

**INTERNATIONAL AIR LAW MOOT COURT COMPETITION 2022**

**CASE CONCERNING NATIONALITY OF AIRLINES**

**STATE OF ATLANTIS**

**V. STATE OF MIDGARD**

**MEMORIAL SUBMITTED ON BEHALF OF**

**THE STATE OF ATLANTIS**

**TEAM NUMBER 10**

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**LIST OF ABBREVIATIONS**

<i>ASA</i>	Air Services Agreement between the Government of the State of Atlantis and the Government of the State of Midgard
<i>Chicago Convention</i>	Convention on International Civil Aviation, signed at Chicago on 7 December 1944
<i>CEO</i>	Chief Executive Officer
<i>CJEU</i>	Court of Justice of the European Union
<i>Compromis</i>	Statement of Agreed Facts
<i>EASA</i>	European Aviation Safety Agency
<i>FATF</i>	Financial Action Task Force
<i>IATA</i>	International Air Transport Association
<i>ICAO</i>	International Civil Aviation Organization
<i>ICAO Doc</i>	International Civil Aviation Organization Document
<i>ICJ</i>	International Court of Justice
<i>ILC</i>	International Law Commission
<i>Para(s)</i>	Paragraph(s)
<i>UN Charter</i>	United Nations Charter, signed at San Francisco on 26 June 1945

*UN Doc*

United Nations Document

*UNTS*

United Nations Treaty Series

*VCLT*

Convention on the Law of Treaties, signed at Vienna  
on 23 May 1969

## LIST OF SOURCES

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## STATEMENT OF RELEVANT FACTS

### (1) Atlantis and Midgard

The parties to the present dispute are two States – the State of Atlantis (*'Atlantis'*, or *'Applicant'*) and the State of Midgard (*'Midgard'*, or *'Respondent'*). The capital of Atlantis is Undersea City, and the capital of Midgard is Middleville.

### (2) Air Services Agreement

Air services between Atlantis and Midgard are governed by a bilateral Air Services Agreement (*'ASA'*) negotiated and signed on 20 January 2014 and entered into force on 1 March 2014.

In accordance with the ASA, Atlantis and Midgard have each designated one airline to operate services between the two States, each operating one daily return frequency between the two capitals:

- a. Atlantis Airlines for Atlantis; and
- b. Odin Airways for Midgard.

At the time the ASA entered into force, Atlantis Airlines was 100% owned by Atlantis, and Odin Airways was 100% owned by Midgard.

### (3) Sale of Shares in Atlantis Airlines

In March 2020, Atlantis Airlines encountered a severe drop in its passenger numbers due to a global pandemic. This put Atlantis Airlines in serious financial difficulty.

Atlantis did not have the funds available to provide emergency financing to Atlantis Airlines, and it, therefore, sought to sell a proportion of its shares in the airline in return for investing the capital needed to prevent the airline's collapse.

Atlantis approached the neighbouring country of Dorado, which is far wealthier than Atlantis due to its extensive gold reserves. Atlantis and Dorado had a strong relationship, with

Dorado investing extensively in Atlantis' infrastructure. In return, Atlantis provided very secure storage facilities for much of Dorado's gold supply.

The share capital of Atlantis Airlines consists of 100,000 Class A "ordinary" shares and 50,000 Class B shares. Atlantis sold shares in Atlantis Airlines as follows:

- a. 49,000 Class A shares to Golden Air, an airline which is 100% owned by the State of Dorado, for 49 million Atlantis Dollars (A\$);
- b. 50,000 Class B shares to Golden Air for A\$50m; and
- c. 21,000 Class A shares to Ms Lemuria, a wealthy individual who is a national of Atlantis but is resident in Dorado, for A\$21m.

Ms Lemuria is very experienced in the aviation industry and previously sat on the board of Golden Air as a non-executive director.

Herewith, the State of Atlantis retained 30,000 Class A shares in Atlantis Airlines.

