INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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)

JUDGMENT OF 14 JULY 2020

2020

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

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, ÉGYPTE
ET ÉMIRATS ARABES UNIS c. QATAR)

ARRÊT DU 14 JUILLET 2020

Official citation:

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), Judgment, I.C.J. Reports 2020*, p. 172

Mode officiel de citation:

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), arrêt, C.I.J. Recueil 2020, p. 172

ISSN 0074-4441
ISBN 978-92-1-003853-9

Sales number
N° de vente: **1192**

14 JULY 2020

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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)

Factual background.

Adoption of aviation restrictions by Bahrain, Egypt and the United Arab Emirates, as well as Saudi Arabia — Initiation of proceedings by Qatar before the ICAO Council ("the Council") — Article II, Section 2, of the 1944 International Air Services Transit Agreement ("the IASTA") — Article 84 of the Convention on International Civil Aviation — Preliminary objections raised before the Council — Decision of the Council on preliminary objections.

Court's appellate function.

Article II, Section 2, encompasses appeal against decisions on preliminary objections — Court has jurisdiction to entertain appeal — Court's role is to determine whether impugned decision is correct.

*

Grounds of appeal — No requirement to follow order of grounds of appeal used by Appellants.

*

Second ground of appeal — Rejection by the Council of first preliminary objection.

Jurisdiction — Disagreement between the Parties before the Council concerns interpretation and application of IASTA and falls within the scope of Article II,

Section 2 — Mere fact that disagreement arose in a broader context does not deprive the Council of jurisdiction under Article II, Section 2 — Council did not err when it rejected first preliminary objection in so far as it concerned jurisdiction.

Admissibility — Difficulty of applying concept of judicial propriety to the Council — Integrity of the Council's dispute settlement function under Article II, Section 2, not affected by consideration of issues outside civil aviation — Council did not err when it rejected first preliminary objection in so far as it concerned admissibility.

Second ground of appeal cannot be upheld.

*

Third ground of appeal — Rejection by the Council of second preliminary objection.

Jurisdiction — Article II, Section 2, imposes precondition of negotiation — Genuine attempt to negotiate must be made prior to filing of application before the Council — Precondition satisfied if negotiations reach point of futility or deadlock — Genuine attempt to negotiate can be made outside of bilateral diplomacy — Qatar made a genuine attempt to negotiate both within and outside ICAO to settle disagreement — No reasonable probability of negotiated settlement as of filing of Qatar's application to the Council — Council did not err when it rejected second preliminary objection in so far as it concerned jurisdiction.

Admissibility — Article 2, subparagraph (g)*, of the ICAO Rules for the Settlement of Differences requires application and memorial filed pursuant to Article 84 (incorporated by reference in Article II, Section 2) to include statement that negotiations took place but were not successful — Statement in Qatar's application and memorial satisfies requirement — Council did not err when it rejected second preliminary objection in so far as it concerned admissibility.*

Third ground of appeal cannot be upheld.

*

First ground of appeal — Due process in procedure before the Council.

Issues presented by the preliminary objections are objective questions of law — Council's procedures did not prejudice in any fundamental way the requirements of a just procedure.

First ground of appeal cannot be upheld.

JUDGMENT

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

In the case concerning the appeal relating to the jurisdiction of the Council of the International Civil Aviation Organization under Article II, Section 2, of the 1944 International Air Services Transit Agreement,

between

the Kingdom of Bahrain,

represented by

H.E. Sheikh Fawaz bin Mohammed Al Khalifa, Ambassador of the Kingdom of Bahrain to the United Kingdom of Great Britain and Northern Ireland, 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 of the Senior Courts of England and Wales, Three Crowns LLP,
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Ms Julia Sherman, member of the Bar of the State of New York, Three Crowns LLP,

as Counsel;

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Mr. Hamad Waheed Sayyar, Counsellor, Embassy of the Kingdom of Bahrain in the United Kingdom of Great Britain and Northern Ireland,
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 Arab Republic of Egypt,

represented by

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Ms Angi Mostafa, Permanent Representative of the Arab Republic of Egypt to the International Civil Aviation Organization,
H.E. Mr. Khaled Mahmoud Elkhamry, Ambassador, Ministry of Foreign Affairs of the Arab Republic of Egypt,
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,
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as Advisers,

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as Agent;

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as Counsel,

and

the State of Qatar,

represented by

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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,
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Ms Yasmin Al-Ameen, Foley Hoag LLP,

as Counsel;

Ms Flannery Sockwell, Foley Hoag LLP,
Ms Nancy Lopez, Foley Hoag LLP,
Ms Deborah Langley, Foley Hoag LLP,

as Assistants,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By a joint Application filed in the Registry of the Court on 4 July 2018, the Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates instituted an appeal from a Decision rendered by the Council of the International Civil Aviation Organization (ICAO) (hereinafter the "ICAO Council" or the "Council") on 29 June 2018 in proceedings commenced by the State of Qatar against these States on 30 October 2017 (hereinafter the "Decision"), pursuant to Article II, Section 2, of the International Air Services Transit Agreement, adopted at Chicago on 7 December 1944 (hereinafter the "IASTA"). In this Decision, the ICAO Council rejected the preliminary objections raised by Bahrain, Egypt and the United Arab Emirates that it lacked jurisdiction "to resolve the claims raised" by Qatar in its application and that these claims were inadmissible.

2. On the same day, the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates filed another joint Application in respect of a different decision of the ICAO Council, also dated 29 June 2018, in separate proceedings brought by the State of Qatar on 30 October 2017 against those four States, pursuant to Article 84 of the Convention on International Civil Aviation, adopted at Chicago on 7 December 1944 (hereinafter the "Chicago Convention" or the "Convention"), the Kingdom of Saudi Arabia also being a party to that instrument (see *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates* v. *Qatar), Judgment, I.C.J. Reports 2020*, pp. 88 and 95, paras. 1 and 26).

3. In their Application in the present case, the Applicant States seek to found the jurisdiction of the Court on Article II, Section 2, of the IASTA, and by reference on Article 84 of the Chicago Convention, in conjunction with Articles 36, paragraph 1, and 37 of the Statute of the Court.

4. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated a signed copy of the Application to the Government of Qatar. He also notified the Secretary-General of the United Nations of the filing of the Application.

In addition, by a letter dated 25 July 2018, the Registrar informed all Member States of the United Nations of the filing of the above-mentioned Application.

5. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar notified the Member States of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text of that document.

6. In conformity with Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the IASTA and to States parties to the Chicago Convention the notifications provided for in Article 63, paragraph 1, of the Statute. In addition, with regard to both of these instruments, in accordance with Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the ICAO, through its Secretary-General, the notifications provided for in Article 34, paragraph 3, of the Statute.

7. Since the Court included upon the Bench no judge of the nationality of the Parties, the Applicant States and Qatar proceeded to exercise the right conferred upon them by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. The Applicant States first jointly chose Mr. Nabil Elaraby, who resigned on 10 September 2019, and, subsequently, Sir Franklin Berman. The Respondent chose Mr. Yves Daudet.

8. By a letter dated 16 July 2018, the Agent of Qatar requested, on behalf of his Government, that the Court join, pursuant to the first sentence of Article 47 of the Rules of Court, the proceedings 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)*. In his letter, the Agent further stated that, should the Court decide not to join the proceedings in the two cases, his Government requested it to direct common action in respect of the written and oral proceedings, pursuant to the second sentence of Article 47 of the Rules of Court.

9. By a letter dated 23 July 2018, the Agent of Saudi Arabia indicated that his Government considered that the joinder of the proceedings in the two cases would not be appropriate, as Saudi Arabia was not a party to the IASTA. The Agent, however, stated that his Government had no objection were the Court to direct common action in respect of the written and oral proceedings.

10. On 23 July 2018, the President of the Court held meetings with the Agents of the Applicant States and Qatar, pursuant to Article 31 of the Rules of Court, in respect of each case. In the course of these meetings, Qatar reiterated its request that the proceedings in the two cases be joined and, failing this, that the Court direct common action in respect of the written and oral proceedings. For their part, the Applicant States in each case opposed the joinder of the two proceedings. They expressed the view, however, that they would be in favour of the Court directing common action under Article 47 of the Rules of Court with regard to both cases.

