with the Appellants' obligations under the IASTA (which is denied), would in any case be justified as lawful countermeasures.

5.83 None of these matters fall within the ICAO Council's jurisdiction *ratione materiae* for the purposes of Article II, Section 2 of the IASTA, and thus the Court should find that the Council had no jurisdiction over Qatar's ICAO Application.

E. THE DECISION IN *APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL (INDIA V. PAKISTAN)* IS INAPPOSITE

5.84 One of Qatar's principal arguments before ICAO was that the Applicant's First Preliminary Objection should be rejected on the basis of the Court's decision in the *Appeal Relating to the Jurisdiction of the ICAO Council*

(*India v. Pakistan*) case[363]. Qatar claimed that the decision stood for the proposition that invocation of a merits defence is irrelevant for the purposes of determining jurisdiction.

5.85 The Court in that case noted that the ICAO Council could not:

> "be deprived of jurisdiction merely because considerations that are claimed to lie outside the [ICAO] Treaties may be involved if, irrespective of this, issues concerning the interpretation or application of these instruments are nevertheless in question. The fact that a defence on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned, – otherwise parties would be in a position themselves to control that competence . . . [The ICAO Council's] 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."[364]

5.86 The situation at issue in *India v. Pakistan* is not analogous to that in the Appeals now before the Court. India's jurisdictional challenge focused on whether the treaty giving rise to the ICAO Council's jurisdiction was still in force. India objected to jurisdiction on the basis that the purported suspension or termination of the Chicago Convention and the IASTA meant that there was no applicable treaty for the ICAO Council to interpret or apply:

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363 *Appeal Relating to the Jurisdiction of the ICAO Council, (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 27; cf. **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, paras 66-71.

364 *Appeal Relating to the Jurisdiction of the ICAO Council, (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 27; cf. **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 71.

> "There is no disagreement between the Applicant and the Respondent relating to the interpretation or application of the Convention or the Transit Agreement. . . . When the treaty is terminated, or suspended in whole or in part, as between two States, any dispute relating to such termination or suspension cannot be referred to the Council, since in such a case no question of 'interpretation' or 'application' can possibly arise, there being no treaty in operation as between the two States."[365]

5.87 India argued that the relevant ICAO Conventions had been replaced by a special régime with Pakistan[366]. It even sought to argue that the ICAO Council did not even have *compétence de la compétence*, a point clearly rejected by the Court[367].

5.88 The Court rejected India's argument on the basis that suspension or termination of the treaties giving rise to the ICAO Council's jurisdiction could not itself act as a limitation on the ICAO Council's jurisdiction[368]. It suffered from two problems. First, it suggested that the purported termination of a treaty that was of disputed validity was sufficient to remove the dispute (including as to the validity of its termination) from the scope of the jurisdictional clause in that treaty. And second, the argument failed to account for the principle of *compétence de la compétence*. Neither issue arises in respect of the Appellants' objection in this case.

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365 *Appeal Relating to the Jurisdiction of the ICAO Council, (India v. Pakistan), Application of India, I.C.J. Reports 1972*, p. 11, para. 27(a).

366 *Ibid*., pp. 51 and 62, paras 10 and 29.

367 *Ibid*., p. 61, para. 27.

368 *Ibid*., pp. 62-64, para. 30.

5.89 By comparison, India did not contest that the "real issue" in dispute was one that fell within the ICAO Council's jurisdiction. Nevertheless, the Court recognized that the ICAO Council must first construe the "character of the dispute submitted to it and the issues thus raised", as a preliminary matter before it could determine whether the dispute was one relating to the interpretation or application of the IASTA[369]. Thus it foreshadowed the application of the real issue test as it has been developed in subsequent cases, but did not need to apply it in that case.

5.90 The Court's statement that the ICAO Council's "competence must depend on the character of the dispute submitted to it and . . . not on [the] defences on the merits" must be read in this context[370]. In that case, the defence invoked by India still arose within the bounds of the IASTA, and was thus for the ICAO Council to determine. Clearly, the Court did not have in mind a case such as this, in which the real issue in dispute encompasses a customary international law defence arising outside of the IASTA.

5.91 The Appellants' objection is thus to be distinguished from *India v. Pakistan*, in that their good faith invocation of countermeasures took the dispute outside the scope of the Convention. The Appellants' objection accordingly asks the Court to recognize that the "real" dispute before the ICAO Council is one that concerns the compliance by Qatar with international law obligations that are completely outside of and separate from the IASTA. Such an objection was not determined by the Court in *India v. Pakistan*.

369 *Ibid*., p. 61, para. 27.

370 *Ibid.*

F. CONCLUSION ON THE "REAL ISSUE" TEST

5.92 In conclusion, the Court must apply the "real issue" test in determining the Appeal against the Decision of the ICAO Council in respect of the Appellants' First Preliminary Objection. This entails an objective characterization of the subject-matter of the dispute, by reference not only to Qatar's framing of the dispute but also taking into account the Appellants' positions on the factual predicate of the dispute and the legal rights and duties involved.

5.93 As is explained above, the ICAO Council had a positive duty to undertake its own analysis to determine the real subject-matter of the claim before it[371]; as the Court has recently emphasized, "[t]he matter is one of substance, not of form"[372]. It manifestly failed to do so, instead rejecting the Appellants' objection without providing any reasons.

5.94 Since the scope of the dispute that the ICAO Council would have to decide goes beyond its jurisdiction under Article II, Section 2 of the IASTA; it should have upheld the Appellants' First Preliminary Objection and declined to exercise jurisdiction[373].

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371 See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 602, para. 26. See also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, pp. 26-27, para. 50; and *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, p. 17, para. 48.

372 *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, p. 17, para. 48.

373 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 610, para. 53.

5.95 Accordingly, the Court should characterize the "real issue" in dispute as one not concerning the interpretation or application of the IASTA, but instead the quite separate issue of Qatar's internationally wrongful acts, in response to which the Appellants imposed lawful countermeasures. That dispute is manifestly outside of the ICAO Council's jurisdiction *ratione materiae* under Article II, Section 2 of the IASTA.

Section 5. In the alternative, Qatar's claims are inadmissible as adjudication on the merits would be incompatible with judicial propriety

5.96 Even if the Court were to reject the Appellants' First Preliminary Objection in respect of the ICAO Council's jurisdiction, and conclude that the ICAO Council in principle has jurisdiction over Qatar's claims of breach of the IASTA in the ICAO Application, that is not the end of the analysis of the ICAO Council's competence to hear the dispute.

5.97 The Appellants' alternative position is that the circumstances of the present case are such that the ICAO Council should nevertheless, and in any case, have declared Qatar's claims inadmissible. This is on the basis that it was required for reasons of judicial propriety to decline to exercise such jurisdiction as it possesses and in particular in order to safeguard the ICAO Council's judicial function and its judicial integrity when acting under Article II, Section 2 of the IASTA[374].

A. JUDICIAL PROPRIETY AND THE NEED TO PROTECT THE JUDICIAL FUNCTION AND JUDICIAL INTEGRITY

5.98 The Court has recognized on a number of occasions that, notwithstanding the fact that in principle it may have jurisdiction over a dispute,

[374] See above, paras 3.4-3.12.

factors may exist which mean that it would be inconsistent with its judicial function and with judicial propriety for it to exercise that jurisdiction to decide a particular issue or even to proceed to render any decision on the merits of an application. That may be the case even where both parties desire the Court to give a ruling. As the Court observed in *Northern Cameroons:*

> "[E]ven if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity."[375]

5.99 There exists a variety of factors which may result in the conclusion that preservation of the judicial function and/or judicial propriety precludes the exercise of jurisdiction. For example, in the *Free Zones* case, the Permanent Court identified a number of such factors which might prevent it from rendering a decision on the particular questions submitted to it by the parties. The Permanent Court held:

(a) first, that it could not be constrained to choose between competing constructions of a treaty advanced by the parties, "none of which may correspond to the opinion at which it may arrive"[376];

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375 *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.

376 *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., 1929, Series A, No. 22*, p. 15.

(b) second, that "it would be incompatible with the Statute, and with its position as a Court of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties"[377]; and

(c) third, that it was unable to comply with the request of the parties that it give guidance as to the applicable regime for tariff exemptions, which the Permanent Court regarded as an essentially non-legal question. As the Permanent Court explained:

> "the settlement of such matters is not a question of law, but is a matter depending on the interplay of economic interests on which no Government can afford to be controlled by an outside organ. Such questions are outside the sphere in which a Court of Justice, concerned with the application of rules of law, can help in the solution of disputes between two States."[378]

5.100 Similarly, in *Haya de la Torre*, the present Court declined to provide any indication as to the manner in which the provision of asylum should be terminated, despite the fact that both parties had requested that the Court give a ruling in this regard. Again, the basis for the Court declining to rule on the question put before it was that the issue was a non-legal one. The Court observed that the various available alternatives:

> "are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on

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377 *Free Zones of Upper Savoy and the District of Gex, Judgment of 7 June 1932, P.C.I.J., 1932, Series A/B, No. 46*, p. 161.

378 *Ibid*., p. 162.

> considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice."[379]

5.101 Considerations of a different nature implicating the judicial propriety of ruling upon the applicant's claims arose in *Northern Cameroons*. There, having concluded that the questions relating to the United Kingdom's compliance with its obligations under the Trusteeship Agreement as to which Cameroon had sought a declaration had been rendered without object as a consequence of the termination of the Trusteeship Agreement, the Court reiterated that:

> "even if, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so."[380]

5.102 As a consequence, the Court concluded that independently of whether or not it had jurisdiction over Cameroon's claims (a question it did not decide), the proper discharge of its duty to safeguard its judicial function required it not to adjudicate upon those claims, which it found in the circumstances had been rendered "devoid of purpose":

> "The Court must discharge the duty to which it has already called attention--the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it,

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379 *Haya de la Torre (Colombia v. Peru), Judgment, I.C.J. Reports 1951*, p. 79.

380 *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37.

> circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties."[381]

5.103 In a similar fashion, in the *Nuclear Tests* cases, the Court made clear that it could not "fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means"[382], with the result that the claims of the Appellants "no longer ha[ve] any object"[383].

5.104 In doing so, the Court, whilst again not finally resolving the question of whether it had jurisdiction over the disputes, held that it in any case possessed an inherent jurisdiction:

> "to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, at p. 29)."[384]

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381 *Ibid*., p. 38

382 *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58.

383 *Ibid., Nuclear Tests (Australia v. France),* p. 271, para. 56, *Nuclear Tests (New Zealand v. France)* p. 476, para. 59.

384 *Ibid., Nuclear Tests (Australia v. France),*p. 259, para. 23; *Nuclear Tests (New Zealand v. France),* p. 463, para. 23.

5.105 The Court expressly linked the existence of that inherent jurisdiction to the consensual basis for and origin of its contentious jurisdiction:

> "Such inherent jurisdiction . . . *derives from the mere existence of the Court as a judicial organ established by the consent of States*, and is conferred upon it in order that its basic judicial functions may be safeguarded."[385]

5.106 As noted at paragraph 4.24 above, in light of the recent clarification by the Court of the distinction between objections to jurisdiction and admissibility in *Croatian Genocide*, and given that they presuppose the existence of jurisdiction, considerations of the type at issue in *Northern Cameroons* and the *Nuclear Tests* cases are properly to be regarded as matters going to the admissibility of a claim[386].

5.107 Likewise, the fundamental principle of the consensual basis of jurisdiction may entail that it is inconsistent with judicial propriety and the proper exercise by an adjudicative body of its judicial function for it to rule upon an issue, notwithstanding that, in principle, it may possess jurisdiction to do so.

5.108 An analogous situation, which likewise implicates considerations of judicial propriety and illustrates the link between such considerations and the fundamental principle of consent as the basis for the jurisdiction of the Court, is presented in the different context of the exercise by the Court of its advisory function under Article 65 of its Statute.

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385 *Ibid*. (emphasis added).

386 *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. 456, para. 120. See above, para. 4.26.

5.109 In that context, the Court when called upon to exercise its advisory jurisdiction has consistently recognized that the principle that it is only able to exercise jurisdiction over a dispute where the States involved have consented thereto does not as such affect its jurisdiction to render an Advisory Opinion[387]. At the same time, however, it has also recognized that the consensual nature of its jurisdiction plays a fundamental role in the separate and distinct question of whether it should, pursuant to the discretion it possesses under Article 65(1) of the Statute, in fact proceed to render an opinion requested of it and whether such a course of action would be consistent with judicial propriety and the Court's judicial character.

5.110 For instance, in *Western Sahara*, the Court observed that:

> "lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion.
>
> In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be

387 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 24, para. 31; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 157-158, para. 47.

> submitted to judicial settlement without its consent."[388]

5.111 Similarly, consider the question of the Court's ability to rule upon a dispute implicating the rights of a third State not party to the proceedings, which has not consented to the adjudication of its dispute. This question likewise implicates the consensual basis for the Court's jurisdiction, and raises analogous concerns as to the proper exercise of the judicial function and judicial propriety.

5.112 The decision of the Court in *Monetary Gold* is illuminating in this regard. Notably, the Court, whilst recognising that the parties to the proceedings had conferred jurisdiction upon it to decide the questions contained in Italy's application relating to entitlement to the monetary gold as between Italy and the United Kingdom, emphasized that it was nevertheless required to "examine whether this jurisdiction is co-extensive with the task entrusted to it"[389].

5.113 The basis for the Court's eventual decision that it was unable to exercise the jurisdiction conferred upon it by the parties was that in order to do so, it would have to "decide a dispute between Italy and Albania"[390]. In that regard, the Court held that in light of the consensual basis for its jurisdiction, it could not "decide such a dispute without the consent of Albania"; as the Court explained:

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388 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, paras 32-33; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 157, para. 47.

389 *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 31.

390 *Ibid*., p. 32.

> "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent . . ."[391]

5.114 On that basis, the Court concluded that "although Italy and the three respondent States have conferred jurisdiction upon the Court, it cannot exercise this jurisdiction"[392]. Similarly, in the *dispositif*, the Court held that:

> "the jurisdiction conferred upon it by the common agreement of France, the United Kingdom, the United States of America and Italy does not, in the absence of the consent of Albania, authorize it to adjudicate upon the first Submission in the Application of the Italian Government."[393]

5.115 Notwithstanding the jurisdiction that had been conferred on it by the parties to resolve issues as between the United Kingdom and Italy, the Court concluded that it was unable to exercise that jurisdiction due to a conflict with the fundamental principle of the consensual basis for its jurisdiction.

5.116 That holding can equally be framed as one which implicates the proper exercise of the Court's judicial function, and therefore the propriety of the Court's exercising jurisdiction over a dispute in respect of which the relevant States have not consented.

5.117 As such, it is submitted that considerations relating to the need to safeguard the fundamental principle of consent to jurisdiction may give rise to

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391 *Ibid*.

392 *Ibid*., p. 33.

393 *Ibid*., p. 34

reasons why a court or tribunal may conclude that it would be inconsistent with judicial propriety and the judicial function for the court or tribunal to exercise a jurisdiction which has been conferred upon it, and on that basis declare an application or claim inadmissible.

B. JUDICIAL PROPRIETY AND THE PROPER EXERCISE OF THE JUDICIAL FUNCTION IN THE CIRCUMSTANCES OF THE PRESENT CASE

5.118 Turning to the situation in the present case, the starting point is necessarily Article II, Section 2 of the IASTA. Since the jurisdiction of the ICAO Council extends only to disagreements concerning the "interpretation or application" of the IASTA, it would be improper for the ICAO Council to extend its jurisdiction beyond these bounds and exercise jurisdiction over matters falling outside the terms of Article II, Section 2.

5.119 If the case were to proceed to the merits in its current form, the ICAO Council would have two options. First, it might adjudicate the issues relating to whether the airspace restrictions constitute legitimate countermeasures, including, in particular, issues relating to whether Qatar has breached its international obligations in matters outside civil aviation. But this would mean that the Appellants will be required to plead their countermeasures defence, and the allegations of Qatar's wrongfulness, in a forum that is not properly equipped to hear such matters, and in respect of which they have not consented to its exercising jurisdiction.

5.120 Here, it is worth recalling the decision of the Court in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, that it is an "essential point of legal principle" that "a party should not have to give an

account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter."[394]

5.121 The alternative would be for the ICAO Council to *decline* to hear the countermeasures defence – and Qatar's internationally wrongful actions justifying the imposition of countermeasures. But this would mean that it could not adjudicate the matter before it, since it could not determine the circumstances precluding the wrongfulness of the acts alleged. Accordingly, it would be wrong for the ICAO Council to adjudicate the dispute in part only, ignoring that part which contains a vital defence of the Appellants.

5.122 As set out above, any exercise of jurisdiction by the ICAO Council over the merits of the narrow disagreement in fact submitted by Qatar, would necessarily require the ICAO Council to take a view on whether the airspace restrictions can properly be justified as lawful countermeasures, which in turn would involve the ICAO Council adjudicating on the wider dispute between the Parties as to whether Qatar has breached its international obligations in relation to matters outside the scope of the IASTA.

5.123 The dispute between the Parties in this regard is one relating precisely to matters which cannot be characterized as concerning the "interpretation or application" of the IASTA, and thus falls outside the ICAO Council's jurisdiction.

5.124 For the ICAO Council to exercise jurisdiction over a dispute clearly falling outside its limited competence and in respect of which the Appellants have not consented to it exercising jurisdiction, is inconsistent with the

394 *Appeal Relating to the Jurisdiction of the ICAO Council, (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 56, para. 18(b).

consensual basis of the ICAO Council's jurisdiction. As a result, it would be inconsistent with judicial propriety and the judicial character of the functions accorded to the ICAO Council under Article II, Section 2 of the IASTA.

5.125 Such a situation is analogous to the situation at issue in *Monetary Gold*, in which the Court held that it was unable to exercise a jurisdiction conferred upon it and which it undoubtedly possessed, where to do so would effectively require it to adjudicate upon the rights and obligations of a third State which had not consented to the exercise of its jurisdiction, and as a result, over which it did not have jurisdiction[395]. The issue in *Monetary Gold* was one as to lack of jurisdiction over a dispute involving a particular State (i.e., a lack of jurisdiction *ratione personae*). In the present case, although the Parties involved are the same, the relevant lack of jurisdiction is one *ratione materiae*, insofar as the ICAO Council does not have jurisdiction over issues falling outside the narrow scope of Article II, Section 2 of the IASTA, which only grants the ICAO Council jurisdiction in respect of disputes relating to the "interpretation or application" of the IASTA.

5.126 In such circumstances, if the ICAO Council were to exercise jurisdiction over Qatar's claims, which would necessarily require it to rule upon the Appellants' defence that the airspace restrictions may be justified as lawful countermeasures, this "would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent"[396].

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395 *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, pp. 31-33.

396 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33.

5.127 As a consequence, even if the ICAO Council were to be held to have jurisdiction over the narrow disagreement submitted to it by Qatar in the ICAO Application, in the circumstances of the present case it should have declared Qatar's Application inadmissible insofar as any resolution of Qatar's claims will necessarily require it to adjudicate upon matters over which it does not possess jurisdiction. Any such exercise of jurisdiction by the ICAO Council would be incompatible with the consensual basis for jurisdiction, and as a result, incompatible with judicial propriety and the ICAO Council's judicial function under Article II, Section 2 of the IASTA.

Section 6. Conclusion

5.128 In light of:

(a) the fact that the jurisdiction of the ICAO Council is limited to disputes relating to the interpretation and application of the IASTA, and

(b) the Appellants' position that the breaches of the IASTA alleged by Qatar may be justified as lawful countermeasures,

the Appellants submit that the ICAO Council is not competent to hear the disagreement submitted to it by Qatar in the ICAO Application.