The State of Atlantis, Golden Air and Ms Lemuria entered into a shareholders agreement as part of the transaction (*'Shareholders Agreement'*). Atlantis Airlines and Golden Air also entered into a co-operation agreement (*'Co-operation Agreement'*). The transaction was completed on 1 June 2020.

#### **(4) Midgard and Dorado**

Due to ongoing political tensions, there is no air services agreement currently in place between Midgard and Dorado.

One of Dorado's most prized statues, a solid gold eagle, is on display in the Midgard National Museum. Despite repeated demands by Dorado to return it, Midgard refused to do so, claiming that it had been legitimately traded for a pair of marble ravens over 200 years ago.

Midgard was very concerned when it heard about the investments in Atlantis Airlines. In particular, Midgard was worried about Dorado's increased influence in the region, and that Golden Air would stand to profit from flights on the Undersea City – Middleville route.

The Midgard government was also concerned that, with significant investment by Golden Air, Atlantis Airlines would be able to offer a far superior 8 passenger experience on the route than Odin Airways, meaning that Odin Airways was likely to lose market share in the longer term once demand recovered.

#### **(5) Suspension of Atlantis Airlines' Rights**

On 1 July 2020, the Civil Aviation Authority of Midgard ('CAAM') launched an investigation into the arrangements at Atlantis Airlines, demanding that Atlantis provide immediate evidence that Atlantis Airlines continued to comply with the nationality requirements to be designated under the ASA.

On 3 July 2020, Atlantis Airlines sent the relevant transaction documents to the CAAM.

On 20 July 2020, Midgard wrote a letter to Atlantis stating that the CAAM had concluded that Atlantis Airlines no longer meets the nationality requirements under the ASA and demanding that the transaction be reversed within 10 days, otherwise Midgard would take action under the ASA.

Atlantis did not do so, and on 1 August 2020 Midgard suspended Atlantis Airlines' right to sell tickets from its Middleville office and through its [www.atlantisairlines.mi](http://www.atlantisairlines.mi) website, pending the resolution of consultations between Midgard and Atlantis.

Atlantis objected to this and accused Midgard of breaching the ASA.

#### **(6) Consultations**

On 3 August 2020 Atlantis entered into bilateral consultations with Midgard over their conflicting interpretations of the ASA, with particular regard to Midgard's interpretation of the nationality requirements of Atlantis Airlines. The consultations continued for four weeks, throughout which time Atlantis Airlines was unable to sell tickets from its Middleville office or its [www.atlantisairlines.mi](http://www.atlantisairlines.mi) website.

On 31 August 2020, Midgard announced that it was no longer willing to continue with the bilateral consultations, as no progress had been made after multiple rounds of talks. Later that day, Midgard revoked Atlantis Airlines' operational authorization, citing Article 4(1) of the ASA.

In response, on 1 September 2020, Atlantis revoked Odin Airways' permission to operate to Atlantis, ending all nonstop air services between the two countries.

### **(7) Dispute resolution**

Not having reached an amicable solution by means of consultations, on 2 September 2020, Atlantis, with the consent of Midgard, started preparations to bring the dispute before the International Court of Justice by way of this Application.

### **(8) Applicable international agreements**

In addition to the ASA, Both Applicant and Respondent are Parties to the following international agreements:

- 1) The Convention on International Civil Aviation, signed at Chicago on 7 December 1944,<sup>1</sup> including all amendments and annexes thereto;
- 2) The United Nations Charter, signed at San Francisco on 26 June 1945;<sup>2</sup> and
- 3) The Convention on the Law of Treaties, signed at Vienna on 23 May 1969.<sup>3</sup>

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<sup>1</sup> Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (*'Chicago Convention'*).

<sup>2</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (*'UN Charter'*).

<sup>3</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (*'VCLT'*).