11. By letters dated 25 July 2018, the Registrar informed the Applicant States and Qatar that, having taken into account their views, the Court had decided not to direct the joinder of the proceedings in the two cases, pursuant to the first sentence of Article 47 of the Rules of Court. He further indicated that the Court, however, considered it appropriate to direct common action, pursuant to the second sentence of that Article, in respect of the said cases, and that the Court would decide in due course on the modalities for such a common action.

12. By an Order dated 25 July 2018, the President of the Court fixed 27 December 2018 and 27 May 2019 as the respective time-limits for the filing of a Memorial by the Applicant States and a Counter-Memorial by Qatar. The Memorial and the Counter-Memorial were filed on 27 December 2018 and 25 February 2019, respectively.

13. By an Order dated 27 March 2019, the Court directed the submission of a Reply by the Applicant States and a Rejoinder by Qatar, and fixed 27 May 2019 and 29 July 2019 as the respective time-limits for the filing of those pleadings. The Reply and Rejoinder were filed within the time-limits thus prescribed.

14. By a letter dated 5 April 2019, the Registrar, acting pursuant to Article 69, paragraph 3, of the Rules of Court, transmitted to the Secretary-General of ICAO copies of the written proceedings filed up to that point in the case, namely the Memorial of the Applicant States and the Counter-Memorial of Qatar, and asked whether the Organization intended to present observations in writing under that provision. By a letter dated 31 July 2019, the Secretary-General of ICAO stated that the Organization did not intend to submit observations in writing at that stage. She indicated, however, that ICAO would advise the Court if it intended to present observations in writing upon receipt of copies of the Reply and the Rejoinder. The said pleadings were communicated to the ICAO under cover of a letter dated 1 August 2019. By a letter dated 20 September 2019, the Secretary-General stated that the Organization did not intend to submit observations in writing under the above-mentioned provision.

15. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

16. By a letter dated 28 March 2019, the Registrar informed the Parties that the Court had decided to organize combined hearings 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)*. These combined hearings were held from 2 to 6 December 2019, at which the Court heard the oral arguments and replies of:

For the Applicant States:	H.E. Sheikh Fawaz bin Mohammed Al Khalifa, H.E. Mr. Amgad Abdel Ghaffar, H.E. Ms Hissa Abdullah Ahmed Al-Otaiba, Mr. Payam Akhavan, Ms Alexandra van der Meulen, Mr. Malcolm Shaw, Mr. Georgios Petrochilos, Mr. Simon Olleson.
For Qatar:	Mr. Mohammed Abdulaziz Al-Khulaifi, Mr. Vaughan Lowe, Mr. Pierre Klein, Mr. Lawrence Martin, Ms Loretta Malintoppi.

*

17. In the Application, the following claims were presented by the Applicant States:

> "For the above-stated reasons, may it please the Court, rejecting all submissions to the contrary, to adjudge and declare:
>
> (1) That the Decision of the ICAO Council dated 29 June 2018 reflects a manifest failure to act judicially on the part of the ICAO Council, and

a manifest lack of due process in the procedure adopted by the ICAO Council; and

(2) That the ICAO Council is not competent to adjudicate upon the disagreement between the State of Qatar and the Applicants submitted by Qatar to the ICAO Council by Qatar's Application (B) dated 30 October 2017; and

(3) That the Decision of the ICAO Council dated 29 June 2018 in respect of Application (B) is null and void and without effect."

18. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Governments of the Applicant States,

in the Memorial:

"1. For the reasons set out in this Memorial, and reserving the right to supplement, amplify or amend the present submissions, the Kingdom of Bahrain, the Arab Republic of Egypt, and the United Arab Emirates hereby request the Court to uphold their Appeal against the Decision rendered by the Council of the International Civil Aviation Organization dated 29 June 2018, in proceedings commenced by the State of Qatar by Qatar's Application (B) dated 30 October 2017 against the Appellants pursuant to Article II, Section 2, of the IASTA.

2. In particular, the Court is respectfully requested to adjudge and declare, rejecting all submissions to the contrary, that:

(1) the Decision of the ICAO Council dated 29 June 2018 reflects a manifest failure to act judicially on the part of the ICAO Council, and a manifest lack of due process in the procedure adopted by the ICAO Council; and

(2) the ICAO Council is not competent to adjudicate upon the disagreement between the State of Qatar and the Appellants submitted by Qatar to the ICAO Council by Qatar's Application (B) dated 30 October 2017; and

(3) the Decision of the ICAO Council dated 29 June 2018 in respect of Application (B) is null and void and without effect."

in the Reply:

"1. For these reasons, and reserving the right to supplement, amplify or amend the present submissions, the Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates hereby request the Court to uphold their Appeal against the Decision rendered by the Council of the International Civil Aviation Organization dated 29 June 2018, in proceedings commenced by Qatar's Application (B) dated 30 October 2017 against the three States pursuant to Article II, Section 2, of the IASTA.

2. In particular, the Court is respectfully requested to adjudge and declare, rejecting all submissions to the contrary, that:

(1) the Decision of the ICAO Council dated 29 June 2018 reflects a manifest failure to act judicially on the part of the ICAO Council, and a manifest lack of due process in the procedure adopted by the ICAO Council; and

(2) the ICAO Council is not competent to adjudicate upon the disagreement between Qatar and the Appellants submitted by Qatar to the ICAO Council by Qatar's Application (B) dated 30 October 2017; and
(3) the Decision of the ICAO Council dated 29 June 2018 in respect of Application (B) is null and void and without effect."

On behalf of the Government of Qatar,

in the Counter-Memorial:

"On the basis of the facts and law set forth in this Counter-Memorial, Qatar respectfully requests the Court to reject Joint Appellants' appeal and affirm the ICAO Council's Decision of 29 June 2018 dismissing Joint Appellants' preliminary objection to the Council's jurisdiction and competence to adjudicate Qatar's Application (B) of 30 October 2017."

in the Rejoinder:

"On the basis of the facts and law set forth in this Rejoinder, Qatar respectfully requests the Court to reject Joint Appellants' appeal and affirm the ICAO Council's Decision of 29 June 2018 dismissing Joint Appellants' preliminary objection to the Council's jurisdiction and competence to adjudicate Qatar's Application (B) of 30 October 2017."

19. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Governments of the Applicant States,

at the hearing of 5 December 2019:

"1. In accordance with Article 60, paragraph 2, of the Rules of the Court, and for the reasons set out during the written and oral phase of the pleadings, the Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates hereby request the Court to uphold their Appeal against the Decision rendered by the Council of the International Civil Aviation Organization dated 29 June 2018, in proceedings commenced by Qatar's Application (B) dated 30 October 2017 against the three States pursuant to Article II, Section 2, of the IASTA.

2. In particular, the Court is respectfully requested to adjudge and declare, rejecting all submissions to the contrary, that:

(1) the Decision of the ICAO Council dated 29 June 2018 reflects a manifest failure to act judicially on the part of the ICAO Council, and a manifest lack of due process in the procedure adopted by the ICAO Council; and
(2) the ICAO Council is not competent to adjudicate upon the disagreement between the State of Qatar and the Appellants submitted by Qatar to the ICAO Council by Qatar's Application (B) dated 30 October 2017; and
(3) the Decision of the ICAO Council dated 29 June 2018 in respect of Application (B) is null and void and without effect."

On behalf of the Government of Qatar,

at the hearing of 6 December 2019:

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

*

20. In the following paragraphs, the Applicant States, namely the Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates, will collectively be referred to as the "Appellants". In describing proceedings before the ICAO Council, these States will be referred to as respondents before the ICAO Council.

* * *

I. Introduction

A. Factual Background

21. On 5 June 2017, the Governments of Bahrain, Egypt and the United Arab Emirates, as well as Saudi Arabia, severed diplomatic relations with Qatar and adopted a series of restrictive measures relating to terrestrial, maritime and aerial lines of communication with Qatar, which included certain aviation restrictions. Pursuant to these restrictions, all Qatar-registered aircraft were barred by the Appellants from landing at or departing from their airports and were denied the right to overfly their respective territories, including the territorial seas within the relevant flight information regions. Certain restrictions also applied to non-Qatar-registered aircraft flying to and from Qatar, which were required to obtain prior approval from the civil aviation authorities of the Appellants. According to the Appellants, the restrictive measures were taken in response to Qatar's alleged breach of its obligations under certain international agreements to which the Appellants and Qatar are parties, namely the Riyadh Agreement (with Endorsement Agreement) of 23 and 24 November 2013, the Mechanism Implementing the Riyadh Agreement of 17 April 2014 and the Supplementary Riyadh Agreement of 16 November 2014 (hereinafter the "Riyadh Agreements"), and of other obligations under international law.

