Corrigé
Corrected

CR 2019/14

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Monday 2 December 2019, at 3 p.m., at the Peace Palace,

President Yusuf presiding,

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

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le lundi 2 décembre 2019, à 15 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

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

COMPTE RENDU

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

____

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

____

The Government of the Kingdom of Bahrain is represented by:

H.E. Sheikh Fawaz bin Mohammed Al Khalifa, Ambassador of the Kingdom of Bahrain to the United Kingdom, accredited to the Kingdom of the Netherlands,

as Agent;

Mr. Georgios Petrochilos, *avocat au barreau de Paris* and Advocate at the Greek Supreme Court, Three Crowns LLP,

Ms Alexandra van der Meulen, *avocate au barreau de Paris* and member of the Bar of the State of New York, Three Crowns LLP,

as Advocates;

Ms Amelia Keene, Barrister and Solicitor of the High Court of New Zealand, Three Crowns LLP,

Mr. Motohiro Maeda, Solicitor admitted in England and Wales, Three Crowns LLP,

Mr. Ryan Manton, Barrister and Solicitor of the High Court of New Zealand, Three Crowns LLP,

Ms Julia Sherman, member of the Bar of the State of New York, ***Three Crowns LLP,***

as Counsel;

Mr. Mohamed Abdulrahman Al Haidan, Director of Legal Affairs, Ministry of Foreign Affairs of the Kingdom of Bahrain,

Mr. Hamad Waheed Sayyar, Counsellor, Embassy of the Kingdom of Bahrain in the United Kingdom,

Mr. Devashish Krishan, Legal Adviser, Court of H.R.H. the Crown Prince of the Kingdom of Bahrain,

Mr. Mohamed Hafedh Ali Seif, Third Secretary, Legal Affairs Directorate, Ministry of Foreign Affairs of the Kingdom of Bahrain,

as Advisers;

Ms Eleonore Gleitz, Three Crowns LLP,

as Assistant.

The Government of the Arab Republic of Egypt is represented by:

H.E. Mr. Amgad Abdel Ghaffar, Ambassador of the Arab Republic of Egypt to the Kingdom of the Netherlands,

as Agent;

Mr. Payam Akhavan, LLM SJD (Harvard), Professor of International Law, McGill University, member of the Bar of the State of New York and of The Law Society of Ontario, member of the Permanent Court of Arbitration,

Le Gouvernement du Royaume de Bahreïn est représenté par :

S. Exc. le cheikh Fawaz bin Mohammed Al Khalifa, ambassadeur du Royaume de Bahreïn au Royaume-Uni, accrédité auprès du Royaume des Pays-Bas,

comme agent ;

M. Georgios Petrochilos, avocat au barreau de Paris et à la Cour suprême grecque, Three Crowns LLP,

Mme Alexandra van der Meulen, avocate au barreau de Paris et membre du barreau de l'Etat de New York, Three Crowns LLP,

comme avocats ;

Mme Amelia Keene, *barrister* et *solicitor* près la *High Court* de Nouvelle-Zélande, Three Crowns LLP,

M. Motohiro Maeda, *solicitor* (Angleterre et pays de Galles), Three Crowns LLP,

M. Ryan Manton, *barrister* et *solicitor* près la *High Court* de Nouvelle-Zélande, Three Crowns LLP,

Mme Julia Sherman, membre du barreau de l'Etat de New York, ***Three Crowns LLP,***

comme conseils ;

M. Mohamed Abdulrahman Al Haidan, directeur des affaires juridiques au ministère des affaires étrangères du Royaume de Bahreïn,

M. Hamad Waheed Sayyar, conseiller à l'ambassade du Royaume de Bahreïn au Royaume-Uni,

M. Devashish Krishan, conseiller juridique à la Cour de S. A. R. le prince héritier du Royaume de Bahreïn,

M. Mohamed Hafedh Ali Seif, troisième secrétaire à la direction des affaires juridiques du ministère des affaires étrangères du Royaume de Bahreïn,

comme conseillers ;

Mme Eleonore Gleitz, Three Crowns LLP,

comme assistante.

Le Gouvernement de la République arabe d'Egypte est représenté par :

S. Exc. M. Amgad Abdel Ghaffar, ambassadeur de la République arabe d'Egypte auprès du Royaume des Pays-Bas,

comme agent ;

M. Payam Akhavan, LLM SJD (Harvard), professeur de droit international à l'Université McGill, membre de la Cour permanente d'arbitrage, membre du barreau de l'Etat de New York et du barreau de l'Ontario,

Ms Naomi Hart, Essex Court Chambers, member of the Bar of England and Wales,

as Counsel and Advocates;

H.E. Ms Howaida Essam Abdel Rahman, Assistant Minister for Foreign Affairs for International Legal Affairs and Treaties of the Arab Republic of Egypt,

Ms Angi Mostafa, Permanent Representative of the Arab Republic of Egypt to the International Civil Aviation Organization,

~~***Mr. Sameh Ahmed Zaky Elhefny, President, Egyptian Civil Aviation Authority,***~~

H.E. Mr. Khaled Mahmoud Elkhamry, Ambassador, Ministry of Foreign Affairs,

Mr. Ihab Soliman, Counsellor, Deputy Chief of Mission, Embassy of the Arab Republic of Egypt in the Kingdom of the Netherlands,

Mr. Hazem Fawzy, Counsellor, Embassy of the Arab Republic of Egypt in the Kingdom of the Netherlands,

Ms Hadeer Samy Ibrahim Elsayed Saoudy, Third Secretary, Ministry of Foreign Affairs,

Mr. Mostafa Diaa Eldin Mohamed, Third Secretary, Embassy of the Arab Republic of Egypt in the Kingdom of the Netherlands,

as Advisers.

The Government of the Kingdom of Saudi Arabia is represented by:

H.E. Mr. Abdulaziz bin Abdullah bin Abdulaziz Abohaimed, Ambassador of the Kingdom of Saudi Arabia to the Kingdom of the Netherlands,

as Agent;

~~***H.E. Mr. Abdulkhalig Rashed bin Rafaa, Minister plenipotentiary, Royal Embassy of Saudi Arabia in the Kingdom of the Netherlands,***~~

Mr. Nasser Awad Alghanoom, Counsellor, Royal Embassy of Saudi Arabia in the Kingdom of the Netherlands,

~~***Mr. Shafi Bajad Alotaibi, Counsellor, Ministry of Foreign Affairs,***~~

~~***Mr. Mohammed Hassan Monis, Counsellor, Ministry of Foreign Affairs,***~~

~~***Mr. Mohammed Ali Almalki, Second Secretary, Ministry of Foreign Affairs,***~~

Mr. Mohammed Saud Alnasser, General Authority of Civil Aviation,

as Advisers;

Mr. Gavan Griffith, QC, Barrister, Lincoln's Inn, member of the Bars of England and Wales and of Australia,

Mme Naomi Hart, Essex Court Chambers, membre du barreau d'Angleterre et du pays de Galles,

comme conseils et avocats ;

S. Exc. Mme Howaida Essam Abdel Rahman, vice-ministre aux affaires étrangères de la République arabe d'Egypte, chargée des affaires juridiques internationales et des traités internationaux,

Mme Angi Mostafa, représentante permanente de la République arabe d'Egypte auprès de l'Organisation de l'aviation civile internationale,

~~***M. Sameh Ahmed Zaky Elhefny, président de l'autorité égyptienne de l'aviation civile,***~~

S. Exc. M. Khaled Mahmoud Elkhamry, ambassadeur, ministère des affaires étrangères,

M. Ihab Soliman, conseiller, chef de mission adjoint de l'ambassade de la République arabe d'Egypte au Royaume des Pays-Bas,

M. Hazem Fawzy, conseiller à l'ambassade de la République arabe d'Egypte au Royaume des Pays-Bas,

Mme Hadeer Samy Ibrahim Elsayed Saoudy, troisième secrétaire, ministère des affaires étrangères,

M. Mostafa Diaa Eldin Mohamed, troisième secrétaire, ambassade de la République arabe d'Egypte au Royaume des Pays-Bas,

comme conseillers.

Le Gouvernement du Royaume d'Arabie saoudite est représenté par :

S. Exc. M. Abdulaziz bin Abdullah bin Abdulaziz Abohaimed, ambassadeur du Royaume d'Arabie saoudite auprès du Royaume des Pays-Bas,

comme agent ;

~~***S. Exc. M. Abdulkhalig Rashed bin Rafaa, ministre plénipotentiaire, ambassade du Royaume d'Arabie saoudite au Royaume des Pays-Bas,***~~

M. Nasser Awad Alghanoom, conseiller, ambassade du Royaume d'Arabie saoudite au Royaume des Pays-Bas,

~~***M. Shafi Bajad Alotaibi, conseiller, ministère des affaires étrangères,***~~

~~***M. Mohammed Hassan Monis, conseiller, ministère des affaires étrangères,***~~

~~***M. Mohammed Ali Almalki, deuxième secrétaire, ministère des affaires étrangères,***~~

M. Mohammed Saud Alnasser, autorité générale de l'aviation civile,

comme conseillers ;

M. Gavan Griffith, QC, *barrister*, Lincoln's Inn, membre du barreau d'Angleterre et du pays de Galles et du barreau d'Australie,

~~***Mr. Chester Brown, Professor of International Law and International Arbitration, University of Sydney, member of the Australian Bar,***~~

as Counsel.