## ISSUES

The State of Atlantis will argue the following contentions:

- a. Midgard did not have the right to suspend Atlantis Airlines' sales of tickets under Article 6 of the ASA, and in particular Midgard did not follow the required procedure for consultation;
- b. Midgard did not have the right to revoke Atlantis Airlines' operational authorization under Article 4 of the ASA, given that:
  - (i) Atlantis Airlines is majority owned and effectively controlled by Atlantis and its nationals; and/or
  - (ii) Atlantis Airlines has its principal place of business in Atlantis, and is not majority owned or effectively controlled by any third country or its nationals;
- c. Midgard's actions in suspending Atlantis Airlines' sales of tickets and revoking the operating authority of Atlantis Airlines were therefore in violation of the ASA;
- d. Atlantis' retaliatory actions against Odin Airways are appropriate, proportionate and lawful.

## SUMMARY OF ARGUMENTS

In respect of the first claim Applicant maintains that by suspending Atlantis Airlines' sales of tickets Midgard violated [1] Article 6 of the ASA – as long as it restricted Atlantis Airlines' freedom to engage in commercial activities in Midgard, [2] Article 7 of the ASA – as long as it created an unjustified advantage for Odin Airways, while creating an additional barrier to trade for Atlantis Airlines, and [3] Article 15 of the ASA – as long as it did not follow the prescribed consultations procedure.

As regards the second claim, Applicant contends that by revoking the operating authorization of Atlantis Airlines Respondent acted in violation of Article 4 of the ASA as Atlantis Airlines has at all times met all nationality conditions laid down in Article 4(1)(a) of the ASA, namely: [1] it is majority owned and effectively controlled by Atlantis and its nationals, and [2] it has its principal place of business in Atlantis, while not being majority owned or effectively controlled by any third country or its nationals.

In respect of the third claim it is submitted that [1] the suspension Atlantis Airlines' sales of tickets and revocation of its operation authorization were in violation of Articles 2, 4, 6, 7 and 15 of the ASA. [2] The said actions are attributable to Midgard, as under customary international law it bears international responsibility for the actions of both its *de jure* and *de facto* state organs.

Lastly, in response to Respondent's counterclaim it is submitted that [1] the revocation by Atlantis of Odin Airways' operational authorization was an appropriate, proportionate and lawful countermeasure to the wrongful conduct of Midgard. [2] Alternatively, Applicant's actions shall be regarded as a lawful suspension of the ASA, as Respondent committed a material breach thereof.

## JURISDICTION OF THE COURT

Pursuant to Article 40(1) of the Statute of the International Court of Justice (*the Court*), the State of Atlantis (*Atlantis*, or *Applicant*) and the State of Midgard (*Midgard*, or *Respondent*) submit the differences between them concerning the interpretation of the nationality of airlines (*Compromis*) signed at The Hague, The Netherlands, on 1 February 2021, for the adjudication by this Court. Both Parties accepted the jurisdiction of this Court under Article 36(1) of the Statute. The jurisdiction of the Court is also based on Article 15 of the bilateral Air Services Agreement (*ASA*) negotiated and signed between Applicant and Respondent on 20 January 2014 and entered into force on 1 March 2014.

The Parties request the Court to determine in accordance with applicable rules of international law as specified in Article 38(1) of the Statute of the Court the legal claims of the State of Atlantis against the State of Midgard, as well as the counter-claims of the State of Midgard against the State of Atlantis.

The Parties do not contest the existence of a “*dispute*” between them with respect to each of the filed claims and counterclaims, and that the counterclaims are “*directly connected with the subject matter*” of at least one of the claims within the meaning of Article 80 of the Rules of the Court.

The Parties have undertaken to accept this Court’s decision as final and binding upon them and commit to implement it in its entirety and in good faith.



## ARGUMENTS

### I. STANDING

It is firstly submitted that Applicant has legal standing to act not only on behalf of itself as a State Party to the ASA to whom the obligations are owed, but also on behalf of Atlantis Airlines – based on the principle of diplomatic protection.