22. On 15 June 2017, Qatar submitted to the Office of the ICAO Secretary-General an application for the purpose of initiating proceedings

before the Council, citing as respondents Bahrain, Egypt and the United Arab Emirates, as well as a memorial. Certain deficiencies in the application and the memorial having been identified by the Secretariat, the Secretary-General, in a letter dated 21 June 2017, requested Qatar to rectify them.

23. On 30 October 2017, pursuant to Article II, Section 2, of the IASTA, Qatar filed a new application and memorial with the ICAO Council, in which it claimed that the aviation restrictions adopted by Bahrain, Egypt and the United Arab Emirates violated their obligations under the IASTA. Article II, Section 2, of the IASTA reads as follows:

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

Article 84 of the Chicago Convention, contained in Chapter XVIII of that Convention, reads as follows:

> "*Settlement of Disputes*
>
> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

24. On 19 March 2018, Bahrain, Egypt and the United Arab Emirates, as respondents before the ICAO Council, raised two preliminary objections. In the first preliminary objection, they argued that the ICAO Council lacked jurisdiction under the IASTA since the real issue in dispute between the Parties involved matters extending beyond the scope of that instrument, including whether the aviation restrictions could be characterized as lawful countermeasures under international law. In the second preliminary objection, they argued that Qatar had failed to meet the precondition of negotiation set forth in Article II, Section 2, of the IASTA, also reflected in Article 2, subparagraph *(g)*, of the ICAO Rules for the Settlement of Differences, and consequently that the Council lacked juris-

diction to resolve the claims raised by Qatar, or alternatively that the application was inadmissible.

25. By a decision dated 29 June 2018, the ICAO Council rejected, by 18 votes to 2, with 5 abstentions, the preliminary objections, treating them as one single objection. In this Decision, the Council stated, *inter alia*, the following:

> "*HAVING CONSIDERED* the preliminary objection of the Respondents, namely that the Council lacks jurisdiction to resolve the claims raised by the Applicant in Application (B); or in the alternative, that the Applicant's claims are inadmissible;
>
> *CONSIDERING* that the question before the Council was whether to accept the preliminary objection of the Respondents;
>
> *BEARING IN MIND* Article 52 of the Chicago Convention which provides that decisions by the Council shall require approval by a majority of its Members and the consistent practice of the Council in applying this provision in previous cases;
>
> *HAVING DECLINED* a request by one of the Respondents to reconsider the above-mentioned majority of 19 Members required in the current Council for the approval of its decisions;
>
> *DECIDES* that the preliminary objection of the Respondents is not accepted. "

26. On 4 July 2018, the Appellants submitted a joint Application to the Court instituting an appeal from the Decision of the Council dated 29 June 2018. Before addressing the three grounds of appeal against that Decision, the Court will describe its appellate function and the scope of the right of appeal to the Court under Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA).

B. The Court's Appellate Function and the Scope of the Right of Appeal to the Court

27. The joint appeal of the three Appellants in the present case is made under Article II, Section 2, of the IASTA, which refers to Chapter XVIII of the Chicago Convention. Bahrain, Egypt and the United Arab Emirates have been parties to the IASTA since 12 October 1971, 13 March 1947 and 25 April 1972, respectively. Qatar has been a party to the IASTA since 25 June 2008. Bahrain, Egypt and the United Arab Emirates have been parties to the Chicago Convention since 19 September 1971, 12 April 1947 and 25 May 1972, respectively. Qatar has been a party to the Chicago Convention since 5 October 1971.

28. Article II, Section 2, of the IASTA (the text of which is reproduced in paragraph 23 above) provides for the jurisdiction of the ICAO Council to decide "any disagreement between two or more contracting States relating to the interpretation or application of this Agreement" if it "cannot be settled by negotiation". Under the Chicago Convention, to which

the IASTA refers, a decision of the Council may be appealed either to an *ad hoc* arbitral tribunal agreed upon between the parties to a dispute or to "the Permanent Court of International Justice". Under Article 37 of the Statute of the International Court of Justice, "[w]henever a treaty or convention in force provides for reference of a matter . . . to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice". The Court held in the past that

> "[t]he effect of that Article . . . is that, as between the parties to the Statute, this Court is substituted for the Permanent Court in any treaty or convention in force, the terms of which provide for reference of a matter to the Permanent Court" (*Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 14, para. 34).

Accordingly, under Article II, Section 2, of the IASTA and Article 84 of the Chicago Convention, the Court is competent to hear an appeal from a decision of the ICAO Council (see *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 53, para. 15, and p. 60, para. 25).

29. The Court notes that Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA) appears under the title "Settlement of disputes", whereas the text of the Article opens with the expression "any disagreement". In this context, the Court recalls that its predecessor, the Permanent Court of International Justice, defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11).

30. The Appellants appeal from a decision of the ICAO Council on the preliminary objections which they raised in the proceedings before it. The text of Article 84 does not specify whether only final decisions of the ICAO Council on the merits of disputes before it are subject to appeal. The Court settled this issue in the first appeal submitted to it against a decision of the ICAO Council (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46). The Court, clarifying its role in the exercise of its appellate function under the Chicago Convention and the IASTA, stated that those treaties

> "enlist the support of the Court for the good functioning of [ICAO], and therefore the first reassurance for the Council lies in the knowledge that means exist for determining whether a *decision as to its own competence* is in conformity or not with the provisions of the treaties governing its action" (*ibid.*, pp. 60-61, para. 26; emphasis added).

As the Court explained, "it would be contrary to accepted standards of the good administration of justice to allow an international organ to

examine and discuss the merits of a dispute when its competence to do so was not only undetermined but actively challenged" (*I.C.J. Reports 1972*, p. 57, para. 18 *(e)*).

The Court therefore concluded that

> "an appeal against a decision of the Council as to its own jurisdiction must therefore be receivable since, from the standpoint of the supervision by the Court of the validity of the Council's acts, there is no ground for distinguishing between supervision as to jurisdiction, and supervision as to merits" (*ibid.*, p. 61, para. 26).

31. Relying on these pronouncements of the Court, the Appellants brought their joint appeal, emphasizing that Article 84 of the Chicago Convention and Article II, Section 2, of the IASTA encompass appeals against decisions of the ICAO Council regarding preliminary objections to its jurisdiction.

32. Qatar expressly recognizes the right of the Appellants under Article II, Section 2, of the IASTA to appeal the Council's decision on its jurisdiction.

33. In view of the above, the Court is satisfied that it has jurisdiction to entertain the present appeal. It notes, however, that the Appellants and Qatar disagree on the scope of the right of appeal.

34. The Appellants submit that an appeal under Article II, Section 2, of the IASTA encompasses "procedural complaints". They argue that they are entitled before the ICAO Council to due process, which according to them, they were denied. The alleged lack of due process in the proceedings before the ICAO Council constitutes their first ground of appeal.

35. Qatar, while denying that any procedural irregularities occurred during the proceedings before the ICAO Council, suggests that the Court should decline to exercise its supervisory authority in respect of these alleged procedural irregularities. In Qatar's view, not only were there no such irregularities, but they would in any case be irrelevant to the objective question of law before the Court, namely whether the ICAO Council has jurisdiction to consider and decide on Qatar's claims under the IASTA.

36. The Court recalls that its role in supervising the Council in the exercise of the latter's dispute settlement functions under Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA) is to determine whether the impugned decision is correct. In the present case, its task is to decide whether the Council has erred in rejecting the preliminary objections of the Appellants to the jurisdiction of the ICAO Council and the admissibility of Qatar's application.

II. Grounds of Appeal

37. The Appellants raise three grounds of appeal against the Decision of the ICAO Council dated 29 June 2018. First, they submit that the

Decision "should be set aside on the grounds that the procedure adopted by the ICAO Council was manifestly flawed and in violation of fundamental principles of due process and the right to be heard".

38. In their second ground of appeal, the Appellants assert that the ICAO Council "erred in fact and in law in rejecting the first preliminary objection made [by them] in respect of the competence of the ICAO Council". According to the Appellants, to pronounce on the dispute would require the Council to rule on questions that fall outside its jurisdiction, specifically on the lawfulness of the countermeasures, including "certain airspace restrictions", adopted by the Appellants. In the alternative, and for the same reasons, they argue that the claims of Qatar are inadmissible.