The Government of the United Arab Emirates is represented by:

H.E Ms Hissa Abdullah Ahmed Al-Otaiba, Ambassador of the United Arab Emirates to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Abdalla Hamdan Alnaqbi, Director of International Law Department, Ministry of Foreign Affairs and International Cooperation,

Mr. Abdulla Al Jasmi, Head of the Multilateral Treaties and Agreements Section, Ministry of Foreign Affairs and International Cooperation,

Ms Majd Abdalla, Senior Legal Researcher, Multilateral Treaties and Agreements Section, Ministry of Foreign Affairs and International Cooperation,

Mr. Mohamed Salim Ali Alowais, Embassy of the United Arab Emirates in the Kingdom of the Netherlands,

Ms Fatima Alkhateeb, Ministry of Foreign Affairs and International Cooperation,

as Special Advisors;

Mr. Malcolm Shaw, QC, Emeritus Sir Robert Jennings Professor of International Law at the University of Leicester, Senior Fellow, Lauterpacht Centre for International Law, University of Cambridge, associate member of the Institut de droit international, Barrister, Essex Court Chambers, London,

Mr. Simon Olleson, Three Stone Chambers, Lincoln's Inn, London, member of the English Bar,

as Counsel and Advocates;

Mr. Scott Sheeran, Senior Legal Adviser to the Minister of State for Foreign Affairs, Ministry of Foreign Affairs and International Cooperation, Barrister and Solicitor of the High Court of New Zealand,

Mr. Paolo Busco, Legal Adviser to the Minister of State for Foreign Affairs, Ministry of Foreign Affairs and International Cooperation, member of the Italian Bar, registered European lawyer with the Bar of England and Wales,

Mr. Mark Somos, Senior Research Affiliate, Max Planck Institute for Comparative Public Law and International Law,

Mr. Charles L. O. Buderi, Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP, London, member of the District of Columbia Bar and California State Bar,

Ms Luciana ***T.*** Ricart, ***LLM, New York University School of Law, Counsel***, Curtis, Mallet-Prevost, Colt & Mosle LLP, London, ***member of the Buenos Aires Bar Association,***

as Counsel.

~~***M. Chester Brown, professeur de droit international et d'arbitrage international, Université de Sydney, membre du barreau d'Australie,***~~

comme conseils.

Le Gouvernement des Emirats arabes unis est représenté par :

S. Exc. Mme Hissa Abdullah Ahmed Al-Otaiba, ambassadeur des Emirats arabes unis auprès du Royaume des Pays-Bas,

comme agent ;

S. Exc. M. Abdalla Hamdan Alnaqbi, directeur du département du droit international, ministère des affaires étrangères et de la coopération internationale,

M. Abdulla Al Jasmi, chef du service des traités et accords multilatéraux, ministère des affaires étrangères et de la coopération internationale,

Mme Majd Abdalla, chargée de recherche principale, service des traités et accords multilatéraux, ministère des affaires étrangères et de la coopération internationale,

M. Mohammed Salim Ali Alowais, ambassade des Emirats arabes unis au Royaume des Pays-Bas,

Mme Fatima Alkhateeb, ministère des affaires étrangères et de la coopération internationale,

comme conseillers spéciaux ;

M. Malcom Shaw, QC, professeur émérite de droit international à l'Université de Leicester, titulaire de la chaire sir Robert Jennings, *senior fellow* au Lauterpacht Centre for International Law de l'Université de Cambridge, membre associé de l'Institut de droit international, *barrister*, Essex Court Chambers, Londres,

M. Simon Olleson, Three Stone, Lincoln's Inn, Londres, membre du barreau d'Angleterre,

comme conseils ou avocats ;

M. Scott Sheeran, conseiller juridique principal du ministre des affaires étrangères, ministère des affaires étrangères et de la coopération internationale, *barrister* et *solicitor* près la *High Court* de Nouvelle-Zélande,

M. Paolo Busco, conseiller juridique du ministre des affaires étrangères, ministère des affaires étrangères et de la coopération internationale, membre du barreau d'Italie, statut de *registered European Lawyer* inscrit au barreau d'Angleterre et du pays de Galles,

M. Mark Somos, chercheur principal adjoint, Institut Max Planck de droit public comparé et de droit international,

M. Charles L. O. Buderi, associé, Curtis, Mallet-Prevost, Colt & Mosle LLP, Londres, membre de l'association du barreau du district de Columbia et du barreau de l'Etat de Californie,

Mme Luciana T. Ricart, ***LLM, faculté de droit de l'Université de New York, avocate,*** Curtis, Mallet-Prevost, Colt & Mosle LLP, Londres, ***membre du barreau de Buenos Aires,***

comme conseils.

The Government of the State of Qatar is represented by:

Mr. Mohammed Abdulaziz Al-Khulaifi, Legal Adviser to H.E. the Deputy Prime Minister and Minister for Foreign Affairs of the State of Qatar, Dean of the College of Law, Qatar University,

as Agent;

Mr. Vaughan Lowe, QC, Emeritus Professor of International Law, University of Oxford , member of the Institut de droit international, Essex Court Chambers, member of the English Bar,

Mr. Pierre Klein, Professor of International Law, Université libre de Bruxelles,

Ms Loretta Malintoppi, 39 Essex Chambers Singapore, member of the Bar of Rome,

Mr. Lawrence H. Martin, Foley Hoag LLP, member of the Bars of the District of Columbia and Massachusetts,

Mr. Constantinos Salonidis, Foley Hoag LLP, member of the Bars of New York and Greece,

Mr. Pierre d'Argent, Professor of International Law, Université catholique de Louvain, ~~***associate***~~ member of the Institut de droit international, Foley Hoag LLP, member of the Bar of Brussels,

as Counsel and Advocates;

H.E. Mr. Abdullah bin Hussein Al-Jaber, Ambassador of the State of Qatar to the Kingdom of the Netherlands,

H.E. Mr. Abdulla bin Nasser Turki Al-Subaey, President of the Civil Aviation Authority of the State of Qatar,

Mr. Ahmad Al-Mana, Ministry of Foreign Affairs of the State of Qatar,

Mr. Jassim Al-Kuwari, Ministry of Foreign Affairs of the State of Qatar,

Mr. Nasser Al-Hamad, Ministry of Foreign Affairs of the State of Qatar,

Ms Hissa Al-Dosari, Ministry of Foreign Affairs of the State of Qatar,

Mr. Ali Al-Hababi, Embassy of the State of Qatar in the Kingdom of the Netherlands,

Mr. Essa Al-Malki, Permanent Representative, Permanent Mission of the State of Qatar to the International Civil Aviation Organisation,

Mr. John Augustin, Adviser, Permanent Mission of the State of Qatar to the International Civil Aviation Organisation,

Mr. Salah Al-Shibani, Director of Legal Affairs Department, Civil Aviation Authority of the State of Qatar,

Mr. Nasser Al-Suwaidi, Director of International Cooperation Department, Civil Aviation Authority of the State of Qatar,

Le Gouvernement de l'Etat du Qatar est représenté par :

M. Mohammed Abdulaziz Al-Khulaifi, conseiller juridique auprès de S. Exc. le vice-premier ministre et ministre des affaires étrangères de l'Etat du Qatar, doyen de la faculté de droit de l'Université du Qatar,

comme agent ;

M. Vaughan Lowe, QC, professeur émérite de droit international à l'Université d'Oxford, membre de l'Institut de droit international, Essex Court Chambers, membre du barreau d'Angleterre,

M. Pierre Klein, professeur de droit international à l'Université libre de Bruxelles,

Mme Loretta Malintoppi, 39 Essex Chambers Singapore, membre du barreau de Rome,

M. Lawrence H. Martin, cabinet Foley Hoag LLP, membre des barreaux du district de Columbia et du Massachusetts,

M. Constantinos Salonidis, cabinet Foley Hoag LLP, membre des barreaux de New York et de Grèce,

M. Pierre d'Argent, professeur de droit international à l'Université catholique de Louvain, membre ~~***associé***~~ de l'Institut de droit international, cabinet Foley Hoag LLP, membre du barreau de Bruxelles,

comme conseils et avocats ;

S. Exc. M. Abdullah bin Hussein Al-Jaber, ambassadeur de l'Etat du Qatar auprès des Pays-Bas,

S. Exc. M. Abdulla bin Nasser Turki Al-Subaey, président de l'autorité de l'aviation civile de l'Etat du Qatar,

M. Ahmad Al-Mana, ministère des affaires étrangères de l'Etat du Qatar,

M. Jassim Al-Kuwari, ministère des affaires étrangères de l'Etat du Qatar,

M. Nasser Al-Hamad, ministère des affaires étrangères de l'Etat du Qatar,

Mme Hissa Al-Dosari, ministère des affaires étrangères de l'Etat du Qatar,

M. Ali Al-Hababi, ambassade de l'Etat du Qatar aux Pays-Bas,

M. Essa Al-Malki, représentant permanent de l'Etat du Qatar auprès de l'Organisation de l'aviation civile internationale (OACI),

M. John Augustin, conseiller à la mission permanente de l'Etat du Qatar auprès de l'Organisation de l'aviation civile internationale (OACI),

M. Salah Al-Shibani, directeur du département des affaires juridiques de l'autorité de l'aviation civile de l'Etat du Qatar,

M. Nasser Al-Suwaidi, directeur du département de la coopération internationale de l'autorité de l'aviation civile de l'Etat du Qatar,

Mr. Talal Abdulla Al-Malki, Director of Public Relations and Communication Department, Civil Aviation Authority of the State of Qatar,

Mr. Rashed Al-Naemi, Embassy of the State of Qatar in the Kingdom of the Netherlands,

Mr. Abdulla Nasser Al-Asiri, Ministry of Foreign Affairs of the State of Qatar,

Ms Noora Ahmad Al-Saai, Ministry of Foreign Affairs of the State of Qatar,

Ms Dana Ahmad Ahan, Ministry of Foreign Affairs of the State of Qatar,

as Advisers;

Mr. Pemmaraju Sreenivasa Rao, Special Adviser in the Office of the Attorney General, State of Qatar, former member of the International Law Commission, member of the Institut de droit international,

Mr. Surya Subedi QC (Hon.), Professor of International Law, University of Leeds, member of the Institut de droit international, Three Stone Chambers, member of the English Bar,

Ms Catherine Amirfar, Debevoise & Plimpton LLP, member of the Bar of New York,

Mr. Arsalan Suleman, Foley Hoag LLP, member of the Bars of New York and the District of Columbia,

Mr. Joseph Klingler, Foley Hoag LLP, member of the Bars of New York and the District of Columbia,

Mr. Ioannis Konstantinidis, Assistant Professor of International Law, College of Law, Qatar University,

Mr. Ofilio Mayorga, Foley Hoag LLP, member of the Bar*s* of New York ***and Nicaragua***,

Mr. Peter Tzeng, Foley Hoag LLP, member of the Bar of New York,

Ms Floriane Lavaud, Debevoise & Plimpton LLP, member of the Bars of New York and Paris, Solicitor in England and Wales,

Mr. Ali Abusedra, Legal Counsel, Ministry of Foreign Affairs of the State of Qatar,

Ms Yasmin Al-Ameen, Foley Hoag LLP,

as Counsel;

Ms Flannery Sockwell,

Ms Nancy Lopez,

Ms Deborah Langley,

as Assistants.