Bringing of claims by States on behalf of its nationals or domiciled companies based on bilateral treaties before the Court is a common practice.<sup>4</sup> More specifically, by means of diplomatic protection, a State may invoke responsibility of another State for an injury caused by an internationally wrongful act of the latter to a national of the former.<sup>5</sup>

As held by the Court in *Diallo*, the concerned rule reflects customary international law.<sup>6</sup> Diplomatic protection may take different forms including judicial proceedings.<sup>7</sup>

As will be demonstrated below, Midgard violated the ASA and the Chicago Convention, first by suspending Atlantis Airlines' sales of tickets, and then by revoking Atlantis Airlines' operational authorization. These actions affected the rights and interests of both Atlantis and Atlantis Airlines.

Accordingly, Applicant has legal standing to invoke responsibility of Respondent.

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<sup>4</sup> *E.g.*, *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15; *Interhandel*, Judgment, I.C.J. Reports 1959, p. 6; *Ambatielos case (merits: obligation to arbitrate)*, Judgment, Merits, 1953: I.C.J. Reports 1953, p. 10.

<sup>5</sup> ILC, *Draft Articles on Diplomatic Protection with commentaries*, 2006, Article 1

<sup>6</sup> *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)*, (Preliminary Objections, Judgment) 2007 I.C.J. Reports 582, paras 582, 599.

<sup>7</sup> *Kaunda and Others v President of the Republic of South Africa*, Constitutional court of South Africa, CCT 23/04, 2004, paras 26-27; *Van Zyl and Others v Government of Republic of South Africa and Others*, Supreme Court of Appeal of South Africa, (170/06) ZASCA 109, 2007, para 1.

## II. MERITS

### A. MIDGARD DID NOT HAVE THE RIGHT TO SUSPEND ATLANTIS AIRLINES' SALES OF TICKETS UNDER ARTICLE 6 OF THE ASA, AND IN PARTICULAR MIDGARD DID NOT FOLLOW THE REQUIRED PROCEDURE FOR CONSULTATION

Applicant hereby submits that by suspending Atlantis Airlines' sales of tickets Midgard violated [1] Article 6 of the ASA – as long as it restricted Atlantis Airlines' freedom to engage in commercial activities in Midgard, [2] Article 7 of the ASA – as long as it created an unjustified advantage for Odin Airways, while creating an additional barrier to trade for Atlantis Airlines, and [3] Article 15 of the ASA – as long as it did not follow the prescribed consultations procedure.

#### 1. By suspending Atlantis Airlines' sales of tickets Midgard violated Article 6 of the ASA

Article 6(1)(a) of the ASA prescribes that the Designated Airlines of each Party shall be allowed to establish in the Territory of the other Contracting Party offices for the promotion and sale of air transportation and ancillary or supplemental services, *“including the right to sell and to issue any ticket and/or airwaybills of any other carrier”*. Under Article 6(1)(b), the Designated Airline shall be entitled to engage directly or through its agents in the sale of air transportation and ancillary or supplemental services. Lastly, Article 6(1)(c) of the ASA further prescribes that such Designated Airlines shall be *“allowed to sell such transportation and ancillary or supplemental services”*, and any person shall be free to purchase such transportation or services.

Atlantis Airlines is the only Designated Airline of Atlantis under the ASA.<sup>8</sup>

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<sup>8</sup> *Compromis*, para 3.

Nevertheless, on 1 August 2020, Midgard suspended Atlantis Airlines' right to sell tickets from its Middleville office and through its [www.atlantisairlines.mi](http://www.atlantisairlines.mi) website<sup>9</sup> – which the only official direct sales channels of the airline located in Midgard.<sup>10</sup> This resulted in substantial financial losses for Atlantis Airlines<sup>11</sup> and was in direct violation of the above-mentioned provisions of Article 6 of the ASA.