39. Under their third ground of appeal, the Appellants contend that the ICAO Council erred when it rejected their second preliminary objection. That objection was based on the assertion that Qatar had failed to satisfy the precondition of negotiation contained in Article II, Section 2, of the IASTA, and thus that the ICAO Council lacked jurisdiction. As part of that objection, they also argued that the claims of Qatar were inadmissible because Qatar had not complied with the procedural requirement in Article 2, subparagraph *(g)*, of the ICAO Rules for the Settlement of Differences.

40. Although the Appellants invoke their three grounds of appeal in the above-mentioned order, the Court is not bound to follow it. The Court will first examine the grounds based on the alleged errors of the ICAO Council in rejecting the Appellants' objections. Thereafter, the Court will consider the ground based on the alleged manifest lack of due process in the procedure before the Council.

A. The Second Ground of Appeal: Rejection by the ICAO Council of the First Preliminary Objection

1. Whether the dispute between the Parties relates to the interpretation or application of the IASTA

41. As noted above, the Appellants' second ground of appeal relates to their first preliminary objection as respondents before the ICAO Council. In this objection, they argued that their actions, including in particular the aviation restrictions, constitute a set of measures "adopted in reaction to Qatar's multiple, grave, and persistent breaches of its international obligations relating to matters essential to [their] security . . ., and constitute lawful countermeasures authorised by general international law". They expressed the view that under Article II, Section 2, of the IASTA the jurisdiction of the Council is limited to any disagreement between two or more States relating to the interpretation or application of the IASTA and that the Council therefore does not have jurisdiction to adjudicate issues as to whether Qatar has breached its

other obligations under international law, including obligations under the Riyadh Agreements.

42. In the Appellants' view, the resolution of Qatar's claims by the ICAO Council would necessarily require it to determine issues forming part of the wider dispute between the Parties, including the question whether Qatar had breached its counter-terrorism obligations and its international obligation not to interfere in the internal affairs of the Appellants, matters falling outside of the scope of the IASTA. They argue that the narrow dispute relating to airspace closures cannot be separated from the broader issues and that the legality of the airspace closures cannot be judged in isolation.

43. The Appellants maintain that the ICAO Council lacks jurisdiction since the real issue in dispute between the Parties cannot be confined to matters within its limited jurisdiction. They contend that, in view of the role of ICAO as the United Nations specialized agency with functions related to matters of civil aviation, the competence of its Council under Article II, Section 2, of the IASTA extends only to the settlement of disagreements relating to the interpretation or application of that agreement. They therefore submit that, before determining that it had jurisdiction, the Council ought to have identified and legally characterized the subject-matter of the dispute before it. It should then have determined whether this dispute fell within its jurisdiction *ratione materiae* under Article II, Section 2, of the IASTA. In their view, the real issue in dispute between the Parties concerns "Qatar's long-standing violations of its obligations under international law other than under the IASTA". They characterize the measures they have taken, including the aviation restrictions that form the basis of Qatar's claim, as lawful countermeasures. The Appellants maintain that none of these matters, i.e. Qatar's alleged violations of international obligations and the Appellants' countermeasures in response thereto, fall within the ICAO Council's jurisdiction *ratione materiae* under Article II, Section 2, of the IASTA. Therefore, they request the Court to adjudge that the Council has no jurisdiction to entertain Qatar's application submitted to it.

*

44. Before the Council, Qatar expressed the view that the issues of countermeasures and their lawfulness go to the merits of the case and should not be considered by the Council when it takes a decision on its jurisdiction. Qatar relied on the Court's Judgment in the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)* (*Judgment, I.C.J. Reports 1972*, p. 46), which in its view "is entirely dispositive of all the arguments of the Respondents, leaving aside the issue of negotiations".

45. Before the Court, Qatar argues that the Council has jurisdiction to decide the case if there is any disagreement between the Parties relating to the interpretation or application of the IASTA which cannot be settled by negotiation. According to Qatar, there is nothing in that Agreement or in the ICAO Rules for the Settlement of Differences that sets any other limit on, or otherwise circumscribes, the jurisdiction of the Council. Qatar contends that the claims it has presented to the ICAO Council relate to the interpretation or application of the IASTA and thus the Council properly rejected the first preliminary objection. It maintains that the Council has jurisdiction to entertain its application notwithstanding the invocation by the Appellants of a defence that raises issues falling outside the scope of the Agreement or the fact that the dispute in question arises in the context of a broader dispute between the Parties.

* *

46. The Court has first to determine whether the dispute brought by Qatar before the ICAO Council is a disagreement between the Appellants and Qatar relating to the interpretation or application of the IASTA. The Council's jurisdiction *ratione materiae* is circumscribed by the terms of Article II, Section 2, of the IASTA to this type of disagreement. As the Court explained in 1972, a disagreement relates to the interpretation or application of the IASTA if, "in order to determine [it], the Council would inevitably be obliged to interpret and apply the [Agreement], and thus to deal with matters unquestionably within its jurisdiction" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 66, para. 36).

47. In its application and memorial submitted to the ICAO Council on 30 October 2017, Qatar requested the Council to "determine that the Respondents violated by their actions against the State of Qatar their obligations under the International Air Services Transit Agreement and other rules of international law". It further requested the Council to "deplore the violations by the Respondents of the fundamental principles of the International Air Services Transit Agreement". Consequently, Qatar asked the Council to urge the respondents "to withdraw, without delay, all restrictions imposed on the Qatar-registered aircraft and to comply with their obligations under the International Air Services Transit Agreement" and "to negotiate in good faith the future harmonious cooperation in the region to safeguard the safety, security[,] regularity and economy of international civil aviation". In its memorial, Qatar stated that parties to the IASTA "grant each other in scheduled international air services [t]he privilege to fly across its territory without landing, and [t]he privilege to land for non-traffic purposes". It further stated that "[b]y their actions starting on 5 June 2017 and lasting to the present time the Respondents violated the letter and spirit of the

[IASTA]" and that "[t]hey are in blatant default of their obligations under the IASTA".

48. The Court considers that the disagreement between the Parties brought before the ICAO Council concerns the interpretation and application of the IASTA and therefore falls within the scope of Article II, Section 2, of the IASTA. The mere fact that this disagreement has arisen in a broader context does not deprive the ICAO Council of its jurisdiction under Article II, Section 2, of the IASTA. As the Court has observed in the past, "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned" (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 20, para. 37; see also *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 23, para. 36).

49. Nor can the Court accept the argument that, because the Appellants characterize their aviation restrictions imposed on Qatar-registered aircraft as lawful countermeasures, the Council has no jurisdiction to hear the claims of Qatar. Countermeasures are among the circumstances capable of precluding the wrongfulness of an otherwise unlawful act in international law and are sometimes invoked as defences (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 55, para. 82). The prospect that a respondent would raise a defence based on countermeasures in a proceeding on the merits before the ICAO Council does not, in and of itself, have any effect on the Council's jurisdiction within the limits laid down in Article II, Section 2, of the IASTA. As the Court stated when considering an appeal from a decision of the ICAO Council in 1972:

> "The fact that a defence on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned, — otherwise parties would be in a position themselves to control that competence, which would be inadmissible. As has already been seen in the case of the competence of the Court, so with that of the Council, its competence must depend on the character of the dispute submitted to it and on the issues thus raised — not on those defences on the merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled." (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 27.)

50. This reasoning applies equally to the present case. The Court therefore concludes that the Council did not err when it rejected the first preliminary objection by the Appellants relating to its jurisdiction.

2. Whether Qatar's claims are inadmissible on grounds of "judicial propriety"

51. Before the ICAO Council, the respondents raised the alternative argument that Qatar's claims are inadmissible. While they referred to "general principles regarding admissibility", they did not elaborate upon arguments specific to their alternative request to declare Qatar's claims inadmissible. They relied instead on the same arguments made against the Council's jurisdiction. They argued that the distinction between the objections to the jurisdiction of the Council and those to the admissibility of Qatar's claims "did not matter for the Council's purposes as both of those types of objection were covered by the wording of Article 5 (1)" of the ICAO Rules for the Settlement of Differences.