5.129 That conclusion is justified on two alternative bases, both as an objection to jurisdiction and, in the alternative, as an objection to admissibility.

5.130 First, as an objection to the jurisdiction of the ICAO Council, the Appellants' position is that had the ICAO Council complied with its duty to characterize the "real issue" in dispute between the Parties, it would have held that the dispute is not confined to the narrow allegations of breach of the IASTA made by Qatar, but instead encompasses the wider dispute between the Parties. This wider dispute implicates Qatar's breaches of other international

obligations, which are relied upon by the Appellants as the basis for their adoption of countermeasures. That wider dispute is not one relating to the "interpretation or application" of the IASTA, and therefore falls outside the jurisdiction of the ICAO Council under Article II, Section 2 of the IASTA.

5.131 Second, in the alternative, as an objection to the admissibility of Qatar's claims before the ICAO Council, even if it were to be held that the ICAO Council has jurisdiction over Qatar's narrow claims as raised in its ICAO Application, any exercise of jurisdiction by the ICAO Council over those claims would necessarily require it to adjudicate upon the wider dispute between the Parties. The Appellants (and Qatar) have not, however, consented to the ICAO Council adjudicating upon that dispute. In light of the fundamental principle that a State cannot be required to submit its dispute for adjudication except insofar as it has consented thereto, it would thus be inconsistent with judicial propriety and/or the ICAO Council's judicial function when acting under Article II, Section 2 of the IASTA for the ICAO Council to adjudicate thereupon. The ICAO Council should therefore have ruled that Qatar's claims are inadmissible.

5.132 Even if that alternative submission were also not upheld, in the light of the strict subject-matter limitation upon the ICAO Council's *jurisdiction ratione materiae* resulting from the formulation of Article II, Section 2 of the IASTA, the ICAO Council does not have jurisdiction to rule upon disputes which do not relate to the interpretation or application of the IASTA.

5.133 As a consequence, the ICAO Council would be unable to render a final decision on the Appellants' substantive – indeed dispositive – defence on the merits that the airspace restrictions constitute lawful countermeasures under international law. In order not to compromise the Appellants' position, the only

possible solution would be for the ICAO Council expressly to leave undecided the Appellants' invocation of countermeasures, merely recognizing it as a defence available under general international law that would dispose entirely of the alleged unlawfulness of the Appellants' measures. That, however, is entirely inconsistent with Qatar's stated position before the ICAO Council, and would in effect amount to a *non liquet*.

CHAPTER VI
THIRD GROUND OF APPEAL: THE ICAO COUNCIL ERRED IN REJECTING THE SECOND PRELIMINARY OBJECTION

6.1 The Appellants' third ground of appeal against the Decision of the ICAO Council of 29 June 2018 is on the basis that, in the circumstances of the present case, the ICAO Council is not competent to rule upon the disagreement submitted to it by Qatar in the ICAO Application relating to the IASTA insofar as Qatar failed to demonstrate that it had complied with the precondition of negotiation contained in Article II, Section 2 of the IASTA, and the ICAO Application failed to comply with the requirements of Article 2(g) of the Rules. As a consequence, the ICAO Council erred in not accepting the Appellants' Second Preliminary Objection and in affirming its jurisdiction to proceed to hear the merits of the dispute. This ground of appeal constitutes a further and separate ground as to why the ICAO Council does not have jurisdiction in this case.

6.2 Under Article II, Section 2 of the IASTA, jurisdiction is conferred on the ICAO Council to adjudicate only disagreements which "cannot be settled by negotiation" before their submission to the ICAO Council. Consistent with the Court's constant jurisprudence in respect of similarly worded jurisdictional clauses, it is a precondition to the existence of jurisdiction of the ICAO Council that an Applicant has in fact attempted negotiations with a view to settling the dispute before submitting an Application in that regard to the ICAO Council.

6.3 The requirement in Article II, Section 2 of the IASTA that there should have been a prior attempt at negotiations is also reflected in Article 2(g) of the ICAO Rules, which provides that an Application and Memorial must include

"[a] statement that negotiations to settle the disagreement had taken place between the parties but were not successful"[397].

6.4 In light of the express terms of Article II, Section 2 of the IASTA and the Court's prior jurisprudence, the making of a genuine attempt to initiate negotiations in relation to the subject-matter of the disagreement prior to filing an Application is a precondition for the ICAO Council's jurisdiction to adjudicate upon the merits of the disagreement (Section 1). In the present case, however, Qatar has failed to show that it in fact made a genuine attempt, or indeed any attempt at all, to initiate negotiations about the airspace restrictions it claims to constitute the subject of its Application prior to submitting it to the ICAO Council, with the result that the ICAO Council should have found that it is without jurisdiction to adjudicate upon the merits of the dispute (Section 2). In the alternative, Qatar's ICAO Application failed to comply with the procedural requirements of Article 2(g) of the Rules, and as a consequence the ICAO Council should have held that Qatar's ICAO Application was inadmissible (Section 3).

Section 1. Prior negotiations constitute a precondition to the ICAO Council's jurisdiction under Article II, Section 2 of the IASTA

6.5 As already noted, Article II, Section 2 states, in relevant part:

> "If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement *cannot be settled by negotiation*, the provisions of Chapter XVIII of the [Chicago] Convention shall be applicable in the same manner as provided therein with reference to any

397 **Vol. II, Annex 6**, ICAO Rules, Art. 2(g).

> disagreement relating to the interpretation or application of the above-mentioned Convention."[398]

6.6 On its true interpretation, and in light of the Court's relevant precedents in relation to jurisdictional provisions containing a similar formulation, Article II contains a "precondition of negotiations"[399] such that, in order for the ICAO Council to have jurisdiction in relation to a disagreement, a party must at the least have made a genuine attempt to initiate negotiations prior to submitting the disagreement to the ICAO Council (Subsection A). In order to comply with the precondition of negotiations, the attempt to initiate negotiations must relate to the subject-matter of the disagreement submitted to the ICAO Council (Subsection B). Finally, both on the express terms of Article II, Section 2 of the IASTA, and as a matter of principle, the precondition of negotiations must have been fulfilled prior to the date of *seisin* of the ICAO Council through the filing of the instrument commencing proceedings (Subsection C).

A. Article II, Section 2 of the IASTA contains a precondition of negotiation

6.7 On its express terms, Article II, Section 2 stipulates that a disagreement between two or more contracting States as to the interpretation or application of the IASTA may only be submitted to the ICAO Council if the disagreement "cannot be settled by negotiation". As a consequence, the occurrence of prior negotiations between the parties (or at least a genuine attempt) in relation to the subject-matter of the disagreement to be submitted to

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398 **Vol. II, Annex 2**, IASTA, Art. II, Sec. 2 (emphasis added).

399 *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. 130, para. 149.

the Council is an essential precondition to the jurisdiction of the Council to adjudicate upon the matter.

6.8 Similar requirements in jurisdictional or compromissory clauses contained in treaties are widespread in international practice. As the Court has previously emphasized in a case concerning a clause which likewise contained a precondition of negotiations:

> "[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 fulfils 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."[400]

6.9 As is evident from the third consideration highlighted by the Court, a requirement in a dispute resolution clause in a treaty that a dispute must be one which "cannot be settled by negotiation" or other similar formulation constitutes a limitation upon the consent of the States parties. As such, as

[400] *Ibid*., pp. 124-125, para. 131.

follows from the discussion in Chapter IV, fulfilment of the precondition of negotiations is a matter going primarily to jurisdiction, rather than merely affecting the admissibility of a claim[401].

6.10 This Court has had occasion to consider jurisdictional provisions containing a requirement of prior attempted negotiations formulated in a manner similar or identical to that contained in Article II, Section 2 of the IASTA in a number of prior cases. It has consistently come to the conclusion that a provision containing such a "precondition of negotiations" (whether phrased in terms that the dispute "cannot be settled by negotiation" or "is not settled by negotiation") imposes a precondition to the existence of the jurisdiction of the Court and that the precondition must be fulfilled prior to the filing of an Application and the *seisin* of the Court.

6.11 In its Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the issue before the Court was whether the United States was obliged to enter into an arbitration procedure in respect of a dispute with the United Nations relating to the United Nations Headquarters Agreement. The relevant jurisdictional provision, Article 21, paragraph (a) of the United Nations Headquarters Agreement provides:

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401 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 65; see also *ibid*., p. 39, para. 88 when consent to jurisdiction "is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application"; *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. 124, para. 131; *ibid*., p. 130, para. 148. See paras 4.17-4.29 above.

> "[a]ny dispute between the United Nations and the United States concerning the interpretation or application of this agreement . . . which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators . . ."[402]

The Court observed that, in addition to being required to satisfy itself that there was a dispute between the United States and the United Nations and that that dispute was one regarding the "interpretation or application" of the United Nations Headquarters Agreement, it was also required to "satisfy itself that [that dispute] is one 'not settled by negotiation or other agreed mode of settlement'"[403].

6.12 Similarly, in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Court was faced with reliance by the applicant on a number of jurisdictional clauses contained in multilateral treaties, some of which required that, in order for the Court to have jurisdiction, a dispute relating to the interpretation or application of the relevant treaty had to be one which "is not settled by negotiation".

6.13 In particular, the applicant sought to rely upon Article 29 of the Convention on the Elimination of All Forms of Discrimination against Women (***CEDAW***), which provides that:

> "[a]ny dispute between two or more States Parties concerning the interpretation or application of the present Convention *which is not settled by negotiation* shall, at the request of one of them, be

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402 Text quoted in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 14, para. 7.

403 *Ibid*., p. 27, para. 34.

> submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."[404]

6.14 In interpreting that provision, the Court observed that it "gives the Court jurisdiction in respect of any dispute between States parties concerning its interpretation or application, on condition that: it has not been possible to settle the dispute by negotiation"[405]. Having concluded that the requirement of negotiation was cumulative with the other conditions contained in Article 29 of the CEDAW[406], the Court held that, it "must therefore consider whether the preconditions on its seisin set out in the said Article 29 have been satisfied in this case"[407].