M. Talal Abdulla Al-Malki, directeur du département des relations publiques et de la communication de l'autorité de l'aviation civile de l'Etat du Qatar,

M. Rashed Al-Naemi, ambassade de l'Etat du Qatar aux Pays-Bas,

M. Abdulla Nasser Al-Asiri, ministère des affaires étrangères de l'Etat du Qatar,

Mme Noora Ahmad Al-Saai, ministère des affaires étrangères de l'Etat du Qatar,

Mme Dana Ahmad Ahan, ministère des affaires étrangères de l'Etat du Qatar,

comme conseillers ;

M. Pemmaraju Sreenivasa Rao, conseiller spécial auprès du bureau de l'*Attorney General* de l'Etat du Qatar, ancien membre de la Commission du droit international, membre de l'Institut de droit international,

M. Surya Subedi QC (Hon), professeur de droit international à l'Université de Leeds, membre de l'Institut de droit international, cabinet Three Stone, membre du barreau d'Angleterre,

Mme Catherine Amirfar, cabinet Debevoise & Plimpton LLP, membre du barreau de New York,

M. Arsalan Suleman, cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

M. Joseph Klingler, cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

M. Ioannis Konstantinidis, professeur adjoint de droit international à la faculté de droit de l'Université du Qatar,

M. Ofilio Mayorga, cabinet Foley Hoag LLP, membre ***des*** barreau**x** de New York ***et du Nicaragua***,

M. Peter Tzeng, cabinet Foley Hoag LLP, membre du barreau de New York,

Mme Floriane Lavaud, cabinet Debevoise & Plimpton LLP, membre des barreaux de New York et de Paris, *solicitor* (Angleterre et pays de Galles),

M. Ali Abusedra, conseiller juridique auprès du ministère des affaires étrangères de l'Etat du Qatar,

Mme Yasmin Al-Ameen, cabinet Foley Hoag LLP,

comme conseils;

Mme Flannery Sockwell,

Mme Nancy Lopez,

Mme Deborah Langley,

comme assistantes.

The PRESIDENT: Please be seated. The sitting is open. For reasons duly made known to me, Judge Robinson is unable to join us for this afternoon's sitting. The Court meets this afternoon to hear the conclusion of the first round of oral argument of the Applicants. I shall now give the floor to Mr. Petrochilos to continue his presentation. You have the floor.

Mr. PETROCHILOS: Good afternoon Mr. President, Members of the Court. Before the lunch recess we looked at the three main propositions emerging from the *Monetary Gold* case and the reasons for which Qatar's selective fragmentation of the Parties' dispute engages these propositions.

SECOND GROUND OF APPEAL: THE JUDICIAL PROPRIETY ASPECTS (CONTINUED)

3. The role of judicial propriety (continued)

24. As I said at the outset, Qatar has come now to acknowledge that these are serious and real difficulties. And so, in this appeal, Qatar has mooted various ways (or one should say hypotheses) through which the ICAO Council could perhaps avoid dealing with the Appellants' defences[1]. The basic concept, it seems, is to preserve the Appellants' interests notwithstanding their lack of consent to ICAO's jurisdiction. This is very much in the mould of what the United Kingdom tried to do, unsuccessfully, in the *Monetary Gold* case.

25. Qatar's ideas have come rather late in the day, rather by way of "quick fixes". But none of them gets the job done[2]; and I will now turn to address them, in the third and last part of my argument.

4. None of Qatar's palliatives safeguards judicial propriety

26. Qatar canvasses three hypotheses. These are novel in every sense of the term; and, indeed, Qatar's new arguments would drastically transform the case that is pending at ICAO. That is of itself a problem; but in any event none of Qatar's hypotheses is satisfactory, chiefly because in one way or another they surgically remove from the case Qatar's wrongdoings and the Appellants' indispensable defences.

[1] RQ — ICAOA and ICAOB, para. 3.49.

[2] MA — ICAOA and ICAOB, para. 5.121.

27. Quite simply, Members of the Court, Qatar's hypotheses are three ways to be rid of the Riyadh Agreements and other international obligations without having to answer the Appellants' charges. No wonder Qatar's ideas are novel.

A. The prospect of an inchoate decision through "judicial notice"

28. Let me turn to the first of these new ideas — that which Professor Akhavan called "Qatar's supposed solution". The supposed solution is that the ICAO Council may be instructed by the Court that it should simply take "judicial notice" of the Appellants' countermeasures, without deciding whether the Appellants were entitled to rely on them as a dispositive defence[3]. Qatar invites the Court to hold that the Council may determine that the Appellants' conduct is "wrongful" — and that term is significant — but without determining the notion of countermeasures at all[4].

29. True, Qatar does not grapple with the Appellants' separate right under the Riyadh Agreements to take "any appropriate action". But let us assume in Qatar's favour that this right is also included in the supposed solution.

30. There are three difficulties which make this a non-solution in fact.

31. The first is that the question of wrongfulness (or not) is insolubly bound up with the question of countermeasures and the Riyadh Agreements[5]. The Court's Judgment in the *Gabčíkovo-Nagymaros* case makes plain that any finding of wrongfulness can be prima facie only, being contingent upon the assessment of countermeasures[6]. In other words, the ICAO Council cannot conclude that the Appellants' measures are "wrongful", as Qatar posits, without first assessing — and indeed dismissing — the Appellants' defences[7].

32. The second problem is that Qatar's supposed solution seems designed to preclude the Applicants from pleading — and preclude the ICAO Council from hearing — Qatar's wrongdoings that led to the Appellants' measures in the first place. This would indeed serve Qatar well, in

---

[3] CMQ — ICAOA, para. 3.68; CMQ — ICAOB, para. 3.67.

[4] CMQ — ICAOA, para. 3.68; CMQ — ICAOB, para. 3.67; RA — ICAOA and ICAOB, para. 4.48.

[5] RA — ICAOA and ICAOB, para. 4.51.

[6] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 55, para. 82; see also RA — ICAOA and ICAOB, paras. 4.50–4.52.

[7] RA — ICAOA and ICAOB, para. 4.51.

leaving out of the case its own misconduct and the Appellants' defences. But it would be manifestly unfair.

33. The third problem is that stripping the case of its integral components would lead to an outcome that the Court said in the *Northern Cameroons* case offends against judicial propriety — namely a decision without "practical consequence", and one which would not "remov[e] uncertainty" in the relations between the Parties[8]. This would be an inchoate decision which, to use the words of the Permanent Court in the *Factory at Chorzów* case, would not "settl[e] the dispute once and for all"[9]. To the contrary: it would invite further disagreement as to what, if anything, is to be done to comply with it.

B. Examination only of "procedural" aspects of countermeasures

34. I now come to Qatar's second hypothesis, which is that the ICAO Council might hold that it can adjudicate only the "procedural" aspects of the Appellants' countermeasures[10]. We are not told exactly how this would work, except that Qatar considers that there are prior notice and negotiation requirements for countermeasures, which Qatar characterizes as being procedural; and in this case — so says Qatar — these dispose of the Appellants' defence without needing to consider other, so-called substantive requirements of validity[11].

35. Now, in this second hypothesis, too, one of the Appellants' defences is taken out of play. But, with respect, this second hypothesis is worse than the first in that it invites the Court to take it for granted that Qatar has a full answer to that defence and for the Court to determine ICAO's jurisdiction on that assumption.

36. In any event, there is no bright line between "procedural" and "substantive" obligations. As Judge Donoghue pointed out in her separate opinion in the *Certain Activities* case, an obligation

---

[8] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 34.

[9] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9,* p. 25.

[10] CMQ — ICAOA, para. 3.69; CMQ — ICAOB, para. 3.68.

[11] RQ — ICAOA and ICAOB, para. 3.47.

which appears procedural may constitute an "obligation of conduct" ***"une obligation de moyen"*** which also has substantive elements[12].

37. In sum, Qatar's proposed distinction appears as unprincipled as it is prejudicial to the Appellants. For, again, the Appellants would be unable to rely on Qatar's multiple, grave wrongdoings as the "substantive" foundation for their responsive measures.

C. An assumption that the ICAO Treaties are a *lex specialis* that suffers no exception

38. Qatar's third and last hypothesis is that the Court might assume that "[t]he ICAO Council could . . . conclude that the [ICAO Treaties] exclude as *lex specialis* recourse to (non-reciprocal) countermeasures"[13].

39. But in the same breath, Qatar admits that this would be a wholly new claim, going to the merits, and which is "not ripe for decision"[14] by the Court. One is therefore unable to see how an admittedly *un*ripe, entirely hypothetical claim may be the predicate for assessing ICAO's jurisdiction to determine the very different case that *has* in fact been asserted by Qatar.

40. Members of the Court, the Appellants appeal a jurisdictional decision that *has* been made by the ICAO Council. They do not appeal a jurisdictional decision that *might* have been made if Qatar had formulated its case differently. One cannot appeal hypotheses.

41. The Court knows the object of the decision that is being appealed. Before the ICAO Council, Qatar represented this:

> "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"[15].