52. The Appellants argue before the Court that, if the case were to proceed to the merits in its current form, the ICAO Council would have two options. First, it might adjudicate the issues relating to whether the aviation restrictions constitute lawful countermeasures, including, in particular, whether Qatar has breached its international obligations in matters outside civil aviation. This would, however, mean that the Appellants would be required to plead their defence on the basis of countermeasures in a forum that they consider not to be properly equipped to determine such matters. Secondly, the ICAO Council might decline to hear the defence on the basis of countermeasures, but this would mean that it could not decide all the matters before it. It would be wrong, in their view, for the Council to adjudicate the dispute in part only, ignoring that part which contains "a vital defence" of the Appellants.

They submit that Qatar's application to the ICAO Council is inadmissible in so far as any resolution of Qatar's claims will necessarily require the Council to adjudicate upon matters over which it does not possess jurisdiction. Any such exercise of jurisdiction by the Council would be incompatible with the consensual basis for jurisdiction and thus incompatible with "judicial propriety" and the ICAO Council's "judicial" function under Article II, Section 2, of the IASTA.

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53. In its submissions to the Council, Qatar took the view that the ICAO Rules for the Settlement of Differences do not permit preliminary objections as to admissibility. It urged the Council not to rule on admissibility at the preliminary objections phase, while admitting that the respondents were not precluded from making admissibility submissions in their counter-memorials on the merits.

54. Before the Court, Qatar characterizes the Appellants' "alternative argument" as not really an "alternative" one but rather as an "obvious

repurposing" of their jurisdictional objection. Qatar notes that the Appellants assert that if the Council were to pass judgment upon their defence on the basis of countermeasures it would "adjudicate" outside the scope of Article II, Section 2, of the IASTA without their consent. It contends that none of the "exceptional circumstances" which gave rise to the doctrine of "judicial propriety" in the Court's jurisprudence are present in the case pending before the Council. Qatar argues that "judicial propriety" would be offended if the Appellants' submissions were to be accepted because the Council then would not exercise its powers "to their full extent".

* *

55. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the Court considered a preliminary objection that was presented simultaneously as an objection to jurisdiction and as one going to the admissibility of the claims (*Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120). The Court then recalled that "[a] distinction between these two kinds of objections is well recognized in the practice of the Court" *(ibid.)*. The effect of an objection, irrespective of whether it is to jurisdiction or to admissibility, if upheld, is the same — it brings the proceedings in respect of that claim to an end. As jurisdiction is based on consent, a jurisdictional objection will most likely concern whether such consent has been given by the objecting State, whether the claim falls within the scope of the consent given or whether conditions attached to that consent are met. As far as objections to the admissibility of a claim are concerned, the Court explained that an objection to admissibility

> "consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein. Such a reason is often of such a nature that the matter should be resolved *in limine litis*" (*ibid.*; see also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 177, para. 29).

56. Article 5 of the ICAO Rules for the Settlement of Differences, approved by the Council on 9 April 1957, bears the heading "Preliminary objection and action thereon". Its first paragraph provides that "[i]f the respondent *questions the jurisdiction* of the Council to *handle* the matter presented by the applicant, he shall file a preliminary objection setting out the basis of the objection" (emphasis added). This provision does not expressly mention preliminary objections to admissibility. However, the Rules for the Settlement of Differences were drafted following the model of the 1946 Rules of this Court, which also did not expressly mention preliminary objections to admissibility. This lack of specificity did not

prevent the Court from dealing with objections to admissibility as a preliminary issue before the amendment of the Rules of Court in 1972 (e.g. *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6). Likewise, Article 5 of the ICAO Rules for the Settlement of Differences does not preclude the Council from considering an objection to the admissibility of a claim as a preliminary issue.

57. The Court is of the view that in proceedings before the ICAO Council, if a party raises a preliminary objection to the admissibility of a claim, that objection should also be resolved *in limine litis* unless it is not of an exclusively preliminary character. In other words, it should be considered and decided upon at a preliminary stage unless it is so intertwined with the merits of the matter brought before the Council that it cannot be dealt with without determining, at least to some degree, issues properly pertaining to the merits (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 459, para. 127). The only other situation where the Council could postpone its determination of a preliminary objection to admissibility by joining it to the merits is when it does not have before it all the facts necessary to decide the question raised. Neither situation, in the view of the Court, was present in the proceedings before the Council in this case.

58. The Council was fully aware of the objection to admissibility raised by the respondents in the proceedings before it. In fact, they argued orally that both objections to jurisdiction and to admissibility were covered by the wording of Article 5 (1) of the ICAO Rules for the Settlement of Differences. The Council did vote on the objection as the one "relating to the interpretation and application of the Transit Agreement" and by majority decided that it "was not accepted". This implies that the objection to the admissibility of Qatar's application was rejected.

59. The question for the Court is whether that decision of the Council rejecting the objection as it relates to the admissibility of Qatar's claims was a correct one. In other words, the Court has to ascertain whether the claims brought before the Council are admissible.

60. The Court observes that it is difficult to apply the concept of "judicial propriety" to the ICAO Council. The Council is a permanent organ responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of a judicial body. In addition to its executive and administrative functions specified in Articles 54 and 55 of the Chicago Convention, the Council was given in Article 84 the function of settling disagreements

between two or more contracting States relating to the interpretation or application of the Convention and its Annexes. This, however, does not transform the ICAO Council into a judicial institution in the proper sense of that term.

61. In any event, the integrity of the Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction under Article II, Section 2, of the IASTA. Therefore, a possible need for the ICAO Council to consider issues falling outside the scope of the IASTA solely in order to settle a disagreement relating to the interpretation or application of the IASTA would not render the application submitting that disagreement to it inadmissible.

62. The Court therefore concludes that the Council did not err when it rejected the first preliminary objection in so far as the respondents asserted that Qatar's claims were inadmissible.

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63. In view of the above, the second ground of appeal cannot be upheld.

B. The Third Ground of Appeal: Rejection by the ICAO Council of the Second Preliminary Objection

64. As their third ground of appeal, the Appellants assert that the ICAO Council erred when it rejected the second preliminary objection which they raised as respondents before the Council, pursuant to which they claimed that the ICAO Council lacked jurisdiction because Qatar had failed to meet the negotiation precondition found in Article II, Section 2, of the IASTA and that Qatar's application to the ICAO Council was inadmissible because it did not comply with Article 2, subparagraph *(g)*, of the ICAO Rules for the Settlement of Differences.

1. The alleged failure to meet a negotiation precondition prior to the filing of Qatar's application with the ICAO Council

65. Article II, Section 2, of the IASTA provides that "[i]f any disagreement . . . cannot be settled by negotiation, the provisions of Chapter XVIII of the [Chicago] Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the above-mentioned Convention". Before the ICAO Council, the respondents contended that prior negotiations constitute a precondition to the filing of an application under Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA). They asserted that the ICAO Council lacked jurisdiction because Qatar failed to comply with this precondition. On

appeal to the Court, the Appellants argue that the ICAO Council erred in rejecting this objection to its jurisdiction.

66. The Appellants recall that the Court, in previous judgments, has found a precondition of negotiation in compromissory clauses of treaties that are similar to Article II, Section 2, of the IASTA. They consider that this jurisprudence can be applied to the negotiation precondition contained in Article II, Section 2.

67. The Appellants, referring to the Judgment of the Court on preliminary objections in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, submit that for a negotiation precondition to be fulfilled, there must be "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" (*Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157). They maintain that a genuine attempt to negotiate must be more than a general call for dialogue. It must relate to the subject-matter of the dispute, which must concern the substantive obligations contained in the treaty in question. The Appellants also assert that, where negotiations have been attempted or have commenced, the precondition of negotiation is met only if negotiations have become futile or deadlocked.

68. The Appellants disagree with Qatar's alternative argument that it had no obligation even to attempt to negotiate, because any such attempt would have been futile (see paragraph 87 below). They argue that a negotiation precondition can never be satisfied "without a 'genuine attempt' to negotiate first being made, even where the disputing [p]arty considers that any such attempt would be futile".

69. The Appellants submit that Qatar did not make a genuine attempt to initiate negotiations concerning the specific subject-matter of its claims under the IASTA prior to submitting the disagreement to the ICAO Council.