In this regard it should be stressed that Respondent cannot refer to the alleged non-compliance with the nationality requirement as the ground for annulling Atlantis Airlines privileges under the said Article 6 of the ASA (as argued by the CAAM),<sup>12</sup> and specifically to the presence of a non-Designated Airline – i.e., Golden Air – in the list of shareholders of Atlantis Airlines, or the arrangement under the Co-operation Agreement allowing Atlantis Airlines to offer DoradoPoints frequent flyer programme or use the aircraft leased from Golden Air.

Firstly, unlike with the suspension of operating authorizations under Article 4 of the ASA, the right to carry out commercial activities under Article 6 of the ASA is not subject to the nationality criterion, or any similar limitations, and no possibility to revoke the rights granted therein is provided as such.

Secondly, it is expressly stated in Article 6(2) of the ASA that each Designated Airline may enter into commercial and/or cooperative marketing arrangements with any other Airline “including an Airline of a third country”. Accordingly, a Designated Airline is free in its commercial arrangements and the scope of products sold.

Thus, the only requirement applicable to Designated Airlines to which the rights granted

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<sup>9</sup> *Compromis*, para 15.

<sup>10</sup> *Clarifications*, para 13.

<sup>11</sup> *Clarifications*, para 5.

<sup>12</sup> *Compromis*, para 15.

under Article 6 are subject is compliance with the laws and regulations of the other Contracting Party (Article 6(3) of the ASA).

There is no indication whatsoever that Atlantis Airlines had at any moment breached the laws and regulations of Midgard. It follows that there was simply no legal ground whatsoever for Midgard to suspend Atlantis Airlines' right to freely engage in economic activities.

Therefore, by suspending Atlantis Airlines' right to sell tickets, Respondent breached Article 6 of the ASA.

## **2. By the same actions, Midgard violated Article 7 of the ASA**

The Chicago Convention proclaims establishment of international air transport services on the basis of equal opportunities.<sup>13</sup> Prohibition of discrimination is prescribed in a number of its substantive provisions – for example, Article 9(a), Article 9(b), Article 44(g), etc.

In the same spirit, Article 7(1) of the ASA expressly provides that each Contracting Party shall allow a fair and equal opportunity for each Designated Airline to compete in providing the international air transportation governed by the ASA. Article 7(2) of the ASA further proclaims that each Contracting Party shall take all appropriate action within its jurisdiction to eliminate all forms of discrimination or unfair competitive practices adversely affecting the competitive position of a Designated Airline of the other Contracting Party.

The main reason behind suspension of Atlantis Airlines' right to sell tickets was its concern that Atlantis Airlines would be able to offer a far superior passenger experience on the route than Odin Airways, which would have negative consequences for Odin Airways' market share.<sup>14</sup>

In view of this Respondent simply shut down the two main sales channels for Atlantis

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<sup>13</sup> *Chicago Convention*, preamble, recital 3.

<sup>14</sup> *Compromis*, para 14.

Airlines,<sup>15</sup> thus favouring Odin Airways and providing it an unjustified advantage on the market, creating a barrier to trade for Atlantis Airlines. It is evident that for both convenience and economic considerations consumers are more likely to buy tickets from the easily accessible Odin Airways, then to resort to travel agents who charge a commission. By doing so, it excessively restricted the ability of Atlantis Airline to effectively compete on the market and provide air services to Midgard citizens or visitors.

It follows that Midgard also violated Article 7 of the ASA as it distorted competition on the air services market.

**3. Prior to suspending Atlantis Airlines' right to sale tickets Midgard did not follow the required procedure for consultation prescribed in Article 15 of the ASA**

Articles 6 and 7 of the ASA do not prescribe a specific procedure for resolving differences between the Parties, however this is primarily due to the fact that the said provisions are clear and not subject to restriction. A general rule, however, is contained in Article 15(1) of the ASA, under which, should any disagreement arise between the Parties relating to the interpretation and application of the Agreement, the Parties shall, in the first place, endeavor to settle their dispute by bilateral consultations. Even though the said provision does not prescribe a specific minimum term for such consultations, it can be deduced from the other provisions of the ASA.