42. Thus, the dispute that is pending before ICAO plainly includes the question whether the Appellants' measures qualify as lawful countermeasures or are grounded in other international law entitlements. Qatar has represented to the ICAO Council that these issues will come for decision.

---

[12] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015*; separate opinion of Judge Donoghue, p. 665, para. 9.

[13] RQ — ICAOA and ICAOB, para. 3.50.

[14] RQ — ICAOA and ICAOB, para. 3.51.

[15] MA — ICAOA, Vol. IV, Ann. 25, para. 77; emphasis in original omitted; MA — ICAOB, Vol. IV, Ann. 25, para. 78; emphasis in original omitted.

By contrast, Qatar now takes a radically different — and somewhat schizophrenic — position before the Court. On the one hand, Qatar continues to argue that the Appellants' claimed entitlements "indisputably" — these are Qatar's words — fall within ICAO's jurisdiction[16]; while on the other hand Qatar now posits a wholly different case in which ICAO would not have (or would not need to have) such jurisdiction.

43. Members of the Court, it is axiomatic that jurisdiction and admissibility are to be assessed by reference to the case as in fact it was lodged[17], this date being the "critical date"[18]. The Court scrupulously polices that requirement, such that a case cannot be transformed over time to cover ground outside the originally claimed jurisdictional basis[19]. And just as an application, if admissible as lodged, cannot become retroactively inadmissible because of subsequent events (as the Court held in the *Lockerbie* case*s*[20] and Professor Shaw recalled), by the same token — and one would say *a fortiori* — an application cannot be made admissible by future transformations of the applicant's case through the pleadings.

44. In short, the jurisdictional fate of ***these*** case***s*** must be assessed based on what has in fact been pleaded — not based on a different case that might have been pleaded.

45. There is a footnote of sorts to this last point and it is this: Qatar seems to posit that, were it drastically to reformulate the case that it has already submitted to ICAO, in the way that I just described, the Council could revisit its decision[21] and hold that it does have jurisdiction *but only* on the basis that the ICAO Treaties exclude as a matter of principle the invocation of countermeasures

---

[16] CMQ — ICAOA and ICAOB, para. 3.18.

[17] *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,* pp. 25–26, paras. 42–44; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130–131, paras. 42–44.

[18] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, I.C.J. Reports 1988,* p. 95, para. 66.

[19] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 267, para. 70; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* pp. 213-214, para. 117.

[20] *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,* pp. 23–24, paras. 37–38; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 128–129, paras. 36–37.

[21] RQ — ICAOA and ICAOB, para. 3.50.

or other equivalent rights. Without entering the merits of this very controversial proposition, that suggestion is, with respect, misguided; and the reason is simple.

46. Unlike under Article 79 of the Court's Rules, the ICAO Rules exclude the possibility of joining preliminary objections to the merits. This results from Article 5, paragraphs 3 and 4, of the ICAO Rules[22] (which you will find under tab 6 in your folders). The lodging of a preliminary objection automatically suspends the proceedings "until the objection is decided by the Council" (para. 3); and then the Council "shall decide the question as a preliminary issue before any further steps are taken under [the] Rules" (para. 4). There is no discretion in these provisions.

47. And so the matter is beyond cavil. The ICAO Council *did* purport to decide the Appellants' objections, which were presented as preliminary objections and were dismissed as such[23]. So far as the Council is concerned, it has decided proceed to the merits; and Qatar has represented to the Council that, on the merits, the debate will be whether or not the Appellants' measures are lawful countermeasures or are justified by other international law entitlements. These, Members of the Court, are the parameters of the case. Qatar cannot now move the proverbial goalposts — still less after the match already has been played.

5. Conclusion

48. Members of the Court, in closing, there are two main conclusions to draw:

(i) The first is that judicial propriety stands in the way of claims that could facially come within the terms of a jurisdictional instrument but practically would lead to dispositions extending well beyond that instrument and the limits of consent. That, the Appellants respectfully submit, is the case with Qatar's claim here.

(ii) The second conclusion is that Qatar's quick-fixes are not equal to this serious problem. If anything, they are more of a curse than they are a cure. For at best, they would lead to an inchoate, uncertain outcome; at worst, they would further compromise the Appellants' right to rely on Qatar's violations of the Riyadh Agreements and other international obligations.

---

[22] MA — ICAOA and ICAOB, Vol. II, Ann. 6, Art 5 (3)-(4).

[23] MA — ICAOA and ICAOB, Vol. V, Ann. 52, pp. 1–2.

49. With that, Mr. President, Members of the Court, I would ask you to call upon Mr. Olleson to address the third and last ground of appeal. Thank you.

The PRESIDENT: I thank Mr. Petrochilos and now invite Mr. Olleson to take the floor. You have the floor.

Mr. OLLESON:

THIRD GROUND OF APPEAL: THE PRECONDITION OF NEGOTIATION

1. Mr. President, Members of the Court, it is an honour for me to appear again before the Court on behalf of the United Arab Emirates, and to have been entrusted by the Applicants with the task of dealing with their third ground of appeal against the decisions of the ICAO Council. This relates to Qatar's failure to comply with the requirement that it should seek to negotiate in respect of the dispute before seising the Council. As with the ground of appeal relating to the "real issue", it raises issues of both jurisdiction and admissibility.

2. The Applicants' position is that Qatar manifestly failed to comply with the jurisdictional precondition of negotiation contained in the Chicago Convention and IASTA before submitting its claims to the Council. As I will show, Qatar's attempts to distort the clear requirements of a precondition of negotiation are to no avail. As a result, the Council should therefore have upheld the Applicants' objection on this basis, and held that it was without jurisdiction.

3. As a subsidiary matter, the Applicants argue that Qatar's Memorials before the Council failed to comply with mandatory requirements in the applicable procedural rules, such that the Council should, in any case, have declared Qatar's Applications inadmissible on that basis.

4. I will focus principally on the jurisdictional challenge.

1. The precondition of negotiation as a limit upon the jurisdiction of the Council

5. The natural starting-point is the relevant jurisdictional provisions — now on your screens — which contain and set the limits of the consent of the States parties to the competence of the ICAO Council. Both confer jurisdiction on the Council only in respect of disagreements which

"cannot be settled by negotiation"[24]. It is common ground that the two provisions are to be treated identically for these purposes.

6. As emphasized by Professor Shaw, and as reaffirmed by the Court only last month, it is elementary that the jurisdiction of international courts and tribunals is based on the consent of the parties, and is confined to the extent accepted by them[25]. Following from that, there are a number of fundamental propositions as to the import and effect of the jurisdictional provisions which Qatar either expressly accepts or has not disputed, and which thus appear to be common ground.

7. *First*, the requirement in each of the relevant jurisdictional provisions that any disagreement "cannot be settled by negotiation" is of the type which the Court has previously held to constitute a "precondition of negotiation"[26].

8. The Court has not in this regard distinguished between clauses conferring jurisdiction upon it over any dispute which "is not" or "cannot be" settled by or through negotiation[27]. Most recently, in *Ukraine* v. *Russia*, you treated the jurisdictional provisions in both the CERD ("which

---

[24] MA — ICAOA and ICAOB, Vol. II, Ann. 1, Chicago Convention, Art. 84; MA, Vol. II, Ann. 2, IASTA, Art. II, Sect. 2.

[25] See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment of 8 November 2019,* para. 33; see also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 307, para. 42.

[26] CMQ — ICAOA and ICAOB, paras. 4.6–4.7; RA, para. 5.4; *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, paras. 159 and 161; see also p. 130, para. 149; and p. 132, para. 156; *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. 43, and p. 121, para. 46; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment of 8 November 2019*, paras. 116 and 117.

[27] See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, para. 159; *Questions Relating to the Obligation to Prosecute or Extradite (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*, p. 120, para. 43; see also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections*, *Judgment, I.C.J. Reports 2018 (I)*, p. 317, para. 75. See previously *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. 27, para. 34; *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. 40–41, para. 91; and p. 43, para. 100.

is not settled by negotiation") and the ICSFT ("which cannot be settled through negotiation") as imposing preconditions of negotiation of this type[28].

9. *Second*, such a precondition of negotiation is properly to be regarded as constituting a limit on the consent of the States parties[29], and therefore as a precondition to seisin[30]. Thus, non-fulfilment is a jurisdictional matter[31].

10. *Third*, such a precondition is one "to be fulfilled *before* the seisin of the Court"[32]. Therefore, by parity of reasoning, in the present cases, the precondition of negotiation is one which Qatar was required to fill before seising the Council. In Qatar's Rejoinder, it places no reliance

---

[28] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections*, *Judgment of 8 November 2019*, paras. 69 and 106; see previously *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. 43.

[29] *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; see also *ibid*., p. 32, para. 65; *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. 125, para. 131 and p. 128, para. 141; *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; *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.

[30] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 141; see also pp. 130, para. 148; *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. 123, para. 54; p. 125, para. 59 and p. 126, para. 61; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment of 8 November 2019,* para. 106; *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, I.C.J. Reports 2018 (II),* p. 417, para. 29.

[31] *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; *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. 125, para. 131; and p. 128, para. 141.

[32] *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), see also *ibid*., at p. 125, para. 131, and p. 130, para. 148; *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, paras. 40–42; p. 123, para. 53; 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, I.C.J. Reports 2018 (II),* p. 417, para. 29; MA — ICAOA and ICAOB, paras. 6.32–6.34.

upon communications post-dating its applications to the Council, and there is (rightly) no mention of its previous argument that it is permissible to have regard to such matters[33].

11. There remain two principal issues of law in dispute between the Parties; Qatar's position on both is self-evidently driven by the deficiencies in the factual record it relies upon to argue that it complied with the precondition of negotiation;

(a) first, Qatar is wrong to suggest that it is permissible to bypass the requirement, which is well established in the Court's case law, that at a minimum a "genuine attempt" to negotiate is required;

(b) second, and separately, Qatar impermissibly seeks to dilute the level of clarity as to the subject-matter of the dispute required in order for any putative attempt to satisfy the precondition.