70. The Appellants recall that the 31 July 2017 Extraordinary Session of the ICAO Council was held pursuant to Qatar's request under Article 54 *(n)* of the Chicago Convention, which provides that "[t]he Council shall . . . [c]onsider any matter relating to the Convention which any contracting State refers to it". With respect to that Extraordinary Session, they contend that "at no point did Qatar indicate that it sought to pursue negotiations in respect of the claims it subsequently sought to bring to the ICAO Council under Article II, Section 2, of the IASTA, and at no point did any such negotiations take place". They further argue that Qatar's efforts within ICAO did not satisfy the precondition of negotiation because its communications were addressed to the President of the ICAO Council or to the Secretary-General of ICAO, not to the Appellants. They maintain that none of the discussions and meetings that took place within the ICAO Council concerned "issues relating to the interpre-

tation and application of the IASTA . . . which, in Qatar's view, form the subject-matter of the disagreement between the Parties". Instead, those discussions were limited to issues relating to safety of aviation and contingency routes and did not touch upon the question of the dispute initiated under Article II, Section 2.

71. The Appellants also disagree with Qatar's assertion that its attempts to settle the dispute through the facilitation of third States constituted a genuine attempt to negotiate because "none of the requests or statements was addressed to the Appellants" and "all of the requests were in general terms, and failed to refer to the specific substantive obligations under the IASTA".

72. The Appellants further submit that Qatar's request for consultations within the context of the World Trade Organization (hereinafter the "WTO") did not constitute a genuine attempt to negotiate because that request concerned alleged violations of WTO obligations by the Appellants and thus was not relevant to alleged violations of obligations contained in the IASTA.

73. The Appellants also disagree with Qatar that a telephone conversation between the Emir of Qatar and the Crown Prince of Saudi Arabia on 8 September 2017 constituted a genuine attempt to negotiate. They assert that the conversation related to the wider dispute between the Parties, not to alleged violations of obligations under the IASTA. The Appellants also point out that Saudi Arabia was not a party to the proceedings in respect of the IASTA.

74. With respect to Qatar's references to reports of statements made by its officials in press statements and before United Nations bodies, the Appellants submit that none of these statements demonstrated a genuine attempt to negotiate. The statements were not addressed to the Appellants and did not deal with the specific subject-matter of Qatar's claims under the IASTA.

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75. In response, Qatar submits that the ICAO Council did not err in rejecting the preliminary objection relating to the precondition of negotiation raised by the respondents before the Council.

76. Qatar agrees with the Appellants that a negotiation precondition normally requires a potential applicant to make a genuine attempt to negotiate and that a negotiation precondition is not met until negotiations have become futile or deadlocked. It also recognizes that negotiations must relate to the subject-matter of the dispute, which must concern the substantive obligations contained in the treaty in question. Qatar emphasizes that no specific format or procedure is required for negotia-

tions, which, it argues, can take place within the context of an international organization.

77. With respect to the Parties involved and the instruments invoked, Qatar stated, when responding to the preliminary objections raised before the ICAO Council, that although Saudi Arabia was not a party to the proceedings initiated on the basis of the IASTA, the common measures relating to aviation restrictions were taken by four States acting jointly and applied to matters covered by both the Chicago Convention and the IASTA. It added that "[f]or the purpose of negotiations or attempted negotiations by Qatar, as a practical matter a distinction could not always be drawn between [States] parties to the Chicago Convention on the one hand and those to the IASTA on the other hand".

78. Qatar maintains that it made a genuine attempt to negotiate within the framework of ICAO, beginning on 5 June 2017, the first day of the aviation restrictions. It points to its 8 June 2017 letter to the President of the ICAO Council, which requested urgent consideration under Article 54 *(n)* of the Chicago Convention, citing the Appellants' alleged violations of the IASTA. In a letter dated 13 June 2017, Qatar informed the ICAO Secretary-General that it would submit a "formal application requesting Council action on a complaint pursuant to Article II, Section 2, of the [IASTA]".

79. Qatar also refers to exchanges held during the ICAO Council Extraordinary Session of 31 July 2017, where it requested that the Appellants "lift the unjust air blockade that [they] had . . . imposed upon it", noting that the measures were "in flagrant violation of all relevant ICAO international Standards, as well as of relevant ICAO instruments to which they were parties". It requested the ICAO Council to "urge the blockading Member States which were Contracting Parties to the 1944 IASTA to comply in *good faith* with their obligations concerning overflight freedom stipulated in that multilateral treaty".

80. Qatar submits that the Appellants consistently refused to discuss the aviation restrictions within the ICAO framework, as evidenced by their opposition to doing so at the ICAO Council's 211th Session on 23 June 2017. It points out that the Appellants' 19 July 2017 Working Paper urged that the ICAO Council limit any discussion under Article 54 *(n)* to issues related to the of international civil aviation. Qatar also refers to the United Arab Emirates' statement at the 31 July 2017 Extraordinary Session reaffirming this position on behalf of all of the Appellants. In Qatar's view, the Extraordinary Session addressed only the safety of aviation and contingency routes because of the Appellants' refusal to negotiate regarding the aviation restrictions.

81. Qatar also contends that it attempted to negotiate with the Appellants outside of ICAO. For example, it sought to "settle the dispute through the intervention of other States", referring to contacts with the Emir of Kuwait and the President and Secretary of State of the United States of America. According to Qatar, the Appellants did not respond to any of these efforts.

82. Qatar further states that it attempted to negotiate regarding the aviation restrictions within the WTO framework by submitting a request on 31 July 2017 for consultations with Saudi Arabia, Bahrain and the United Arab Emirates. It maintains that these three States declined to engage in consultations.

83. Additionally, Qatar submits that it made a genuine attempt to negotiate when the Emir of Qatar telephoned the Crown Prince of Saudi Arabia on 8 September 2017 with the facilitation of the President of the United States of America. Qatar states that, immediately after the call, Saudi Arabia suspended any dialogue or communication with Qatari authorities.

84. Qatar also asserts that statements made by its officials in United Nations bodies demonstrated a willingness to negotiate with the Appellants with respect to the overall dispute, including the aviation restrictions.

85. Qatar maintains that the Appellants made statements expressing a refusal to negotiate. It refers to a press report stating that the Minister of State for Foreign Affairs of the United Arab Emirates said on 7 June 2017 that there was "nothing to negotiate" with Qatar. Additionally, Qatar cites press reports stating that the Appellants made a set of 13 demands on 22 June 2017, which were described by the Minister for Foreign Affairs of Saudi Arabia as "non-negotiable".

86. For the above reasons, Qatar contends that it made a genuine attempt to negotiate and that any further attempt to negotiate would have been futile.

87. Although Qatar maintains that it made a genuine attempt to negotiate with the Appellants, it asserts, in the alternative, that a State has no obligation to attempt to negotiate prior to the filing of an application if the potential respondent has shown a complete unwillingness to negotiate, rendering any attempt to negotiate futile. It relies on the Judgment of the Court in the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* (*Judgment, I.C.J. Reports 1980*, p. 27, para. 51), in which, according to Qatar, the Court "held that the Iranian Government's 'refusal to enter into any discussion of the matter' despite the United States' protests was sufficient to discharge the negotiation requirement" applicable in that case.

Qatar contends that the Appellants displayed a complete unwillingness to negotiate and that any attempt would have been futile. In its view, there is no need for the Court to decide whether Qatar made a genuine attempt to negotiate with respect to the disagreement arising under Article II, Section 2, of the IASTA.

* *

88. The Court observes that Article II, Section 2, of the IASTA refers to Chapter XVIII of the Chicago Convention, entitled "Disputes and Default". This chapter provides a dispute settlement procedure that is available in the event of disagreements concerning the interpretation or application of the Convention and its Annexes. It follows that disagreements relating to the interpretation or application of the IASTA are to be resolved through the procedure provided in Chapter XVIII of the Chicago Convention. Article II, Section 2, of the IASTA further specifies that the disagreements that are to be settled through this procedure, which involves resort to the ICAO Council, are only those that "cannot be settled by negotiation". The Court also notes that Article 14 of the ICAO Rules for the Settlement of Differences contemplates that the Council may invite the parties to a dispute to engage in direct negotiations.

89. The reference in Article II, Section 2, of the IASTA to a disagreement that "cannot be settled by negotiation" is similar to the wording of the compromissory clauses of a number of other treaties. The Court has found several such compromissory clauses to contain negotiation preconditions that must be satisfied in order to establish the Court's jurisdiction (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 (I)*, p. 128, para. 140, and *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 445, para. 56). This jurisprudence is also relevant to the interpretation of Article II, Section 2, and to its application in determining the jurisdiction of the ICAO Council.