This is due to the customary rule<sup>16</sup> of treaty interpretation codified in Articles 31 and 32 of the VCLT. Namely, Article 31(1) of the VCLT provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and

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<sup>15</sup> *Compromis*, para 14; *Clarifications*, para 13.

<sup>16</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6, at pp. 21-22, para 41; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at pp. 109-110, para 160; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, at para 47.

in the light of its object and purpose. According to Article 31(2) of the VCLT, the context for the purpose of the interpretation of a treaty shall comprise, first and foremost, the entire text of the treaty including its preamble and annexes. Therefore, other provisions of the ASA are of relevance.

The ASA refers to the issue of consultations in Article 4(2) (in the context of revocation or suspension of operating authorizations), Article 12 (in the context of safety standards), Article 13 (in the context of aviation security) and Article 14(2) (in the context of negotiating amendments to the ASA). In the three out of the four instances, the ASA prescribes a minimum period of sixty days for consultations from the date of the receipt of the request, unless otherwise agreed. It is also evident that the most relevant provision in this context is Article 4(2) which – along with Articles 6 and 7 – relates primarily to the rights of the Designated Airlines.

The consultations were launched on 3 August 2020 and unilaterally disrupted by Midgard within 4 weeks – three times less than the prescribed minimum.<sup>17</sup> Following this Midgard immediately revoked Atlantis Airlines' operational authorization – this time in violation of the mandatory procedure of the minimum of 60-day consultations prescribed under Article 4(2) of the ASA. Such rushed behaviour in both instances is clearly not in compliance with the spirit of close cooperation prescribed under the ASA. Furthermore, in respect of suspension of the right to sell tickets, no deferral was provided at all – the suspension was enforced on 1 August 2020, whereas the consultations were launched only after.<sup>18</sup>

It follows that, by suspending Atlantis Airlines' sales of tickets without resorting first to the consultations procedure, Respondent violated Article 15 of the ASA.

Therefore, the suspension of Atlantis Airlines' sales of tickets by Midgard was carried

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<sup>17</sup> *Compromis*, paras 16-17.

<sup>18</sup> *Compromis*, paras 15-16.

out in violation of Articles 2, 7 and 15 of the ASA.

**B. MIDGARD DID NOT HAVE THE RIGHT TO REVOKE ATLANTIS AIRLINES' OPERATIONAL AUTHORIZATION UNDER ARTICLE 4 OF THE ASA**

Pursuant to Article 17 of the Chicago Convention, the nationality of aircraft is governed by the state of its registration. Contrary to what is argued by Respondent, the nationality of Atlantis Airlines never changed, as will be demonstrated below.

Under Article 4(1)(a) of the ASA, a Contracting Party has the right to revoke the operating authorization of an Airline designated by the other Contracting Party if, inter alia, such airline is not able to prove upon request that either (i) the majority ownership and effective control of such airline are vested in the designating State, its nationals, or both; **or** (ii) such airline has its principle place of business on the territory of the designating State, and is not majority owned or effectively controlled by any third country, its nationals, or both, where such third country has no existing air services agreements with the Contracting Party seeking to revoke the operating authorization.

An airline in question is only required to prove compliance with either of the two requirements,<sup>19</sup> however in the case of Atlantis Airlines both requirements are met.

Namely, Atlantis Airlines [1] is majority owned and effectively controlled by Atlantis and its nationals, **and** [2] has its principal place of business in Atlantis, while not being majority owned or effectively controlled by any third country or its nationals.

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<sup>19</sup> *Clarifications*, para 15.