6.15 The Court went on to find that, although the applicant had issued various protests to the respondent in respect of the alleged conduct in issue which might be held to evidence the existence of a dispute for the purposes of Article 29, that provision "requires also that any such dispute be the subject of negotiations."[408] On the evidence before it, the Court was not satisfied that the Democratic Republic of the Congo had in fact sought to commence negotiations in respect of the interpretation or application of the CEDAW, and

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404 Convention on the Elimination of All Forms of Discrimination against Women, signed at New York on 18 December 1979, entered into force on 3 September 1981, 1249 *UNTS* 13 (***CEDAW***), Art. 29 (emphasis added).

405 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 87.

406 *Ibid*.

407 *Ibid*; see also *ibid*., p. 39, para. 88.

408 *Ibid*., pp. 40-41, para. 91

on that basis (as well as in light of its conclusion that the applicant had not complied with the additional cumulative requirements, in particular insofar as it also had not shown that it had sought to initiate the arbitration procedure foreseen by Article 29)[409], the Court held that it was without jurisdiction under the CEDAW[410].

6.16 A similar conclusion was reached in *Armed Activities* insofar as the applicant sought to found the Court's jurisdiction over its claims on Article 75 of the WHO Constitution, which confers jurisdiction on the Court in respect of:

> "[a]ny question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly. . ."[411]

6.17 In addition to finding that there was no question or dispute between the parties falling within the scope of that provision[412], the Court held that the applicant had:

> "in any event not proved that the other *preconditions for seisin of the Court* established by that provision have been satisfied, namely that it attempted to settle the question or dispute by negotiation with Rwanda or that the World Health Assembly had been unable to settle it."[413]

6.18 A similar approach was taken in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia*

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409 *Ibid*., pp. 40-41, paras 91-92.

410 *Ibid*., p. 41, para. 93.

411 Quoted at *ibid*., p. 41, para. 94.

412 *Ibid*., p. 43, para. 99.

413 *Ibid*., p. 43, para. 100 (emphasis added).

v. Russian Federation), in which the jurisdictional clause at issue was Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (***CERD***), which provides that:

> "[a]ny 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."[414]

6.19 The Court concluded that the requirements that a dispute must be one "which is not settled by negotiation or by the procedures expressly provided for in this Convention" contained in Article 22 of the CERD "establish preconditions to be fulfilled before the seisin of the Court."[415] In reaching that conclusion, the Court considered its previous decisions in relation to comparably worded clauses, in particular the decisions in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement 26 June 1947* and *Armed Activities on the Territory of the Congo*, discussed at paragraphs 6.11-6.17 above[416], and the fact that in those prior

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414 International Convention on the Elimination of All Forms of Racial Discrimination, signed at New York on 7 March 1966 entered into force on 4 January 1969, 660 *UNTS* 195 (***CERD***), Art. 22 (emphasis added).

415 *Ibid.*, p. 128, para. 141; see also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 120, para. 40 and p. 125, para. 59; and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures*, Order of 23 July 2018, p. 11, para. 29.

416 *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*, pp. 126-128, paras 136-139.

decisions, the Court has "interpreted the reference to negotiations as constituting a precondition to seisin"[417].

6.20 Subsequently, the Court has expanded the approach adopted in relation to provisions requiring that a dispute must be one which "is not settled by negotiation" in clauses such as Article 29 of the CEDAW and Article 22 of the CERD to provisions which stipulate that the dispute must be one which "cannot be settled by negotiation".

6.21 For example, in *Questions Relating to the Obligation to Extradite or Prosecute*, the relevant jurisdictional provision was that contained in Article 30, paragraph 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (***CAT***), which, like Article II, Section 2 of the IASTA, requires that for the Court to have jurisdiction the dispute must be one that "cannot be settled through negotiation":

> "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. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the

417 *Ibid*., p. 128, para. 140; see also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 120-121, paras 40 and 44; and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures*, Order of 23 July 2018, p. 11, para. 29: (Art. 22 of the CERD establishes "procedural preconditions to be met before the seisin of the Court").

> International Court of Justice by request in conformity with the Statute of the Court."[418]

6.22 As in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court proceeded on the basis that the requirement in Article 30, paragraph 1 of the CAT that the dispute "cannot be settled through negotiation" constituted a precondition to its jurisdiction. Having concluded that there existed a "dispute" between the parties, the Court turned to consider:

> "the other conditions which should be met for it to have jurisdiction under Article 30, paragraph 1, of the Convention against Torture . . . These conditions are that the *dispute cannot be settled through negotiation* and that, after a request for arbitration has been made by one of the parties, they have been unable to agree on the organization of the arbitration within six months from the request."[419]

6.23 Similarly, in its Provisional Measures Order in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia)*, the Court assimilated and treated as having equivalent effect the jurisdictional provision in Article 22 of the CERD (which, as noted at paragraph 6.18 above, requires that a dispute must be one "which is *not* settled by negotiation"), and Article 24, paragraph 1 of the ICSFT (which

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418 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed at New York on 10 December 1984, entered into force on 26 June 1987, 1465 *UNTS* 85 (***CAT***), Art. 30(1) (emphasis added).

419 *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 445, para. 56 (emphasis added).

stipulates that the dispute must be one which "*cannot* be settled through negotiations within a reasonable time")[420].

6.24 The Court observed that both provisions "set out procedural preconditions to be fulfilled before the seisin of the Court."[421] Further, having summarized the procedural preconditions contained in each provision in turn (including their respective requirements of negotiations)[422], the Court made reference to "the negotiations to which both compromissory clauses refer"[423].

6.25 Given the express reference to negotiations and the similarity of its formulation to the provisions at issue in the cases discussed above, the requirement of Article II, Section 2 of the IASTA that the dispute is one that "cannot be settled by negotiation" likewise is to be understood as establishing a precondition to the exercise of the ICAO Council's jurisdiction (and indeed to the effective seisin of the ICAO Council by the applicant).

B. CONTENT OF THE PRECONDITION OF NEGOTIATION

6.26 Not only does the Court's case law clearly establish that a provision framed in terms similar to Article II, Section 2 of the IASTA constitutes a

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420 CERD, Art. 22; **Vol. II, Annex 12**, ICSFT, Art. 24(1).

421 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 120, para. 40.

422 *Ibid*., paras 41-42.

423 *Ibid*., pp. 120-121, para. 43. See also *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, p. 25, para. 75 (where the requirement in Article 35(2) of the Palermo Convention that the dispute should be one that "cannot be settled through negotiation within a reasonable time" was described as one of a number of "procedural requirements before a State party may refer a dispute to the Court").

precondition to jurisdiction, but in addition, it clearly identifies what is required in order to comply with the precondition.

6.27 In this regard, the starting point is that Article II, Section 2 of the IASTA requires that any negotiations must be undertaken with a view to "settl[ing]" the disagreement. Thus, on its clear terms, Article II, Section 2 imposes a concrete obligation on the claimant party to attempt negotiations with a view to settling the disagreement before submitting the dispute to the ICAO Council.

6.28 In its judgment in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court provided guidance as to the characteristics of the negotiations required for the purposes of the "precondition of negotiation" contained in Article 22 of the CERD. It explained:

> "In determining what constitutes negotiations, the Court observes that negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of 'negotiations' differs from the concept of 'dispute', and requires—*at the very least—a genuine attempt by one of the disputing parties to engage in discussions with the other*

> *disputing party, with a view to resolving the dispute*"[424].

6.29 It later also clarified:

> "Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met. However, where negotiations are attempted or have commenced . . . the precondition of negotiations is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked".[425]

6.30 As the above passage demonstrates, the requirement that there should be a "genuine attempt to negotiate" necessarily requires that some attempt to negotiate should in fact have been made. For instance, in *Obligation to Extradite or Prosecute*, the Court quoted from the decision in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, and then observed:

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424 *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. 132, para. 157 (emphasis added); see also *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 446, para. 57; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 120-121, para. 43.

425 *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. 159; see also *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, pp. 445-446, para. 57; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 120-121, para. 43.

> "The requirement that the dispute 'cannot be settled through negotiation' *could not be understood as referring to a theoretical impossibility* of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, 'no reasonable probability exists that *further* negotiations would lead to a settlement' (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345)."[426]

6.31 As the Court has also made clear, to satisfy the "precondition of negotiation", the negotiations, or the attempt to initiate negotiations, must directly concern the disagreement between the two States submitted for adjudication and must have particularly addressed (or at least have sought to address) the specific question of interpretation or application of the treaty that gives rise to the dispute between the parties. As explained in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)* in respect of the precondition of negotiation contained in Article 22 of the CERD:

> "[T]o meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must

426 *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 446, para. 57 (emphasis added). See also *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, p. 13, where the Permanent Court's discussion of when the precondition of negotiation might be held to be fulfilled proceeded on the basis that "discussion should have been commenced".

concern the substantive obligations contained in the treaty in question."[427]

C. The precondition of negotiations must be fulfilled prior to seisin

6.32 As already mentioned, in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, the Court concluded that the requirements contained in the jurisdictional clause in Article 22 of the CERD (including the precondition of negotiations) constituted "preconditions to be fulfilled *before the seisin* of the Court"[428], and, further that it "imposes preconditions which must be satisfied *before resorting to the Court*"[429].

6.33 Previously, in the *South West Africa* cases, where the relevant jurisdictional provision in the mandate stipulated that jurisdiction extended only to disputes which "cannot be settled by negotiation", the Court had regarded it

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

428 *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. 128, para. 141 (emphasis added).

429 *Ibid*., p. 130, para. 148 (emphasis added). See also e.g., *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 120, para. 40; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures*, Order of 23 July 2018, p. 11, para. 29. See also the precondition of negotiations contained in Article 35 of the Palermo Convention, which constitutes one of a number of "procedural requirements before a State party may refer a dispute to the Court", *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections*, Judgment of 6 June 2018, p. 25, para. 75.

as self-evident that the "the alleged impossibility of settling the dispute obviously could only refer to the time when the Applications were filed"[430].