90. The Court considers that Article II, Section 2, of the IASTA imposes a precondition of negotiation that must be met in order to establish the ICAO Council's jurisdiction. Prior to filing an application under Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA), a contracting State must make a genuine attempt to negotiate with the other concerned State or States. If the negotiations or attempted negotiations reach a point of futility or deadlock, the disagreement "cannot be settled by negotiation" and the precondition to the jurisdiction of the ICAO Council is satisfied.

91. As the Court has recognized, a genuine attempt to negotiate can be made outside of bilateral diplomacy (*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. 160). Exchanges that take place in an international organization are also recognized as "established modes of

international negotiation" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346).

92. In responding to the preliminary objection presented to the ICAO Council, Qatar cited a series of communications in June and July 2017 in which it urged the ICAO Council to take action with respect to the aviation restrictions. These communications referred both to the aviation restrictions and to provisions of the IASTA that, according to Qatar, are implicated by those restrictions. In its 15 June 2017 request to the ICAO Council under Article 54 *(n)* of the Chicago Convention, for example, Qatar argued that Bahrain, Egypt and the United Arab Emirates "[d]eprived the State of Qatar of its right to transit over their territories, as granted under the [IASTA]".

In advance of the Extraordinary Session of the ICAO Council, held on 31 July 2017, Qatar submitted a working paper in which it reiterated its objections to the aviation restrictions, making reference to the IASTA. At the Extraordinary Session, Qatar requested the Appellants to "lift the unjust air blockade" imposed by them, noting that the measures were "in flagrant violation of all relevant ICAO international standards, as well as of relevant ICAO instruments to which they were parties".

93. The Court notes that many of the interactions relevant to the question whether the negotiation precondition has been met with regard to Article II, Section 2, of the IASTA took place in the context of Qatar's request pursuant to Article 54 *(n)* of the Chicago Convention. Moreover, some of these interactions involved Saudi Arabia, which is not a party to the present case. The Court recalls, however, that Article II, Section 2, of the IASTA provides that Chapter XVIII of the Chicago Convention shall be applicable to settlement of disagreements under the IASTA in the same manner as it applies to settlement of disagreements under the Chicago Convention. In considering whether the precondition of negotiation was fulfilled in this case, the Court finds it appropriate to take into account interactions that took place as a consequence of Qatar's invocation of Article 54 *(n)* of the Chicago Convention. Those interactions relate to aviation restrictions which were jointly adopted by four States, including the three Appellants, and which, according to Qatar, are inconsistent with the Appellants' obligations under the IASTA. The Court further observes that the competence of ICAO unquestionably extends to questions of overflight of the territory of contracting States, a matter that is addressed in both the Chicago Convention and the IASTA. The overtures that Qatar made within the framework of ICAO related directly to the subject-matter of the disagreement that was later the subject of its application to the ICAO Council under Article II, Section 2, of the IASTA. The Court concludes that Qatar made a genuine attempt within ICAO to

settle by negotiation its disagreement with the Appellants regarding the interpretation and application of the IASTA.

94. As to the question whether negotiations within ICAO had reached the point of futility or deadlock before Qatar filed its application to the ICAO Council, the Court has previously stated that a requirement that a dispute cannot be settled through negotiations "could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that . . . 'no reasonable probability exists that further negotiations would lead to a settlement'" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 446, para. 57, quoting *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345). In past cases, the Court has found that a negotiation precondition was satisfied when the parties' "basic positions ha[d] not subsequently evolved" after several exchanges of diplomatic correspondence and/or meetings (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 446, para. 59; see also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 317, para. 76). The Court's inquiry into the sufficiency of negotiations is a question of fact to be considered in each case (*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. 160).

95. In advance of the ICAO Council's Extraordinary Session of 31 July 2017, which was to be held in response to Qatar's request, the Appellants submitted a working paper that urged the Council to limit any discussion under Article 54 *(n)* of the Chicago Convention to issues related to the safety of international aviation. At the Extraordinary Session, Qatar called for consideration of the aviation restrictions and requested the Appellants to lift their "unjust air blockade". The representative of the United Arab Emirates, speaking also on behalf of Bahrain, Egypt and Saudi Arabia, responded by defending the legality of the aviation restrictions and urging the Council to limit its deliberations to matters related to the safety of international civil aviation, as distinct from action that the Council might take under Article 84.

96. The statements made to the ICAO Council on behalf of the Appellants support Qatar's assertion that the Appellants were unwilling to seek a resolution of the disagreement over the aviation restrictions within the ICAO Council. The minutes of the Extraordinary Session indicate that the President of the Council drew a distinction between measures that the Council might take under Article 54 *(n)* of the Chicago Convention and measures that the Council might take under Article 84 of that Conven-

tion, in line with the approach urged by the Appellants. During the Extraordinary Session, the Council focused on matters other than the aviation restrictions that would form the subject-matter of Qatar's application to the ICAO Council, with particular attention to contingency arrangements to facilitate air traffic over the high seas.

97. The Court considers that, as of the close of the Extraordinary Session, settlement of the disagreement by negotiation within ICAO was not a realistic possibility. The Court also takes into account developments outside of ICAO. Diplomatic relations between Qatar and the Appellants had been severed on 5 June 2017, concurrently with the imposition of the aviation restrictions. Senior officials of the Appellants stated that they would not negotiate with Qatar, recalling the demands that they had addressed to Qatar. There is no indication that the positions of the Parties as to the aviation restrictions changed between the imposition of those restrictions and the filing of Qatar's application before the ICAO Council on 30 October 2017. Under these circumstances, the Court considers that, at the moment of the filing of Qatar's application before the ICAO Council, there was no reasonable probability of a negotiated settlement of the disagreement between the Parties regarding the interpretation and application of the IASTA, whether before the ICAO Council or in another setting.

98. The Court also recalls that Qatar maintains that it faced a situation in which the futility of negotiation was so clear that the negotiation precondition of Article II, Section 2, of the IASTA could be met without requiring Qatar to make a genuine attempt at negotiations. Because the Court has found that Qatar did make a genuine attempt to negotiate, which failed to settle the dispute, it has no need to examine this argument.

99. For the reasons set forth above, the Court considers that the ICAO Council did not err in rejecting the contention advanced by the respondents before the Council that Qatar had failed to fulfil the negotiation precondition of Article II, Section 2, of the IASTA prior to filing its application before the ICAO Council.

2. Whether the ICAO Council erred by not declaring Qatar's application inadmissible on the basis of Article 2, subparagraph (g)*, of the ICAO Rules for the Settlement of Differences*

100. The Appellants maintain that Qatar did not comply with Article 2, subparagraph *(g)*, of the ICAO Rules for the Settlement of Differences, which provides that an application and memorial filed pursuant to Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA) must include "[a] statement that negotiations to settle the disagreement had taken place between the parties but were not successful". According to the Appellants, this is a procedural requirement that is not merely one of form. In view of the negotiation

precondition in Article II, Section 2, of the IASTA, Article 2, subparagraph *(g)*, must be understood as requiring an appropriately substantiated statement "that a genuine attempt to negotiate has in fact been made".

101. The Appellants maintain that the application and memorial that Qatar submitted to the ICAO Council indicated that no negotiations had taken place or were even attempted and thus did not satisfy the requirement of Article 2, subparagraph *(g)*. As a result, the Appellants contend that the ICAO Council "erred . . . in not declaring Qatar's ICAO Application inadmissible".

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102. Qatar argues that the Appellants misconstrue the nature of the Article 2, subparagraph *(g)*, requirement, which provides simply that the applicant before the ICAO Council "shall file an application to which shall be attached a memorial containing . . . [a] statement that negotiations to settle the disagreement had taken place but were not successful". Qatar submits that Article 2, subparagraph *(g)*, does not require an applicant to substantiate its statement that negotiations had taken place but were not successful. Qatar maintains that Article 2, subparagraph *(g)*, contains only a requirement of form.

103. Qatar considers that it fulfilled the Article 2, subparagraph *(g)*, requirement because the memorial that it submitted to the ICAO Council stated that the respondents before the Council "did not permit any opportunity to negotiate the aviation aspects of their hostile actions".

* *

104. Article 2 of the ICAO Rules for the Settlement of Differences sets out the basic information that is to be contained in a memorial attached to an application filed pursuant to Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA), in order to facilitate the ICAO Council's consideration of such applications. By requiring a statement regarding negotiations, subparagraph *(g)* of Article 2 takes cognizance of the negotiation precondition contained in Article II, Section 2, of the IASTA.