2. At a minimum, a "genuine attempt" to negotiate is required

12. Mr. President, Members of the Court, the first point: Qatar rightly has not sought to dispute the Court's holding in *Georgia* v. *Russia* and later cases, that compliance with a precondition of negotiation "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"[34]. Again, you reaffirmed that holding in *Ukraine* v. *Russia* last month[35].

13. While not contesting the statement of principle, Qatar seeks to undermine it by arguing: first, that even the making of a genuine attempt is not required when the applicant takes the view

---

[33] CMQ — ICAOA, fn. 347; CMQ — ICAOB, fn. 351; See previously MA — ICAOA and ICAOB, Vol. IV, Ann. 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 Convention on International Civil Aviation (Chicago, 1944)*, 30 April 2018, paras. 99–101; MA —ICAOB, Vol. IV, Ann. 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)*, 30 April 2018, paras. 100–102.

[34] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157; see also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, 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*, p. 120, para. 43. RQ — ICAOA and ICAOB, para. 4.7.

[35] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment of 8 November 2019*, paras. 69 and 116.

that negotiations would be futile; and second, and conversely, that the supposed futility of negotiations can be unilaterally determined by a State without any genuine attempt to negotiate ever having in fact been made[36]. That approach aims to introduce a significant element of subjectivity into a precondition which calls for objective verification of whether a genuine attempt has been made. The purposes underlying a precondition of negotiation, and the requirement that there should have been a genuine attempt, however, are independent of the eventual reaction of the addressee.

14. As I will discuss shortly, Qatar's position constitutes a return to that originally adopted in its memorial before the Council[37]. It is also a notable shift and hardening of its position compared to that adopted in its Counter-Memorial before the Court, in which it argued that a precondition of negotiation could be discharged where a party was met by an "immediate and total refusal" to negotiate[38]; that position, of course, implied that there must have been at least an attempt to initiate negotiations.

15. Even if Qatar could point to any evidence unequivocally demonstrating the *a priori* futility of negotiations (and it cannot), Qatar's position finds no support in the Court's prior case law and is an attempt to put the cart before the horse.

16. Tellingly, rather than putting forward any authority that positively supports its position, Qatar simply makes a series of bare assertions that a requirement to make a genuine attempt to negotiate in circumstances in which the other party has supposedly refused to talk would be "absurd"[39], "inconsistent with good faith"[40], and "entirely formalistic"[41].

---

[36] RQ — ICAOA and ICAOB, para. 4.13.

[37] MA — ICAOA, Vol. III, Ann. 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 (Chicago, 1944)*, 30 October 2017; judges' folder, tab 42; MA-ICAOB, Vol. III, Ann. 23: *Application (B) and Memorial of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the International Air Services Transit Agreement, (Chicago, 1944)*, 30 October 2017; judges' folder, tab 43.

[38] CMQ — ICAOA and ICAOB, para. 4.8.

[39] RQ — ICAOA and ICAOB, para. 4.6.

[40] RQ — ICAOA and ICAOB, para. 4.8.

[41] RQ — ICAOA and ICAOB, para. 4.8.

17. The primary response to Qatar's position as to futility, which is one of principle, is that it is impermissible to assume that a request for negotiations, if such had been made, would necessarily have been rebuffed.

18. As explained by Judge Greenwood in his separate opinion in *Georgia* v. *Russia*:

> "In making an attempt to settle the dispute by negotiation a precondition, Article 22 [of CERD] gives the State against which a claim is being made a choice of accepting an offer to negotiate regarding that dispute, rather than submitting itself to immediate recourse to the Court."[42]

19. The Respondent has to be given that choice, and this independent of whether it would ultimately choose to negotiate or not. Such a choice self-evidently depends upon an attempt to negotiate having been made. A State which receives a request for negotiations in respect of a dispute arising under a treaty containing such a compromissory clause, will no doubt evaluate carefully whether or not to engage, in the knowledge that if it does not, the consequence is that the dispute can then be submitted to the stipulated forum. But that choice simply does not arise if no genuine attempt to negotiate is ever made.

20. Secondly, and entirely consistent with these considerations of principle, the Court's jurisprudence is clear in this regard. It leaves no room for dispute that, at a minimum, a genuine attempt is required, and this before any consideration of possible "futility". In *Georgia* v. *Russia*, the relevant portion of the Court's reasoning (which is extracted at tab 39 of your folders and to which I would invited you to turn) proceeded on the following basis:

(a) first, at paragraph 157, on page 132, the Court observed that negotiations "are distinct from mere protests or disputations"; they "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"[43];

(b) second, and as a consequence, "the concept of 'negotiations' differs from the concept of 'dispute', and requires [and this is the key passage] — *at the very least* — *a genuine attempt by*

---

[42] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*; separate opinion of Judge Greenwood, p. 328, para. 13; judges' folder, tab 40.

[43] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 132, para. 157 (judges' folder, tab 39); 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), Preliminary Objections*, *Judgment of 8 November 2019*, para. 116.

one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute"[44];

(c) third, having noted at paragraph 158 that the requirement of a genuine attempt cannot require the reaching of an agreement[45], over the page, at paragraph 159, the Court made clear that the making of such an attempt is nevertheless an essential element of compliance with the precondition. You said: "Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met."[46]

(d) fourth, as the Court emphasized, it is only where a genuine attempt has been made — that is, "where negotiations are attempted or commenced" — that the further question of whether there has been a "failure of negotiations", or they "have become futile or deadlocked"[47] becomes relevant.

There is thus a two-stage process.

21. Further confirmation is provided by paragraph 169 where the Court characterized the task before it as being twofold:

> "first, to determine whether the facts in the record show that . . . Georgia and the Russian Federation *engaged in negotiations* with respect to the matters in dispute concerning the interpretation or application of CERD; and secondly, *if the Parties did engage in such negotiations*, to determine whether those negotiations failed"[48].

---

[44] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157; emphasis added (judges' folder, tab 39); 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), Preliminary Objections*, *Judgment of 8 November 2019*, para. 116.

[45] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 132–133, para. 158; judges' folder, tab 39.

[46] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 133, para. 159; judges' folder, tab 39.

[47] *Ibid*.; 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), Preliminary Objections*, *Judgment of 8 November 2019,* para. 116.

[48] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 135–136, para. 169; emphasis added; see also *ibid*., p. 134, para. 162.

I note the same approach has been adopted in subsequent cases[49].

22. The Court's statement in this regard is general, framed purely in the abstract, and without reference to the particular circumstances of the case. Qatar's suggestion that the facts of the present case are in some way different[50], is thus nothing to the point. Further, there is absolutely no indication that an exception in the case of *a priori* futility was envisaged — to the contrary, in *Georgia* v. *Russia* itself, the Court expressly rejected a suggestion that an alleged refusal to negotiate was "sufficient to vest the Court with jurisdiction"[51].

3. An attempt to negotiate must identify the dispute with sufficient clarity

23. Mr. President, Members of the Court, I turn to the second area of disagreement, which relates to the level of clarity required of any attempt to negotiate. As noted in our Reply, the disagreement here appears, at least to a certain extent, to be as much one of emphasis as of substance[52]. But Qatar's Rejoinder demonstrates that underlying this there do indeed remain significant differences of principle.

24. We do not understand it to be disputed that any attempt to negotiate must convey sufficiently clearly that negotiations are in fact being sought.

25. For its part, Qatar accepts in principle that any attempt to negotiate must address the subject-matter of the dispute with "sufficient clarity"[53]; it is thus common ground that there exists a minimum threshold of clarity as to the issues in dispute as to which negotiations are being sought. The difference between the Parties relates to the content of that minimum threshold.

---

[49] See e.g. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, 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*, p. 121, para. 44; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment of 8 November 2019,* paras. 70 and 120.

[50] RQ — ICAOA and ICAOB, para. 4.7.

[51] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 139, para. 182.

[52] RA — ICAOA and ICAOB, para. 5.34.

[53] RQ — ICAOA and ICAOB, para. 4.21.

26. In this regard, the Applicants' position[54], which has remained constant, is that the correct approach is that enunciated by the Court in *Georgia* v. *Russia*; there the Court stated at paragraph 161:

> "to 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 concern the substantive obligations contained in the treaty in question."[55]

27. Qatar suggested that this is the "only support" put forward for the Applicants' position[56]; but that is more than a little disingenuous. This passage is the Court's statement of principle as to the "adequate form and substance"[57] of negotiations. In any event, the Court reaffirmed last month in *Ukraine* v. *Russia* that this is indeed the applicable test[58].

28. In its Rejoinder, Qatar put forward two arguments in this regard, both of which are flawed.

29. First, it argues that it is sufficient that an attempt to negotiate should relate not to the subject-matter of the treaty, but to "'the subject-matter' of the *dispute (i.e. the airspace restrictions)*"[59].

30. Focusing on the particular measures at issue, however, is manifestly erroneous; if that were indeed the law, it would be sufficient in order for a State to satisfy a precondition of negotiation in any treaty simply to complain as a matter of fact of particular measures adopted.

31. Instead, the true position as it results from the Court's case law is that where a dispute relates to allegations of breach of a treaty — i.e. the "application" of the treaty — the relevant

---

[54] MA — ICAOA and ICAOB, para. 6.31; and RA — ICAOA and ICAOB, paras. 5.36-5.37.

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

[56] RQ — ICAOA and ICAOB, para. 4.23; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 133, para. 161.

[57] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 156; see also p. 133, para. 161.

[58] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment of 8 November 2019,* paras. 69 and 116.

[59] RQ — ICAOA and ICAOB, para. 4.24; emphasis added.