6.34 The Court's approach in this regard reflects the more general and well-established approach apparent from the Court's jurisprudence to the effect that all matters impacting upon jurisdiction, in principle, fall to be assessed as at the date of the filing of the application. For instance, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the Court reiterated what it regarded as:

> "the general rule which it applies in this regard, namely: 'the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings' (to this effect, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 44). . . .
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> it is normally by reference to the date of the filing of the instrument instituting proceedings that it must be determined whether those conditions are met".[431]

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430 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 344.

Section 2. Qatar failed to satisfy the jurisdictional precondition of negotiations before filing its ICAO Application

6.35 As noted above, the Second Preliminary Objection made by the Appellants against the jurisdiction of the ICAO Council was based on Qatar's non-compliance with Article II, Section 2 of the IASTA. In the alternative, the Appellants also objected that Qatar's non-compliance with the requirements of Article 2(g) of the ICAO Rules rendered its claims inadmissible.

6.36 The first, jurisdictional limb of the objection is made in light of the Court's constant and consolidated jurisprudence in respect of the interpretation and effects of a precondition of negotiation contained in the jurisdictional provision of a treaty framed in terms similar or identical to those in Article II, Section 2 of the IASTA. According to this jurisprudence, Qatar was required at the very least to make a genuine attempt to initiate negotiations with the Appellants prior to submitting the disagreement to the ICAO Council. Further, Qatar was required to attempt negotiations concerning the specific subject-matter of its claims of breach of the IASTA.

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431 *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*, pp. 437-438, para. 79; see also e.g., *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, p. 16: "The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided [under the applicable compromissory clause]"; *Nottebohm Case (Liechtenstein v. Guatemala) (Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 28, para. 36; *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. 85, para. 30: "[t]he dispute must in principle exist at the time the Application is submitted to the Court".

6.37 Notably, before the ICAO Council, Qatar did not seriously contest the Appellants' position as to the interpretation and effect of Article II, Section 2 of the IASTA, and in particular their position that:

(a) Article II, Section 2 of the IASTA contains a precondition of negotiation which constitutes a limit upon the consent of the Contracting States, and which must be satisfied before the ICAO Council can have jurisdiction to adjudicate upon a disagreement submitted to it[432];

(b) both as a matter of the ordinary meaning of the words of Article II, Section 2 of the IASTA, and as a matter of the clear criteria that this Court has specified in relation to similarly worded clauses, the precondition of negotiations "requires – at the very least – a *genuine attempt* by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute."[433]

6.38 Further, the position adopted by Qatar in its submissions before the ICAO Council, as well as the material put forward and relied upon by Qatar itself before the ICAO Council in support of its position, demonstrate that it never made a genuine attempt to initiate negotiations with the Appellants in relation to the subject-matter of the claims in the two Applications subsequently submitted to the ICAO Council with a view to resolving that dispute. As a consequence, it failed to fulfil the precondition of negotiations under Article II, Section 2 of the IASTA.

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[432] **Vol. III, Annex 24**, ICAO Preliminary Objections, paras 80-89.

[433] *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. 132, para. 157 (emphasis added); see *cf* **Vol. III, Annex 24**, ICAO Preliminary Objections, paras 90-94.

6.39 In its ICAO Application and Memorial, Qatar acknowledged that no efforts to initiate negotiations had been undertaken, and it instead sought to argue that any such attempts would have been futile[434] (Subsection A).

6.40 Following the filing by the Appellants of their Preliminary Objections, by contrast, Qatar's position underwent a marked (and remarkable) change that was fundamentally inconsistent with the position originally adopted (Subsection B). In particular, in its subsequent submissions (most notably its Response and thereafter at the hearing), Qatar instead sought to argue that it had nevertheless *de facto* engaged in negotiations or had made a genuine attempt to initiate negotiations which satisfied the precondition of negotiations under Article II, Section 2. It further argued that supposed efforts to initiate negotiations undertaken after the filing of the ICAO Application and Memorial and commencement of the proceedings before the ICAO Council were sufficient in this regard.

6.41 Despite putting forward a large volume of evidence in support of its new position, Qatar was still unable to demonstrate that it had made a genuine attempt to initiate negotiations in relation to the specific subject matter of the disagreement, whether before or after the filing of the ICAO Application.

6.42 Each of Qatar's arguments by which it sought to demonstrate that it has complied with the precondition of negotiations in Article II, Section 2 of the IASTA is flawed, either because it is unsupported by the factual record or is without merit as a matter of law. Nevertheless, in upholding its jurisdiction, and

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434 See **Vol. III, Annex 23**, ICAO Application, and **Vol. III, Annex 23**, ICAO Memorial, Sec. (g). Cf. **Vol. III, Annex 24**, ICAO Preliminary Objections, paras 100-106.

rejecting the Appellants' Preliminary Objections in this regard, the ICAO Council erred either in fact or as a matter of law.

A. QATAR'S INITIAL POSITION IN THE ICAO MEMORIAL

6.43 In neither Qatar's initial ICAO Application nor the accompanying ICAO Memorial did Qatar seek to demonstrate that it either engaged in negotiations with the Appellants or that it made any attempt whatsoever to initiate negotiations in relation to the disagreements or disputes submitted to the ICAO Council[435].

6.44 In the ICAO Memorial, under the heading "g) A statement of attempted negotiations", Qatar asserted as follows:

> "The Respondents did not permit any opportunity to negotiate the aviation aspects of their hostile actions against the State of Qatar. They repeatedly gave an ultimatum to the State of Qatar on matters unrelated to air navigation and air transport. The last contact with the Respondents was a conference call with officials of the Respondents on 5 and 6 June 2017 that did not result in any understanding. In fact, the crisis gradually escalated when the Respondents declared all Qatar's citizens and resident 'undesirable' (persona non grata) in their territories and ordered them to leave the Respondents' territories within 14 days. The severance of diplomatic relations makes further negotiating efforts futile."[436]

6.45 Read as a whole, and taken together with the complete lack of any evidence of attempts to initiate negotiations put forward with the ICAO

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435 **Vol. III, Annex 24**, ICAO Preliminary Objections, paras 100-106.

436 **Vol. III, Annex 23**, ICAO Memorial, Sec. (g).

Application and Memorial, that statement constitutes a clear and candid admission by Qatar that it failed to make any attempt prior to the filing of its Application to engage in negotiations with the Appellants in relation to the disagreement that it claims to be the subject of its Application. As a consequence, Qatar also implicitly admitted that it did not comply with the jurisdictional precondition of negotiations under Article II, Section 2 of the IASTA.

6.46 The principal thrust of the position initially taken by Qatar in its ICAO Memorial was that the Appellants "did not permit any opportunity" to negotiate, and that, in light of the severance of diplomatic relations, any attempt to initiate negotiations in relation to the disagreement under the IASTA would have been "futile".

6.47 Not only is that position self-serving, but, as noted at paragraphs 6.26-6.30 above, the Court's jurisprudence makes clear that the precondition of negotiations requires, at the least, a "genuine attempt" to initiate negotiations. The futility of negotiations cannot be established until at least a genuine attempt to initiate such negotiations has been made.

6.48 The policy rationales underlying the precondition of negotiations in Article II, Section 2 of the IASTA would be frustrated if an Applicant were permitted to unilaterally declare that negotiations would be futile before even attempting to initiate them. If it were otherwise, the precondition of negotiations would easily be circumvented.

6.49 The only contact with the Appellants mentioned by Qatar in its ICAO Memorial dating from after the announcement of the airspace restrictions was the "conference call" which supposedly took place between its officials and officials of the Appellants on 5 and 6 June 2017.

6.50 The Appellants are not aware of any "conference call" on 5 and 6 June 2017 by which Qatar sought to discuss the subject-matter of the airspace restrictions in the light of the Appellants obligations under the IASTA, and Qatar put forward no evidence substantiating its assertions as to the occurrence of calls on those dates or evidencing their content. The only calls from early June 2017 of which the Appellants are aware were technical calls seeking clarifications as to the NOTAMs issued to implement the airspace restrictions.

6.51 In any event, the supposed conference call (or calls) on 5 and 6 June 2017 were not relied upon by Qatar as constituting an attempt to initiate negotiations, but were instead only mentioned as being the "last contact" with the Appellants[437]. In its subsequent submissions, Qatar made no mention of these supposed calls and did not attempt to suggest that they amounted to either negotiations or an attempt to initiate negotiations.

6.52 Qatar's invocation of and reliance on the fact that the Appellants had allegedly declared Qatari citizens *persona non grata* and broken off diplomatic relations is also flawed and irrelevant. The situation of the nationals of State A present in State B is self-evidently of no import for the ability of State A to seek to initiate negotiations with State B.

6.53 Similarly, the severance of diplomatic relations does not render the initiation of negotiations impossible and does not constitute a valid justification for a failure to attempt to initiate negotiations as required by Article II, Section 2 of the IASTA:

(a) First, as confirmed by Article 63 of the Vienna Convention on the Law of Treaties "[t]he severance of diplomatic or consular relations

437 See *ibid*.

between parties to a treaty does not affect the legal relations established between them by the treaty".

(b) Second, absence of diplomatic relations does not constitute an obstacle to the ability of a State to attempt to initiate negotiations; the Court has never previously held that an applicant State was excused from complying with a requirement in a jurisdictional provision requiring an attempt to settle the dispute through negotiations or that the dispute had not been adjusted through diplomacy merely on the basis that the parties did not at the relevant time maintain diplomatic relations[438].

As a result, Qatar remained bound to make a "genuine attempt" to settle the disagreement through negotiation prior to submitting it to the ICAO Council.

6.54 In this regard, it is recalled that, in the immediate aftermath of the adoption of the airspace restrictions by the Appellants, Qatar filed with the ICAO two Applications and Memorials dated 8 June 2017. As discussed in Chapter III, those initial applications proved abortive, as they were rejected by the ICAO Secretariat due to the presence of a number of defects.