105. Qatar's application and memorial before the ICAO Council contain a section entitled "A statement of attempted negotiations", in which Qatar states that the respondents before the ICAO Council "did not permit any opportunity to negotiate" regarding the aviation restrictions. The Secretary-General confirmed that she had verified that Qatar's application "compl[ied] in form with the requirements of Article 2 of the . . . Rules [for the Settlement of Differences]" when forwarding the document to the respondents before the ICAO Council. The question of substance,

that is to say whether Qatar had met the negotiation precondition, was addressed by the ICAO Council in the proceedings on preliminary objections, pursuant to Article 5 of the ICAO Rules for the Settlement of Differences.

106. The Court sees no reason to conclude that the ICAO Council erred by not declaring Qatar's application before the ICAO Council to be inadmissible by reason of a failure to comply with Article 2, subparagraph *(g)*, of the ICAO Rules for the Settlement of Differences.

*

107. Having found first, that the ICAO Council did not err in rejecting the contention that the Council lacked jurisdiction because Qatar had not met the negotiation precondition contained in Article II, Section 2, of the IASTA and, secondly, that the ICAO Council did not err in rejecting the assertion that Qatar's application before the ICAO Council was inadmissible for failing to comply with Article 2, subparagraph *(g)*, of the ICAO Rules for the Settlement of Differences, the Court concludes that the ICAO Council did not err when it rejected the second preliminary objection raised by the respondents before the Council.

108. For the reasons set forth above, the Court cannot uphold the third ground of appeal.

C. The First Ground of Appeal: Alleged Manifest Lack of Due Process in the Procedure before the ICAO Council

109. The Appellants argue that irregularities in the procedures that the ICAO Council followed in reaching the Decision prejudiced in a fundamental way the requirements of a just procedure. They contend that those procedures were manifestly flawed and that this constituted a grave violation of fundamental principles of due process and of the ICAO Council's own rules. Hence, the Appellants call upon the Court to exercise its supervisory authority and to hold the Decision of the ICAO Council to be null and void *ab initio*.

110. The Appellants allege a series of procedural violations, which are set out below. They maintain that the ICAO Council carries out a "judicial function" when it is deciding a disagreement pursuant to Article II, Section 2, of the IASTA.

111. The Appellants complain that the Decision does not state the reasons on which it was based. They consider it "[a] fundamental requirement of due process . . . that judicial bodies give the necessary reasons in support of their decisions".

112. In addition, the Appellants criticize the absence of deliberations prior to the Decision. In their view, the holding of deliberations after hearing the parties "is essential for judicial bodies to function in a collegial manner".

113. The Appellants criticize the Council's decision to vote on their preliminary objections by secret ballot, despite their request for a roll call vote with open voting.

114. The Appellants argue that the ICAO Council violated the principle of equality of the parties and the right to be heard because, as respondents before the ICAO Council, they were awarded "[p]atently insufficient time . . . to present their case" and were collectively given the same length of time to do so as was given to Qatar individually.

115. The Appellants maintain that the ICAO Council incorrectly required 19 votes (out of 36 ICAO Council Members) to uphold their preliminary objections. They submit that only a simple majority of 17 votes (out of 33 ICAO Council Members entitled to participate in the vote) was required under Article 52 of the Chicago Convention, read together with Articles 53 and 84 of the Chicago Convention and Article 15, paragraph 5, of the ICAO Rules for the Settlement of Differences.

116. Finally, the Appellants note that while they presented two preliminary objections to the Council, the Decision refers to a single "preliminary objection". They assert that the decision of the President of the Council "to put to a vote a question relating to 'a preliminary objection' (singular) was neither introduced nor seconded by members of the Council", in violation of Rules 40 and 45 of the Rules of Procedure for the Council.

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117. According to Qatar, the Court's supervisory authority over decisions by the ICAO Council does not extend to procedural questions. Recalling paragraph 45 of the Judgment of the Court in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)* (*I.C.J. Reports 1972*, pp. 69-70), Qatar asserts that the Court need not rule on the Appellants' procedural complaints because the Decision of the ICAO Council was "objectively correct". It further maintains that there were no irregularities in the way the Council conducted itself and that, in any event, none of the procedures about which the Appellants complain prejudiced in any fundamental way the requirements of a just procedure.

118. With respect to the specific irregularities alleged by the Appellants, Qatar considers the absence of open deliberations on the issues in dispute and the lack of reasoning in the Decision to be "natural consequences of the Council's decision to vote by secret ballot". Qatar adds that voting by secret ballot is expressly permitted under Rule 50 of the Rules of Procedure for the Council. As to the absence of reasons in the Decision, Qatar also emphasizes that "the fact that the . . . Council may perform a judicial function does not turn it into a judicial organ *stricto sensu*, much less into [the Court]".

119. Moreover, Qatar argues that "open deliberations are . . . *not* essential for the [ICAO] Council to function in a collegial manner" and that the ICAO Council's approach was consistent with its recent practice.

120. Qatar emphasizes that the Council's procedures conformed with the principle of the equality of the parties and the right to be heard. The respondents before the ICAO Council "acted jointly in the proceedings before the Council" and "the legal issues in dispute are identical as to all" of them. Qatar contends that the respondents before the ICAO Council had ample opportunity to present their case before the Council.

121. Based on Articles 52, 53 and 66 *(b)* of the Chicago Convention and previous practice of the ICAO Council, Qatar argues that the ICAO Council required the correct voting majority to decide on the preliminary objections. It further argues that even if the ICAO Council had required the majority put forward by the Appellants in this appeal, this would not have made a practical difference in this case because the preliminary objection would have failed under either voting majority.

122. Finally, Qatar contests the Appellants' claim that the ICAO Council took its Decision on the incorrect premise that they, as respondents before the Council, had raised a single preliminary objection to its jurisdiction. Qatar maintains that the minutes of the session at which the ICAO Council voted not to accept the preliminary objections reveal that the ICAO Council was aware that the respondents before the Council had provided "two justifications" for their challenge to the Council's jurisdiction, since the original motion made by one ICAO Council representative and seconded by another to vote on two preliminary objections was never changed or modified.

* *

123. The Court recalls that, in its Judgment in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)* (*I.C.J. Reports 1972*, pp. 69-70, para. 45), it concluded that, in the proceedings at issue, the ICAO Council had reached the correct decision as to its jurisdiction, which is an objective question of law. The Court also observed that the procedural irregularities alleged by the Appellant did not prejudice in any fundamental way the requirements of a just procedure. The Court had no need to examine whether a decision of the ICAO Council that was legally correct should nonetheless be annulled because of procedural irregularities.

124. In the present case, the Court has rejected the Appellants' second and third grounds of appeal against the Decision of the ICAO Council. The Court considers that the issues posed by the preliminary objections that were presented to the Council in this case are objective questions of law. The Court also considers that the procedures followed by the Coun-

cil did not prejudice in any fundamental way the requirements of a just procedure.

125. For the reasons set forth above, the first ground of appeal cannot be upheld.

* *

126. Recalling the Court's previous observation that the Chicago Convention and the IASTA give the Court "a certain measure of supervision" over decisions of the ICAO Council (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 60, para. 26), the Court emphasizes that it will be best positioned to act on any future appeal if the decision of the ICAO Council contains the reasons of law and fact that led to the ICAO Council's conclusions.

* * *

127. For these reasons,

THE COURT,

(1) Unanimously,

Rejects the appeal brought by the Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates on 4 July 2018 from the Decision of the Council of the International Civil Aviation Organization, dated 29 June 2018;

(2) By fifteen votes to one,

Holds that the Council of the International Civil Aviation Organization has jurisdiction to entertain the application submitted to it by the Government of the State of Qatar on 30 October 2017 and that the said application is admissible.

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Judge* ad hoc Berman.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fourteenth day of July two thousand and twenty, in five copies, one of which will be placed in the archives of the Court and the others transmitted to the Governments of the King-

dom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates, and to the Government of the State of Qatar, respectively.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe GAUTIER,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge GEVORGIAN appends a declaration to the Judgment of the Court; Judge *ad hoc* BERMAN appends a separate opinion to the Judgment of the Court.

(Initialled) A.A.Y.
(Initialled) Ph.G.