"subject-matter of the dispute", in respect of which a genuine attempt to negotiate is required, is the issue of compliance with the substantive obligations in question. Again, this is clearly apparent from the decision in *Georgia* v. *Russia*, where, immediately after having set out the applicable test, the Court framed its task as being to assess whether there had been negotiations between the Parties "with a view to resolving their dispute concerning the Russian Federation's compliance with its substantive obligations under CERD"[60]. You said the same, *mutatis mutandis*, at the provisional measures stage in *Ukraine* v. *Russia*[61].

32. Second, relying on a few isolated words from the Court's explanation of what constitutes negotiations in *Georgia* v. *Russia*, Qatar suggests that a distinction is to be drawn between actual negotiations and attempts to negotiate, and that, as regards the latter, all that is required is that an attempt be made "with a view to resolving the dispute"[62].

33. That approach would empty the requirement of any substantive content, moreover, it begs the question of what the relevant "dispute" is. Further, the Court's discussion of the required substance of negotiations in *Georgia* v. *Russia*, envisaged no such differentiation; the Court's ultimate conclusion in that case was, of course, that there had not in fact been any attempt by Georgia to negotiate on relevant matters falling under the CERD[63].

34. In any event, there is no good or principled reason to introduce a distinction such as that Qatar suggests, and Qatar certainly does not identify one. Its suggestion that in the case of attempts to negotiate "it does not make sense to impose as stringent a subject-matter requirement"[64] is both entirely unsupported and misguided: the need for sufficient clarity as to the subject-matter of the dispute is, if anything, more pressing in the case of an attempt to negotiate.

---

[60] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 134, para. 162.

[61] *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. 121, para. 44.

[62] RQ — ICAOA and ICAOB, heading of Chap. 4, Sect. I. A. 2, (before para. 4.21); and para. 4.25; cf. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157 *in fine*.

[63] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 139–140, paras. 181-182.

[64] RQ — ICAOA and ICAOB, para. 4.25.

35. Finally, it bears emphasis that the need for sufficient clarity as to the subject-matter of the dispute, and that negotiations are being sought in respect of that dispute, is of particular importance in a situation such as the present, where Qatar's claims as to compliance with obligations under the Chicago Convention and IASTA are but one part of a far more wide-ranging dispute between the Parties[65]. As observed by Judge Greenwood in his separate opinion in *Georgia* v. *Russia* ***in*** explaining his vote in favour of the Court's decision, in such a situation involving a wider dispute:

> "the offer to negotiate must be sufficiently clear that it can be seen for what it is. Where the two States are simultaneously engaged in a wider dispute, that means that it must be clear that there is an offer to negotiate regarding the Convention dispute and not simply about the wider dispute between the parties . . . [T]he offer of negotiation regarding the narrower dispute must be capable of being discerned amidst the exchanges about the wider dispute."[66]

36. In *Georgia* v. *Russia*, there had been diplomatic exchanges for a number of years in respect of the overall situation, including specific allegations in respect of ethnic cleansing in the period immediately preceding the filing of Georgia's application[67]. Yet the Court nevertheless held that Georgia had failed to make sufficiently clear that it was seeking to negotiate in respect of violations of obligations under the CERD[68], and had therefore failed to comply with the precondition of negotiations before filing its application.

4. Qatar failed to comply with the precondition of negotiation

37. Mr. President, Members of the Court, having dealt with the legal issues, I turn to the facts.

38. The first, and obvious point is that Qatar is unable to point to any communication addressed to the Applicants in which it both set out its allegations of breach of obligations arising under the Chicago Convention and IASTA, and requested negotiations with the Applicants with a

---

[65] See RA — ICAOA and ICAOB, para. 5.37.

[66] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, separate opinion of Judge Greenwood, p. 328, para. 13.

[67] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 118–120, paras. 109, 111 and 113.

[68] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 138–140, paras. 178-182.

view to resolving the dispute in that regard. As a result, Qatar has no option other than to rely on a variety of materials; in effect, it asks the Court to connect the dots, pointing here to a statement which it says evidences that there was a dispute, and here to a statement that it was ready to negotiate.

39. None of the various statements constitutes compliance with the precondition of negotiation; all fall far short of constituting a "genuine attempt" to negotiate with a view to resolving the relevant dispute. This is because either they were addressed to third parties or even to the world at large, rather than to the Applicants, and/or, where some reference to a willingness to enter into discussions was made, those references were entirely general and did not sufficiently identify the dispute under the Chicago Convention and IASTA, still less make clear that Qatar was offering to negotiate in that regard.

40. This occurred in a situation in which it is clear that Qatar had, from the outset, taken a conscious and deliberate decision on the one hand, to publicly protest in a general fashion its openness to dialogue at every possible opportunity but, on the other, to take no concrete steps in fact to initiate negotiations in respect of the specific dispute.

41. In its initial, abortive applications dated 8 June 2017[69], submitted to the Council less than two weeks after the adoption of the measures[70], Qatar made clear that no negotiations had taken place; on the last page of each of the ***M***emorials, which are at tab 41 of your folders, it already at this stage stated, in terms, that "all diplomatic ties between the nations concerned have been ruptured and negotiations are no longer possible"[71].

---

[69] See MA — ICAOA and ICAOB, paras. 3.16 and 6.54.

[70] MA — ICAOA and ICAOB, Vol. V, Ann. 34: *ICAO Council — 211st Session — Summary Minutes of the Meeting of the Tenth Meeting of 23 June 2017*, 11 July 2017, para. 10; MA — ICAOA and ICAOB, Vol. V, Ann. 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 Aug. 2017, para. 65 (p. 1641/1625); compare MA, Vol. III, Ann. 23, letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Dr. Fang Liu, ICAO Secretary General, 21 Oct. 2017 (p. 589); and see also MA, Vol. IV, Ann. 25, Exhibit 4, letter from Mr. Jassim bin Saif Al-Sulaiti, Minister of Transport and Communications to Dr. Fang Liu, ICAO Secretary General (Ref.: 2017/15993), 13 June 2017; (p. 977/967); MA, Vol. IV, Ann. 25, Exhibit 5, letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Dr. Fang Liu, ICAO Secretary General (Ref.: 2017/15995), 13 June 2017; and MA, Vol. IV, Ann. 25, Exhibit 6, letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Dr. Fang Liu, ICAO Secretary General (Ref.: 2017/15995), 15 June 2017.

[71] MA — ICAOA and ICAOB, Vol. III, Ann. 22, *Application (1) of the State of Qatar and accompanying Memorial, Complaint Arising under the International Air Services Transit Agreement done in Chicago on December 7, 1944,* 8 June 2017; and *Application (2) of the State of Qatar and accompanying Memorial, Disagreement Arising under the Convention on International Civil Aviation done in Chicago on December 7, 1944*, 8 June 2017; judges' folder, tab 41.

42. Further, in press releases from the first half of June 2017, Qatar's Foreign Minister made clear that it was unwilling to negotiate with the ***Applicants*** unless they revoked the measures they had adopted[72]. Significantly, these statements pre-date the list of so-called "demands" relied upon by Qatar to show the supposed futility of negotiations.

43. Even in the ***A***pplications dated 30 October 2017, which are at tabs 42 and 43 of your folders, despite having had the benefit of the intervening four and a half months to consider its position, Qatar took a broadly similar position to the original applications. It now asserted that the Applicants "did not permit any opportunity to negotiate", and that, supposedly, "[t]he severance of diplomatic relations makes further negotiating efforts futile"[73].

44. Against that backdrop, I turn to the materials Qatar now relies upon in an attempt to support its position that it did in fact, nevertheless, comply with the precondition of negotiation.

Supposed direct attempts to negotiate

45. As regards supposed direct attempts, Qatar's Rejoinder relies only faintly on the various press releases, press reports and public statements on the basis of which it claimed before the Council and in the Counter-Memorial that it had "repeatedly and publicly asserted its openness to dialogue and negotiation"[74]. Whilst it repeats and relies upon its flawed position that those supposed attempts "need only to have been made 'with a view to resolving the dispute'"[75], it has provided no adequate response to the undisputed fact that these statements were not addressed to the ***Applicants***, but instead made to the world at large. In any event, as I have explained, general

---

[72] MA — ICAOA and ICAOB, Vol. IV, Ann. 26, Exhibit 24, *Al-Araby*, "Qatari FM: We will not negotiate al-Jazeera or our foreign policy with Gulf countries", 10 June 2017; MA, Vol. IV, Ann. 26, Exhibit 25: Reuters, "Qatar says it will not negotiate unless neighbors lift 'blockade'", 19 June 2017; MA, Vol. IV, Ann. 26, Exhibit 26, *Al-Jazeera*, "Qatar FM: We won't negotiate until blockade is lifted", 19 June 2017; see also MA — ICAOA, Vol. IV, Ann. 25, Exhibit 22 / MA — ICAOB Vol. IV, Ann. 25, Exhibit 21, Qatar Ministry of Foreign Affairs, Information Office, "The Foreign Minister's Interview with RT on GCC Crisis", 10 June 2017; MA — ICAOA, Vol. IV, Ann. 25, Exhibit 23 / MA — ICAOB, Vol. IV, Ann. 25, Exhibit 22, Qatar Ministry of Foreign Affairs, Information Office, "Foreign Minister: Qatar Focuses on Solving Humanitarian Problems of Illegal Siege", 12 June 2017; MA — ICAOA, Vol. IV, Ann. 25, Exhibit 24 / MA — ICAOB, Vol. IV, Ann. 25, Exhibit 23, Qatar Ministry of Foreign Affairs, Information Office, "Foreign Minister: Dialogue is Qatar's Strategic Choice to Resolve GCC Crisis", 12 June 2017.

[73] MA — ICAOA, Vol. III, Ann. 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 (Chicago, 1944)*, 30 October 2017 (p. 601), judges' folder, tab 42; MA — ICAOB, Vol. III, Ann. 23: *Application (B) and Memorial of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the International Air Services Transit Agreement, (Chicago, 1944)*, 30 October 2017 (p. 599), judges' folder, tab 43.