6.55 Significantly, the section of those documents entitled "Report of negotiations", which appear to have been intended to comply with the requirements of Article 2(g) of the ICAO Rules (and thereby to substantiate compliance with the requirement of prior negotiation under Article II, Section 2 of the IASTA) was of essentially similar content to that subsequently contained in the Applications filed with ICAO on 30 October 2017. In a similar fashion to

438 Cf. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, p. 3; *Oil Platforms (Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 809-810, para. 16; *Oil Platforms (Iran v. United States of America), Merits, Judgment, I.C.J. Reports 2003*, pp. 210-211, paras 106-107.

the Memorials accompanying Qatar's later Applications which underlie the present proceedings, Qatar's central position in the Memorials accompanying its initial abortive Applications was that, "all diplomatic ties between the nations concerned have been ruptured" and "negotiations are no longer possible."[439] A similar statement was contained in its Request under Article 54(n) of the Chicago Convention, dated 15 June 2017[440].

6.56 Despite the significant period of time between the initial abortive applications of 8 June 2017 and the filing of the second applications on 30 October 2017, Qatar nevertheless undertook no efforts to initiate negotiations with the Appellants in relation to the subject-matter of the disagreement prior to filing the second applications with the ICAO Council.

6.57 A complete failure even to attempt to initiate negotiations cannot satisfy the requirement of prior negotiations contained in a clause such as Article II, Section 2 of the IASTA. In the absence of any evidence of a genuine attempt to initiate negotiations with a view to settling the dispute, Qatar cannot establish that negotiations would have been unsuccessful in resolving the dispute.

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439 **Vol. III, Annex 22**, Request for the Intervention of the ICAO Council in the Matter of the Actions of the Arab Republic of Egypt, the Kingdom of Saudi Arabia, the United Arab Emirates and the Kingdom of Bahrain to close their Airspace to aircraft registered in the State of Qatar, attaching Application (1) of the State of Qatar, Complaint Arising under the International Air Services Transit Agreement done in Chicago on December 7, 1944, and Application (2) of the State of Qatar, Disagreement Arising under the Convention on International Civil Aviation done in Chicago on December 7, 1944, 8 June 2017 and Memorials for Application (1) and (2), p. 6.

440 **Vol. V, Annex 31**, 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.

6.58 To the extent that the ICAO Council may have rejected the Appellants' Preliminary Objections on the basis that negotiations were not required because they would have been "futile", it erred and this Court should hold that the ICAO Council was without jurisdiction due to a failure by Qatar to comply with the precondition of negotiations contained in Article II, Section 2 of the IASTA.

B. QATAR'S NEW POSITION IN ITS RESPONSE TO THE PRELIMINARY OBJECTIONS

6.59 Although, as discussed above, Qatar's ICAO Memorial acknowledged that it had not attempted to initiate negotiations in respect of the disagreement submitted to the ICAO Council, in its Response to the Preliminary Objections, Qatar substantially changed tack and claimed that in fact it had negotiated or attempted to initiate negotiations.

6.60 None of the material put forward by Qatar in support of that new position, however, supports its position. There was thus no basis on which the ICAO Council could properly have concluded that Qatar had complied with the precondition of negotiation contained in Article II, Section 2 of the IASTA.

6.61 Rather, examination of Qatar's Response to the Preliminary Objections and the accompanying exhibits submitted before the ICAO Council in fact confirms the absence of any "genuine attempt" by Qatar to settle the disagreement by negotiation with the Appellants. Instead, what the exhibits clearly demonstrate is that the tactic adopted by Qatar was publicly to assert its openness to dialogue and its willingness to negotiate, but then to take no concrete steps actually to attempt to initiate negotiations. In addition, it is telling that none of the exhibits produced by Qatar demonstrate any attempt by Qatar to initiate negotiations on the specific topic of the airspace restrictions.

6.62 Accordingly, the ICAO Council erred in fact and in law in rejecting the Appellants' Second Preliminary Objection based on a failure to comply with the precondition of negotiations. It should instead have held that it was without jurisdiction over the disagreement.

1. Qatar's supposed attempts to negotiate within ICAO and other international bodies

6.63 Qatar argued for the first time in its Response to the Preliminary Objections that there had "been negotiations between the parties within the framework of ICAO."[441] In support of that allegation, Qatar referred to six letters written by Qatar to the President of the ICAO Council or the ICAO Secretary General and to the record of the Council's Extraordinary Session of 31 July 2017[442].

6.64 None of these documents, however, evidence prior negotiations in relation to the matters at issue in Qatar's ICAO Application, or any attempt by Qatar to initiate such negotiations.

6.65 The six letters referred to by Qatar[443] were addressed to either the President of the ICAO Council or to the Secretary General of ICAO rather than to the Appellants. Moreover, nowhere in these letters was there any invitation to negotiate addressed to the Appellants; Qatar never attempted to explain how letters not addressed to the Appellants could constitute such an invitation.

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441 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, paras 114-122, exhibits 1-6.

442 See *ibid*., paras 114, 115 and 122.

443 *Ibid*., para. 114.

6.66 As a consequence, the letters cannot be regarded (and could not have been regarded by the ICAO Council) as constituting a "genuine attempt to negotiate" for the purposes of the precondition of negotiations in Article II, Section 2 of the IASTA.

6.67 As for the discussion at the ICAO Council Extraordinary Session of 31 July 2017, held pursuant to Qatar's request under Article 54(n) of the Chicago Convention, at no point did Qatar indicate that it sought to pursue negotiations in respect of the claims it subsequently sought to bring to the ICAO Council under Article II, Section 2 of the IASTA, and at no point did any such negotiations take place. In any event, again, Qatar's requests under Article 54(n) were directed to the Council and not to the Appellants.

6.68 Further, although in the Article 54(n) proceedings Qatar made various allegations of breach by the Appellants of their obligations under the Chicago Convention and the IASTA, that is insufficient to characterize those proceedings as involving negotiations that satisfy the precondition of negotiations in Article II, Section 2 of the IASTA. As discussed at paragraph 6.28 above, and as the Court has made clear, the concept of negotiations is distinct from that of a "dispute", and negotiations are categorically different from "mere protests or disputations", "the plain opposition of legal views . . . between two parties", or "the exchange of claims and directly opposed counter-

claims"[444]. Whilst the type of negotiations foreseen and required by the precondition of negotiations necessarily presupposes the existence of a dispute, what characterizes negotiations and sets them apart is a "genuine attempt . . . to engage in discussions . . . with a view to *resolving the dispute*"[445].

6.69 In any event, as reflected in the summary of the Session, the ICAO Council was careful to emphasise:

> "the need to clearly differentiate between any actions that it, as a governing body, might consider taking in relation to Article 54 n) of the *Convention on International Civil Aviation* . . . and any actions that it might consider taking in relation to Article 84 thereof, which provided a process for the settlement of any disagreement between Contracting States concerning the interpretation or application of the Convention and its Annexes *which cannot be settled by negotiation*."[446]

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444 *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. 132, para. 157; see also *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 446, para. 57; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 120-121, para. 43.

445 *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. 132, para. 157 (emphasis added); see also *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 446, para. 57; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Judgment, I.C.J. Reports 2017*, pp. 120-121, para. 43.

446 **Vol. III, Annex 24**, ICAO Preliminary Objections, Exhibit 22, Summary Minutes of Extraordinary Session of the Council, 31 July 2017, ICAO document C-WP/14640 (Restricted), para. 2 (emphasis added).

6.70 Qatar also sought to suggest that the meetings coordinated by the ICAO MID Office to review contingency routes in some manner satisfied the requirement of prior negotiations under Article II, Section 2 of the IASTA. The discussions, however, were at a technical level and in any event did not address either the disagreement submitted by Qatar supposedly relating to the interpretation or application of the IASTA or the wider issues that in reality underlie and form part of that dispute. Again, those discussions could not properly have been regarded by the ICAO Council as an attempt by Qatar to initiate negotiations with a view to settling the disagreement before submitting the dispute to the Council.

6.71 Qatar also sought to invoke actions taken by it before other international fora, including in particular its requests for consultations addressed to Bahrain and the UAE within the context of the World Trade Organization, as constituting attempts to initiate negotiations. Those requests, however, likewise are insufficient to constitute a "genuine attempt" to negotiate in respect of the disagreement.

6.72 First, and most obviously, no such request was made in respect of Egypt and clearly cannot constitute an attempt to initiate negotiations in its regard.

6.73 Second, and in any case, the requests cannot properly be regarded as constituting either negotiations or an attempt to initiate negotiations, even in respect of the artificially narrow disagreement that Qatar purported to submit to the ICAO Council. As already noted at paragraph 6.31 above, the Court has made clear that in order to satisfy the precondition of negotiations, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in

question"[447]. The requests for consultations relied upon by Qatar, however, made no mention of the relevant obligations contained in the Chicago Convention and IASTA that Qatar alleged in its Applications and Memorials had been breached.

2. Qatar's other supposed attempts to initiate negotiations

6.74 In addition, Qatar in its Response to the Preliminary Objections sought to rely upon a long list of press statements and press reports of interviews and statements allegedly made to officials of third States in an attempt to show that it attempted to negotiate with the Appellants. Even if those statements were in fact made, and the reports of them put forward by Qatar were accepted as being true and accurate, these statements would not assist Qatar in meeting its burden of showing that there was a "genuine attempt" by it to settle the disagreement by initiating negotiations prior to submission of the disagreement to ICAO Council.

6.75 First, a significant proportion of the statements and other materials relied upon (in particular those discussed at paragraphs 190-200 of Qatar's Response to the Preliminary Objections and annexed as Exhibits 75 to 85 thereto) were made after the date of filing of Qatar's ICAO Application on 30 October 2017. In light of the well-established rule, discussed at paragraphs 6.32-6.34 above, that compliance with any preconditions for jurisdiction must be fulfilled as at the date of seisin, statements made after the date of Qatar's

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

ICAO Application cannot be relied upon as evidencing compliance with the precondition of negotiations contained in Article II, Section 2 of the IASTA.

6.76 Second, the vast majority of the materials relied upon by Qatar were not addressed to the Appellants, but instead were either addressed to third parties and subsequently reported in the media or constitute press releases issued by Qatar to the world at large. As such, they cannot constitute a "genuine attempt" to initiate negotiations with the Appellants.

6.77 Qatar itself admitted in its Response to the Preliminary Objections that there were "few direct contacts between the parties"[448]. In fact, the only instance of direct contact relied upon by Qatar occurring prior to the filing of the ICAO Application on 30 October 2017 is a purported telephone conversation between representatives of Qatar and Saudi Arabia on 8 September 2017[449]. That contact, however, also could not have been relied upon by the ICAO Council as showing that Qatar had sought to initiate negotiations, not least because Saudi Arabia is not party to these proceedings.

6.78 First, the evidence of the content of the supposed conversation is unreliable. It is striking that no official source is cited by Qatar in this regard, and Qatar relies only on press reports as to the supposed content of the conversation. At a minimum, one would have expected Qatar's assertion as to the content of the call to have been backed up by a transcript or contemporaneous note or an official statement from Qatar. By contrast, a contemporaneous official Saudi Press Release immediately contested the

448 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 177.

449 *Ibid.*

reports in the Qatari press as to the call's content[450]. Qatar bore the burden of proof in this regard, and its unsupported assertions as to the supposed contents of the call are an insufficient basis on which the ICAO Council could have reached any findings of fact in this regard.

6.79 Second, in any event, it is notable that Qatar did not itself claim that it offered to negotiate in that phone call. Further, and whilst the contents of the call are disputed, it is striking how tentative Qatar was as to the contents of the conversation between the Emir of Qatar and the Crown Prince of the Kingdom of Saudi Arabia, limiting itself to stating that "it seems both stressed the need to resolve the crisis by sitting down to dialogue."[451]

6.80 Third, it is also notable that Qatar does not assert, and neither party at any point claimed (or is reported as having claimed) that there had been any specific discussion at the alleged call as to the matters that Qatar alleges to be the subject of its claims to the ICAO Council, namely, compliance with relevant international obligations in the field of civil aviation, including in particular obligations under the Chicago Convention and the IASTA.

6.81 Fourth, even if the content of the discussion at the alleged call had been as Qatar suggested, such a discussion as to the need for dialogue, couched in the most general terms, and in the context of a far-wider dispute between the Parties, self-evidently does not constitute either negotiations in relation to the interpretation or application of the IASTA or an attempt to initiate negotiations in that regard.

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450 *Ibid*., para. 180.

451 *Ibid*., para. 177.

6.82 Finally, and in any event, even reviewing the data in the light most favourable to Qatar, the purported phone call on 8 September 2017 was only with Saudi Arabia, which is not party to these proceedings. There is no suggestion by Qatar (nor any evidence) that Qatar at any point attempted to contact any of the Appellants in order to seek to initiate negotiations. Neither did it make any genuine attempt to do so through other channels, such as via the Emir of Kuwait.

6.83 Quite apart from the fact that they were not addressed to the Appellants and did not constitute an invitation to negotiate, the long catalogue of press statements, interviews, and statements allegedly made to officials of third States or the world at large are insufficient to satisfy the precondition of negotiations as they did not deal with the specific subject-matter of Qatar's claims, despite Qatar's subsequent attempt to frame them as such before the ICAO Council.

6.84 As already noted at paragraph 6.31 above, the Court's constant approach in this regard is that in order to satisfy the precondition of negotiations, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question"[452].

6.85 None of the statements relied upon by Qatar before the ICAO Council, however, refers to issues relating to the interpretation and application of the

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

IASTA, and which, in Qatar's view, form the subject-matter of the disagreement between the Parties. Nor do any of those materials even refer more generally to aviation matters.

6.86 Further, even if it were to be accepted, purely for the sake of argument, that the various statements were in fact made, and the reports of them put forward by Qatar are true and accurate, on their face these statements in any event do not establish that Qatar ever made a "genuine attempt" to settle the disagreement or dispute by seeking to initiate negotiations prior to submission of its Applications to the ICAO Council. Instead, it is striking that all of these so-called attempts to initiate negotiations relate to the crisis as a whole, thereby contradicting Qatar's claim that the dispute before the Court is restricted to the IASTA only.

6.87 In that regard, as discussed in Chapter V, by its pleadings before the ICAO Council, Qatar sought to artificially characterize the "core issue" in this case as one limited only to "the disagreement relating to the interpretation or application of the IASTA"[453]. By contrast, the Appellants take the position that the "real issue" in this case concerns wider matters as set out in Chapter II, which are outside the ICAO Council's jurisdiction.

6.88 If, however, the disagreement is to be understood as relating solely to breaches of the IASTA, as Qatar alleges, then it follows that the required attempt to initiate negotiations must relate specifically to the alleged breach of the IASTA. Yet, none of the statements offered by Qatar as evidence of negotiations or of attempts at negotiation refers to the IASTA. They are entirely

453 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 43, see also, *ibid*., para. 44.

general statements as to Qatar's alleged willingness "to sit and talk"[454] or the "importance of dialogue"[455].

6.89 Qatar cannot have it both ways. It cannot on the one hand claim in its Response to the Preliminary Objections based on the lack of the Council's competence in respect of issues relating to countermeasures that the dispute does not involve wider issues, while on the other simultaneously arguing that vague references to a broader political dialogue or mediation satisfy the requirement of prior negotiations (which are required to specifically address the subject-matter of the dispute and the relevant obligations at issue). If Qatar seeks to insist that the dispute is not about the wider issues between the Parties, it must necessarily concede that the materials it relied upon cannot satisfy the requirement of negotiations in Article II, Section 2 of the IASTA. Conversely, if Qatar claims that the references to a broader political dialogue satisfy the prior negotiations requirement in Article II, Section 2, it must necessarily concede that the dispute is about wider issues that fall outside the ICAO Council's jurisdiction.

3. Qatar's legal arguments in its Response to the Preliminary Objections are flawed

6.90 In support of its position that it had fulfilled the precondition of negotiations, Qatar in its Response to the Preliminary Objections attempted to argue that negotiations need not be attempted prior to filing an application with

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454 *Ibid*., para. 128; and **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 16, "Foreign Minister: Qatar 'Willing to Talk' to Resolve Diplomatic Crisis", Qatar, Ministry of Foreign Affairs, 6 June 2017.

455 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, para. 162; and **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, Exhibit 48, "Foreign Minister Meets Turkish Minister of Foreign Affairs", Ankara Information Office, Qatar, Ministry of Foreign Affairs, 14 July 2017.

the ICAO Council and that it is sufficient if negotiations are attempted after an application has been submitted[456].

6.91 Qatar's argument finds no support in the text of Article II, Section 2 of the IASTA. Rather, the approach suggested by Qatar is in direct contradiction with the express terms of that provision, which require that an attempt to settle the disagreement through negotiation must have been made prior to submitting an application to the Council. Notably, Qatar put forward no support for its position in that regard.

6.92 Further, Qatar's suggestion that the requirement that the precondition of negotiations must be satisfied prior to seisin is "not as settled in law as the Respondents claim"[457] is self-evidently flawed. Qatar's selective quotation on the observations of the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* are a futile attempt to escape from the fact that the Court subsequently in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)* denied that it had jurisdiction in circumstances in which negotiations had not been attempted prior to the seisin of the Court. The same is true *a fortiori* of Qatar's reliance upon the joint opinion of the five dissenting judges in that latter case.

6.93 Qatar's suggestion in its Response to the Preliminary Objections that "negotiations are futile and the parties are deadlocked, and that the disagreement cannot be settled by negotiations"[458], once again ignores the

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456 **Vol. IV, Annex 25**, ICAO Response to the Preliminary Objections, paras 99-101.

457 *Ibid*., para. 99.

458 *Ibid*., para. 209.

holding of the Court in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*[459]. In light of that decision, it is clear that where the relevant jurisdictional provision contains a precondition of negotiation, it is impermissible for a State not to make any attempt to negotiate and then simply to assert that any negotiations, if attempted would have been futile – at the least a genuine attempt to negotiate must have been made.

6.94 In the absence of any attempt to initiate negotiations, Qatar's claim that negotiations would be "futile" cannot properly be based on any express or implied rejection or refusal of negotiations by the Appellants. No attempt was ever made by Qatar to initiate negotiations, so it cannot be said that they would have been futile.

C. CONCLUSION

6.95 In sum, Qatar failed to put forward any evidence before the ICAO Council establishing that it attempted to negotiate with the Appellants prior to submitting the disagreement to the ICAO Council on any characterization of the subject-matter in dispute. In the circumstances, the ICAO Council erred in asserting jurisdiction, as Qatar failed to comply with the precondition of negotiations contained in Article II, Section 2 of the IASTA. Consequently, this Court should hold that the ICAO Council was without jurisdiction to rule upon

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459 *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. 132, para. 157; see also *Questions Relating to the Obligation to Extradite or Prosecute, (Belgium v. Senegal), I.C.J. Reports 2012*, pp. 27-28, para. 57; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 120-121, para. 43.

the disagreement submitted to it by Qatar in the ICAO Application relating to the IASTA.

Section 3. Qatar's claim is inadmissible due to its failure to comply with Article 2(g) of the ICAO Rules

6.96 The requirements of Article II, Section 2 are reflected as a procedural requirement in Article 2(g) of the Rules. In accordance with Article 2(g), an application and memorial must include "[a] statement that negotiations to settle the disagreement had taken place between the parties but were not successful".