[74] CMQ — ICAOA and ICAOB, para. 4.38.

[75] RQ — ICAOA and ICAOB, para. 4.30.

public assertions by a State that it is ready to engage in "dialogue" fall far short of what is required to satisfy a precondition of negotiation. One does not comply with a precondition of negotiation by press release.

46. Even in the few instances identified by Qatar in which passing reference was made to "air links", or even more tenuously, the so-called "blockade"[76], these are still insufficient to constitute compliance with the precondition of negotiation. In none of these statements was there even the slightest indication of either the relevant obligations to which the dispute submitted to the Council relates, or the instrument under which they arise.

47. What is more, and contrary to Qatar's assertion otherwise[77], in none of these statements was any attempt made to enter into discussions with the Applicants with a view to resolving the dispute[78].

48. Qatar's suggestion that these statements were made "with a view to resolving *all* of the disputes"[79] resulting from the measures adopted by the Applicants merely serves to highlight the fact that they were entirely general and related to the dispute under the Riyadh Agreements. I note in passing that that position, and the content of the various press releases and statements, are wholly at variance with (and undermine) its thesis in respect of the Second Ground that there is a sharply delineated ICAO dispute.

49. Qatar instead focusses principally on the telephone conversation on 8 September 2017 between the Qatari Emir and the Crown Prince of the Kingdom of Saudi Arabia. That, at least, is a direct contact, and indeed, it is the only direct contact to which Qatar is able to point. But it was a contact with only one of the Applicants, and Qatar has not shown that the Crown Prince was authorized to act on behalf of the other States.

---

[76] See e.g. CMQ — ICAOA and ICAOB, paras. 4.50–4.52, referring to MA — ICAOA, Vol. IV, Ann. 25, Exhibit 34 / MA — ICAOB, Vol. IV, Ann. 25, Exhibit 33, BBC, "Qatar condemns Saudi Refusal to negotiate over demands", 28 June 2017; and MA — ICAOA, Vol. IV, Ann. 25, Exhibit 40 / MA — ICAOB, Vol. IV, Ann. 25, Exhibit 39, Qatar Ministry of Foreign Affairs, Information Office, "Foreign Minister: Any Threat to Region is Threat to Qatar", 5 July 2017.

[77] RQ — ICAOA and ICAOB, para. 4.33.

[78] See e.g. MA — ICAOA, Vol. IV, Ann. 25, Exhibit 34; MA — ICAOB, Vol. IV, Ann. 25, Exhibit 33: BBC, *Qatar condemns Saudi Refusal to negotiate over demands*, 28 June 2017;and MA — ICAOA, Vol. IV, Ann. 25, Exhibit 40; MA — ICAOA and ICAOB, Vol. IV, Ann. 25, Exhibit 39: Qatar Ministry of Foreign Affairs, Information Office: *Foreign Minister: Any Threat to Region is Threat to Qatar*, 5 July 2017; CMQ — ICAOA and ICAOB, Vol. IV, Ann. 86: The Peninsula, *Emir speech in full text: Qatar ready for dialogue but won't compromise on sovereignty*, 22 July 2017.

[79] RQ — ICAOA and ICAOB, para. 4.33; emphasis in original.

50. Further, taking the press reports at their highest, the most they can sustain is that there was a call for "dialogue". Even accepting that that was the case, however, the fact remains that any such call was again entirely general and was aimed at the real issue in dispute, namely the dispute as to Qatar's compliance with the Riyadh Agreements[80]. Qatar does not allege that the Crown Prince and the Emir discussed the aviation aspects, or that any mention was made specifically of the airspace restrictions, still less of any dispute in that regard, which might reasonably have been understood to implicate the obligations of the Applicants under the Chicago Convention and IASTA.

Supposed attempts to negotiate within ICAO

51. Qatar's position that it complied with the precondition of negotiation through the procedures of ICAO, likewise does not withstand scrutiny. In the present case there is nothing in the proceedings before ICAO which comes even close to satisfying the precondition.

52. First, Qatar's letters sent to ICAO in early June 2017 cannot be regarded as fulfilling the precondition of negotiation, both because they were not addressed to the Applicants, and in any event because there was no attempt to initiate negotiations.

53. As regards the former point, Qatar seeks to make much of the fact that its letters to ICAO were communicated to the Applicants[81]; but it is difficult to see how this in itself changes matters. As emphasized by the Court in *Georgia* v. *Russia*, negotiations entail something more than mere "accusations" or the assertion of "claims"[82]. The fact that allegations of breach of obligation addressed to a third party are subsequently then transmitted to the allegedly wrongdoing party, may well mean that it will be difficult to deny that a dispute exists; it does not, however, somehow magically transform those allegations into an attempt to initiate negotiations.

54. That conclusion is *a fortiori* when the relevant communications do not even contain any mention of negotiations, let alone any request in that regard. Qatar asserts in this regard that the

---

[80] CMQ — ICAOA and ICAOB, para. 4.45.

[81] RQ — ICAOA and ICAOB, para. 4.37.

[82] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157; 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. 43.

Applicants' position that the letters addressed to ICAO did not attempt to initiate negotiations is "simply false"[83].

55. In this context, it relies upon the letter of 5 June 2017, which is now on your screens[84]. Qatar's assertion that negotiations were requested or that the letter should otherwise be regarded as an attempt to negotiate, however, is simply incomprehensible. The passages it cites to substantiate its position, and the letter as a whole, contain no mention of negotiations at all.

56. The same is true of Qatar's letter dated 17 June 2017, which is now on your screens[85]. Again, in the passages relied upon by Qatar, and in the letter more generally, there is no mention whatsoever of negotiations.

57. The evident purpose of both letters was no more than to seek to activate the relevant procedures under ICAO.

58. In fact, all of the initial communications from Qatar to ICAO in early June 2017 contain no more than accusations and claims, and requests that ICAO should take action[86]; they all lack the something more identified by the Court in *Georgia* v. *Russia* which distinguishes negotiations[87].

59. Second, Qatar's reliance on the Article 54 (n) proceedings themselves is equally unavailing. It is common ground that, in certain circumstances, it is possible that a precondition of negotiation may be satisfied through the medium of diplomacy by conference or parliamentary diplomacy. But Qatar complains that the Council's consideration under Article 54 (n) was limited

---

[83] RQ — ICAOA and ICAOB, para. 4.38.

[84] MA — ICAOA and ICAOB, Vol. IV, Ann. 25, Exhibit 2: *Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Dr. Fang Liu, ICAO Secretary General* (ref. QCAA/ANS.02/502/17), 5 June 2017.

[85] MA — ICAOA and ICAOB, Vol. IV, Ann. 25, Exhibit 1: *Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Mr. Olumuyiwa Benard Aliu, President of the ICAO Council* (ref. 2017/16032), 17 June 2017.

[86] MA — ICAOA and ICAOB, Vol. IV, Ann. 25, Exhibit 2: *Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Dr. Fang Liu, ICAO Secretary General* (ref. QCAA/ANS.02/502/17), 5 June 2017; MA — ICAOA and ICAOB, Vol. IV, Ann. 25, Exhibit 3: *Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Mr. Olumuyiwa Benard Aliu, President of the ICAO Council* (ref. 2017/15984), 8 June 2017; MA — ICAOA and ICAOB, Vol. IV, Ann. 25, Exhibit 4: *Letter from Mr. Jassim bin Saif Al-Sulaiti, Minister of Transport and Communications to Dr. Fang Liu, ICAO Secretary General* (ref. 2017/15993), 13 June 2017; MA — ICAOA and ICAOB, Vol. IV, Ann. 25, Exhibit 6: *Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Dr. Fang Liu, ICAO Secretary General* (ref. 2017/15995), 15 June 2017, and Ann.; MA — ICAOA and ICAOB, Vol. V, Ann. 31, *Request of the State of Qatar for Consideration by the ICAO Council under Article 54 (n) of the Chicago Convention*, 15 June 2017; MA — ICAOA and ICAOB, Vol. IV, Ann. 25, Exhibit 1: *Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Mr. Olumuyiwa Benard Aliu, President of the ICAO Council* (ref. 2017/16032), 17 June 2017.

[87] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157.

"to issues relating to the safety of aviation and contingency routes"[88]; it thereby admits that the proceedings did not touch on the substance of Qatar's claims. This is not because, as Qatar suggests, the Applicants "excluded the aviation prohibitions"[89]; rather it is because the Council itself, quite understandably and properly, decided from the outset that, taking account of the scope of its functions under Article 54 (n), and in particular Qatar's stated intention of invoking the dispute resolution process under Article 84, it was necessary to keep the issues which were the subject of those proceedings separate[90].

60. It bears noting in this regard that, in its initial communications to ICAO, Qatar consistently sought to conflate the two procedures[91], even going so far as to request that the Applicants not be permitted to take part in the Council's consideration of Qatar's request under Article 54 (n)[92].

61. Qatar also relies heavily on a passage from Judge Buergenthal's 1969 work on ICAO, and his observations in respect of the dispute between the United States and the then-Czechoslovakia over balloons[93].

62. That work predates the Court's more recent case law as to what is required by a precondition of negotiation, including the decision in *Georgia* v. *Russia*. And more fundamentally, as Qatar itself notes[94], no formal disagreement was submitted by Czechoslovakia to the Council under Article 84 of the Chicago Convention, and instead its complaints were in fact raised and

---

[88] RQ — ICAOA and ICAOB, para. 4.42.

[89] CMQ — ICAOA and ICAOB, para. 4.57; and paras. 4.60 and 4.61; see also CMQ — ICAOA and ICAOB, paras. 4.42 and 4.44.

[90] MA — ICAOA and ICAOB, Vol. V, Ann. 34: *ICAO Council — 211st Session — Summary Minutes of the Meeting of the Tenth Meeting of 23 June 2017*, 11 July 2017, para. 55 (pp. 1557/1541); and see *ibid*., paras. 25-26 (pp. 1553/1537); and 40-41 (pp. 1555/1539). See also MA — ICAOA and ICAOB, Vol. V, Ann. 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 Aug. 2017, paras. 2 (pp. 1630/1614), and 69 (pp. 1642/1626).