6.97 Article 2(g) of the ICAO Rules thus requires that an applicant affirm in its application and memorial that negotiations took place. A statement which makes it clear that no negotiations were attempted plainly cannot satisfy the procedural requirement in Article 2(g), as it does not constitute "[a] statement that negotiations to settle the disagreement had taken place . . .". Rather, such a statement is an acknowledgement of precisely the contrary situation – that is, that negotiations to settle the disagreement have not taken place between the Parties and that the precondition of negotiations in Article II, Section 2 of the IASTA is not fulfilled.

6.98 As noted at paragraph 6.44 above, the relevant paragraph of Qatar's ICAO Memorial did not state that negotiations had taken place but had not been successful; instead, it made clear that no negotiations had taken place and that Qatar had not attempted to initiate any such negotiations on the flawed basis that to do so would have been "futile".

6.99 As such, Qatar failed to comply with the requirements of Article 2(g) of the ICAO Rules. As a result, the ICAO Council erred in upholding its jurisdiction and in not declaring Qatar's ICAO Application inadmissible on this basis.

CHAPTER VII
CONCLUSIONS

7.1 This appeal has been lodged by the Appellants with the International Court of Justice pursuant to Article II, Section 2 of the IASTA.

7.2 The Appellants request the Court to rule upon the proper limits of the ICAO Council's jurisdiction under Article II; whether, in the circumstances of the present case, any jurisdiction the ICAO Council might have should not be exercised; and whether the ICAO Council failed in its duty to observe fundamental, generally accepted principles of judicial procedure under Article II, Section 2. In particular, the Court is asked to determine that the ICAO Council overstepped fundamental principles of due process thus rendering its Decision null and void; and that in any event the ICAO Council erred in fact or in law in deciding "that the preliminary objection of the Respondents is not accepted" in respect of the ICAO Application.

7.3 This Memorial first sets out (in **Chapter II**) the background facts that form the dispute between the Parties and which led to the adoption of countermeasures by the Appellants, one aspect of which Qatar seeks to challenge before the ICAO Council. While these facts fall beyond the purview of the ICAO Council's jurisdiction under Article II, Section 2 of the IASTA, they are necessary components of the real dispute between the Appellants and Qatar. They are therefore essential to understanding why that dispute is not capable of consideration by the ICAO Council (which constitutes the basis for the Appellants' First Preliminary Objection before the ICAO Council and its second ground of appeal before the Court).

7.4 Accordingly, Chapter II recounts briefly Qatar's support for and harbouring of terrorists and extremists, as well as its systematic interference in

the internal affairs of the Appellants and other States, in disregard of its obligations under general international law and other binding international obligations. These include the Riyadh Agreements, which complement the conventional and customary international law obligations incumbent upon Qatar. The Appellants put Qatar on notice of their grave concerns about its failures to comply on numerous occasions, including through the Implementing Mechanism and other processes established by the Riyadh Agreements. Qatar nonetheless persisted in its policies of intervention in the affairs of the Appellants and its support for terrorism and extremism in breach of its international obligations. As a consequence, in June 2017, the Appellants adopted a comprehensive suite of measures with a view to inducing Qatar to comply with its obligations. Without prejudice to the compliance of such measures with their obligations under the IASTA, the Appellants submit – and have stated formally from the outset – that these measures constitute lawful countermeasures relating to matters in respect of which the ICAO Council is not competent to adjudicate.

7.5 The first ground of appeal, set out in **Chapter III**, is quite separate from the merits of the Preliminary Objections raised by the Appellants before the ICAO Council. It relates to the procedure followed by the ICAO Council in reaching its Decision of 29 June 2018, by which the ICAO Council dismissed the Appellants' two Preliminary Objections. The ICAO Council manifestly failed to uphold the Appellants' fundamental rights of due process, not least in failing to deliberate or provide a reasoned decision. The multiple failures in the proceedings were so grave and so widespread as to denude the proceedings and the Decision of a judicial character, rendering it null and void.

7.6 **Chapter IV** sets out the distinction between jurisdiction and admissibility as it applied in the context of the particular legal provisions

pertaining to the ICAO Council, including pursuant to the ICAO Rules. It establishes that objections to both jurisdiction and admissibility fall to be determined by the ICAO Council as a preliminary issue, this being an issue debated specifically between the disputing Parties before the Council, but which the Council entirely failed to address in its Decision.

7.7 In **Chapter V**, the Appellants set out their second ground of appeal, namely, that the ICAO Council is not competent to rule upon the disagreement submitted to it by Qatar in the ICAO Application relating to the IASTA, and that the ICAO Council accordingly erred in its Decision of 29 June 2018 in not accepting the Appellants' First Preliminary Objection and thereby affirming its jurisdiction to proceed to hear the merits of the dispute. This is because the real subject-matter of the dispute, objectively determined, does not concern matters within Article II, Section 2 of the IASTA.

7.8 In fact, the real dispute between the Parties comprises Qatar's multiple actions and omissions in violation of international obligations extending well beyond the field of civil aviation, and the measures which the Appellants were compelled to take in 2017 to induce compliance with those obligations by Qatar, which also extend well beyond the field of civil aviation. Thus Qatar's complaint under the IASTA is an attempt artificially to sever one part of the Parties' dispute and bring it before a forum which is not competent, nor equipped, to assess the entirety of the dispute. The effect of this artifice is either to hamper the Appellants from invoking in defence the broad countermeasures that they have adopted, or to prejudice that key defence in other fora. In a word, a peripheral aspect of the dispute is made to swallow up the overwhelming mass of the matter and, what is more, in a manner that prejudices the Appellants' rights. The Court is thus requested to uphold the First Preliminary Objection made by the Appellants before the ICAO Council.

7.9 Finally, the Appellants' third ground of appeal is detailed in **Chapter VI**. The Appellants submit that the ICAO Council is not competent to rule upon the disagreement submitted to it by Qatar in the ICAO Application since Qatar failed to demonstrate that it had complied with the precondition of negotiations contained in Article II, Section 2 of the IASTA; and, in any case, Qatar's ICAO Application and Memorial failed to comply with Article 2(g) of the ICAO Rules. Qatar failed to put forward any evidence before the ICAO Council establishing that it attempted to negotiate with the Appellants even the artificially narrow disagreement that it has purported to submit to the ICAO Council and thus cannot satisfy this precondition. None of the materials that Qatar belatedly relied upon before the ICAO Council constitutes evidence of a genuine attempt to negotiate, since they do not refer to the IASTA or even mention the restrictions on civil aviation. Instead, they merely confirm the Appellants' submission that the real issue in dispute concerns Qatar's internationally wrongful actions, which falls outside the ICAO Council's competence. Accordingly, the Court is requested to uphold the Second Preliminary Objection made by the Appellants before the ICAO Council.

7.10 In conclusion, the Court is respectfully requested to uphold the Appellants' appeal and hold that the Decision of the ICAO Council dated 29 June 2018 in respect of Qatar's ICAO Application is null and void and without effect on the basis of one or more of the following grounds:

A. FIRST GROUND OF APPEAL

(a) The Decision of the ICAO Council on 29 June 2018 manifestly violated fundamental rules of due process and the applicable procedural rules in a manner so extreme as to render the proceedings devoid of any judicial character;

B. SECOND GROUND OF APPEAL

(a) The ICAO Council is without jurisdiction to adjudicate upon the dispute between the Parties, which falls outside the ICAO Council's jurisdiction *ratione materiae* under Article II, Section 2 of the IASTA; in the alternative,

(b) Qatar's claims are inadmissible because it would be improper for the ICAO Council to exercise jurisdiction in circumstances in which this would be prejudicial to the rights of the Appellants and contrary to judicial propriety;

C. THIRD GROUND OF APPEAL

(a) The ICAO Council is without jurisdiction to adjudicate upon the disagreement because Qatar has failed to satisfy a necessary precondition to the ICAO Council's jurisdiction by not attempting to initiate negotiations in relation to its claims prior to submitting them to the ICAO Council; in the alternative,

(b) The ICAO Council is not competent to adjudicate upon Qatar's ICAO Application because Qatar failed to comply with the procedural requirement set out in Article 2(g) of the ICAO Rules of affirming that negotiations had taken place but were not successful.

SUBMISSIONS

1. For the reasons set out in this Memorial, and reserving the right to supplement, amplify or amend the present submissions, the Kingdom of Bahrain, the Arab Republic of Egypt, and the United Arab Emirates hereby request the Court to uphold their Appeal against the Decision rendered by the Council of the International Civil Aviation Organization dated 29 June 2018, in proceedings commenced by the State of Qatar by Qatar's Application (B) dated 30 October 2017 against the Appellants pursuant to Article II, Section 2 of the IASTA.

2. In particular, the Court is respectfully requested to adjudge and declare, rejecting all submissions to the contrary, that:

1) the Decision of the ICAO Council dated 29 June 2018 reflects a manifest failure to act judicially on the part of the ICAO Council, and a manifest lack of due process in the procedure adopted by the ICAO Council; and

2) the ICAO Council is not competent to adjudicate upon the disagreement between the State of Qatar and the Appellants submitted by Qatar to the ICAO Council by Qatar's Application (B) dated 30 October 2017; and

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

Respectfully submitted on behalf of the Kingdom of Bahrain, the Arab Republic of Egypt, and the United Arab Emirates, respectively.

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H.E. Shaikh Fawaz bin Mohammed Al Khalifa
Agent of the Kingdom of Bahrain

Signed on 27 December 2018

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H.E. Amgad Abdel Ghaffar
Agent of the Arab Republic of Egypt

Signed on 27 December 2018

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H.E. Saeed Ali Yousef Alnowais
Agent of the United Arab Emirates

Signed on 27 December 2018

CERTIFICATION

The Agents of each Appellant in respect of that State hereby certify that all annexes are true copies of the documents referred to and that the translations provided are accurate.

_____

H.E. Shaikh Fawaz bin Mohammed Al Khalifa
Agent of the Kingdom of Bahrain

Signed on 27 December 2018

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H.E. Amgad Abdel Ghaffar
Agent of the Arab Republic of Egypt

Signed on 27 December 2018

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H.E. Saeed Ali Yousef Alnowais
Agent of the United Arab Emirates

Signed on 27 December 2018