[91] See above, note 86, and see MA — ICAOA and ICAOB, Vol. V, Ann 34: *ICAO Council — 211st Session — Summary Minutes of the Meeting of the Tenth Meeting of 23 June 2017*, 11 July 2017, paras. 9 and 10 (pp. 1547-1549/1531-1533).

[92] See MA, Vol. IV, Ann. 25, Exhibit 4: Letter from Jassim bin Saif Al-Sulaiti, Minister of Transport and Communications to Dr. Fang Liu, ICAO Secretary General (ref. 2017/15993), 13 June 2017 (pp. 977/967); see also MA, Vol. V, Ann. 34: *ICAO Council — 211st Session — Summary Minutes of the Meeting of the Tenth Meeting of 23 June 2017*, 11 July 2017, para. 9 (pp. 1547/1531).

[93] RQ — ICAOA and ICAOB, para. 4.45, quoting MA — ICAOA and ICAOB, Vol. VI, Ann. 125: T. Buergenthal, *Law-making in the International Civil Aviation Organization*, 1969, at p. 131 (pp. 2311/2293); emphasis omitted.

[94] RQ — ICAOA and ICAOB, para. 4.45.

debated in the Assembly, and subsequently before the ICAO Council[95]. In the context of those debates, the United States both disputed the factual allegations made against it and that the conduct in question violated the Chicago Convention, and, as Qatar also notes, it "refused to give the assurances requested by Czechoslovakia"[96].

63. As a consequence, Judge Buergenthal's views as to that episode permit no conclusions to be drawn for the very different circumstances of the present case, in which there were no discussions between the Parties as to the substance of the dispute in the context of the Article 54 (n) proceedings.

Supposed attempts to negotiate within the WTO

64. I can deal rather more briefly with Qatar's argument that it complied with the precondition of negotiation through its Requests for Consultations under the WTO. Those requests were addressed to only three of the ***Applicants***, excluding Egypt.

65. The crucial point undermining Qatar's reliance on the Requests is that they concern only alleged breaches of WTO obligations, and make no mention of the alleged breaches of obligations under the Chicago Convention and IASTA which form the subject-matter of the dispute subsequently submitted to the ICAO Council.

66. Bahrain, Saudi Arabia and the UAE clearly cannot be expected to have understood that, in seeking consultations in respect of disputes in respect of WTO obligations, Qatar was also seeking negotiations in respect of disputes under the Chicago Convention and IASTA.

Third party facilitation and mediation

67. Finally, I turn to the supposed attempts to negotiate through the facilitation of third parties.

68. In this regard, two elements are fatal to Qatar's case: first, no communication calling for negotiations was ever addressed to the Applicants; and second, and in any event, such statements as

---

[95] MA — ICAOA and ICAOB, Vol. VI, Ann. 125: T. Buergenthal, *Law-making in the International Civil Aviation Organization*, 1969, at pp. 131-135 (pp. 2311-2315/2293-2297).

[96] RQ — ICAOA and ICAOB, para. 4.45; MA — ICAOA and ICAOB, Vol. VI, Ann. 125: T. Buergenthal, *Law-making in the International Civil Aviation Organization*, 1969, at p. 136 (pp. 2316/2298).

Qatar asserts were made to the effect that it was open to a negotiated settlement were in entirely general terms.

69. The second point has already been addressed and on its own is dispositive. On Qatar's own case, the efforts of third States to facilitate a resolution were all addressed to the dispute between the Parties relating to Qatar's compliance with the Riyadh Agreements, which is the real issue. None of those efforts can be regarded as being a genuine attempt to negotiate the disagreement in relation to the alleged breaches of the Chicago Convention and IASTA; Qatar at no point suggests otherwise.

70. As regards the first point, Qatar misrepresents the ***Applicants***' position, which is precisely that attempts by third parties to mediate or facilitate resolution of a dispute are incapable of fulfilling the precondition of negotiations, at least if they do not in fact result in discussions between the parties involved.

71. In this regard, Qatar wrongly suggests in its Rejoinder that the Applicants accept that "attempts to negotiate may be indirect"[97]. The passage it relies on from the ***Applicants***' Reply[98], which made reference to the facts of the *Treaty of Amity* case (and not *Tehran Hostages*, as Qatar wrongly suggests)[99], however, was making quite a different point, namely that, even in the absence of diplomatic relations, letters seeking to initiate negotiations may be transmitted through a third State[100]. That is quite different and in no way implies an acceptance that negotiations can be conducted indirectly.

72. In conclusion, none of the materials relied upon by Qatar meets the necessary minimum requirements of a "genuine attempt" to negotiate. Whilst, to paraphrase the Court's conclusion in *Georgia* v. *Russia*, certain of the materials relied upon might, at most, "attest to the existence of a dispute . . . on a subject-matter capable of falling under" the Chicago Convention and IASTA, they quite plainly "fail to demonstrate an attempt at negotiating these matters"[101].

---

[97] RQ — ICAOA and ICAOB, para. 4.51.

[98] RA — ICAOA and ICAOB, fn. 433.

[99] RQ — ICAOA and ICAOB, para. 4.51.

[100] See RA — ICAOA and ICAOB, para. 5.47 and fn. 433.

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

73. On that basis, the Council should properly have held that Qatar had failed to comply with the precondition of negotiation contained in Article 84 of the Chicago Convention and Article II, Section 2 of the IASTA, and that it was therefore without jurisdiction over Qatar's applications. The Applicants' appeal should be allowed, and the Council's decisions set aside, also on this basis.

5. Qatar's applications are inadmissible for non-compliance with Article 2 *(g)* of the Rules for the Settlement of Differences

74. Mr. President, Members of the Court. Finally, I turn to the objection based on admissibility. Qatar no longer contests that preliminary objections as to admissibility may properly be raised before the Council[102]. As noted by Mr. Petrochilos, in accordance with the applicable Rules for the Settlement of Differences, preliminary objections must be dealt with by the Council before any further steps are taken[103].

75. Article 2, paragraph *(g)*, of those Rules (at tab 6 of your folders) stipulates that a memorial shall contain "[a] statement that negotiations to settle the disagreement had taken place between the parties but were not successful"[104].

76. That requirement is plainly intended to reflect and give effect to the jurisdictional precondition of negotiation contained in Article 84 and Article II, Section 2. As such, it cannot be interpreted as being a mere requirement of form. Rather, the language of Article 2 is imperative, it states that a memorial "shall" contain such a statement. The failure of a memorial to comply renders an application inadmissible.

77. Qatar's principal response in this regard is to quibble as to the language used by the Applicants as to what Article 2 *(g)* requires[105], and to assert that the statement is required merely to "state" (in French "attester"), that negotiations had taken place. That argument, however, takes Qatar nowhere. I have already shown you the relevant section of Qatar's memorials dated 30 October 2017. That left no doubt that no negotiations had in fact taken place. Qatar only

---

[102] CMQ — ICAOA, fn. 286; CMQ — ICAOB, fn. 290.

[103] MA — ICAOA and ICAOB, Vol. II, Ann. 6: ICAO, Rules for the Settlement of Differences, approved on 9 April 1957; amended on 10 November 1975 (ICAO document 7782/2), Art. 5 (4); judges' folder, tab 6***, Petrochilos, supra, para. 46.***

[104] *Ibid.*, Art. 2 *(g)*.

[105] CMQ — ICAOA and ICAOB, paras. 4.86 and 4.87.

half-heartedly contested this in its Counter-Memorial[106], and no longer appears to dispute it; certainly, in its Rejoinder it did not repeat the argument that the reference to "further negotiations" must be taken as meaning that there had been some prior negotiations.

78. As to Qatar's argument based on the purported amendment made in its response before the Council[107], it cannot be the case that such a deficiency may be cured by an amendment consisting of a bald assertion that negotiations had taken place, and had not been successful, and that, particularly, in circumstances in which that new statement both flatly contradicted the position previously taken, and was also patently inconsistent with the documentary evidence placed by Qatar before the Council.

79. Qatar's other arguments similarly do not assist it. Its argument that the requirement even to attempt negotiations may be dispensed with[108] is flawed for the reasons I gave earlier. As to its suggestion that the prior practice of the Council shows that it has not declared previous cases inadmissible on this basis[109], in previous cases before the Council the question of admissibility was simply never in issue.

80. Finally, Qatar suggests in reliance on the *Pakistan* v. *India* case that the issue is irrelevant if the Council is nevertheless held by the Court to have jurisdiction, and that there is no need to have regard to procedural matters before the Council[110]. In that case, however, the Court was concerned with defects in the manner in which the Council had dealt with the case, and not with threshold questions relating to the admissibility of the claim. The authority is therefore inapposite.

81. In conclusion, quite apart from the fact that it was without jurisdiction as a result of Qatar's non-compliance with the precondition of negotiation, the Council should in any case have declared Qatar's Applications inadmissible for non-compliance with Article 2, paragraph *(g)*, of the Rules for the Settlement of Differences.

---

[106] CMQ — ICAOA and ICAOB, para. 4.88.

[107] RQ — ICAOA and ICAOB, para. 4.56.

[108] CMQ — ICAOA and ICAOB, para. 4.88; RQ — ICAOA and ICAOB, para. 4.56.

[109] RQ — ICAOA and ICAOB, para. 4.55.

[110] RQ — ICAOA and ICAOB, para. 4.57.

82. Mr. President, Members of the Court. That concludes both my presentation, and the Applicants' first round of submissions. I am grateful for your attention, and your patience.

The PRESIDENT: I thank Mr. Olleson. Indeed your statement brings to an end today's sitting. Oral argument in the cases will resume tomorrow at 3 p.m., for Qatar's first round of oral pleadings. The sitting is adjourned.

The Court rose at 4 p.m.

____