**1. Atlantis Airlines is majority owned and effectively controlled by Atlantis and its nationals**

According to a study by IATA the substantial ownership is ranging from more than 50% to more than 76% of shares.<sup>20</sup> Thus, the minimum ownership should be at least more than 50% to be substantial and major.<sup>21</sup> World practice demonstrates that for national air carrier designation airlines have to be substantially owned and effectively controlled by a national legal entity. With regard to ownership, the maximum foreign equity participation is capped to 49% and the domestic share should be a single majority.<sup>22</sup>

The share capital of Atlantis Airlines consists of 150 000 shares – 100 000 Class A “ordinary” shares and 50,000 Class B shares.<sup>23</sup> Under the Shareholders Agreement, Class A shares provide the right to vote: 30% of them is held by the State of Atlantis, and 21% by Ms Lemuria, an Atlantis citizen.<sup>24</sup>

Thus, 51% of voting shares belong to Atlantis and its nationals, which complies with Article 4 of the Atlantis-Midgard Air Services Agreement.<sup>25</sup> This majority is, in fact, substantial

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<sup>20</sup> Middeldorp, G., *Substantial Ownership and Effective Control of International Airlines: The Netherlands*, at p. 273, available at <http://www.ejcl.org/64/art64-16.html>.

<sup>21</sup> Van Fenema, H.P. *Substantial ownership and effective control as airpolitical criteria*, in Masson-Zwaan, T.L., and Mendes de Leon, P.M.J. (eds.), *Air and space law: de lege ferenda*, The Hague: Kluwer, 1992, pp. 27-41, at p. 28.

<sup>22</sup> ICAO Working Paper, Worldwide Air Transport Conference, Sixth Meeting, 18 to 22 March 2013, ATConf/6-WP/84 4/3/13.

<sup>23</sup> *Compromis*, para 9.

<sup>24</sup> *Compromis*, para 9-10.

<sup>25</sup> *Compromis*, Appendix 3: the Atlantis-Midgard Air Services Agreement, Article 4.



ownership, which according to the ICAO Template Air Services Agreements is more than 50% equity ownership.<sup>26</sup>

Furthermore, under the Shareholders Agreement, the most important issues such as making amendments to Atlantis Airlines' articles of incorporation (including changes of legal form and corporate purposes), increasing or decreasing of Atlantis Airlines' share capital, any liquidation, merger or split-up of Atlantis Airlines shall be decided by a majority of 75% of votes cast.<sup>27</sup> A simple majority of votes is sufficient only for a decision on less important on mostly technical issues.<sup>28</sup>

Moreover, Atlantis is entitled to require that Golden Air transfers all of its shares to the State of Atlantis, where its general interests are substantially prejudiced and no remedy can be found within a period of six months.<sup>29</sup>

Thus, Atlantis has the majority of votes on the most important corporate and commercial issues and can boycott issues that directly or indirectly contradict the ASA.

The management of Atlantis Airlines consists of a board of directors comprised of twelve members, including the chairperson, and it takes all decisions by a simple majority.<sup>30</sup> Six board members are appointed by Atlantis and are its citizens.<sup>31</sup> Ms Lemuria – an Atlantis

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<sup>26</sup> ICAO Doc 9587, *Policy and Guidance Material on the Economic Regulation of International Air Transport*, 3<sup>rd</sup> ed., ICAO 2008, Appendix 5, p. 9.

<sup>27</sup> *Compromis*, Appendix 1: Extract from Shareholders Agreement, Article 2(1).

<sup>28</sup> *Compromis*, Appendix 1: Extract from Shareholders Agreement, Article 2(2).

<sup>29</sup> *Compromis*, Appendix 1: Extract from Shareholders Agreement, Article 1(3).

<sup>30</sup> *Compromis*, Appendix 1: Extract from Shareholders Agreement, Article 3(3).

<sup>31</sup> *Compromis*, Appendix 1: Extract from Shareholders Agreement, Article 3(4).

citizen – is eligible to be a board member and act as its chairman.<sup>32</sup> In addition, she was appointed to the position of the Chief Executive Officer.<sup>33</sup>

The term “effective control” can be described as the power, direct or indirect, actual or legal, to set policy and direct or manage the execution thereof.<sup>34</sup> The FATF defines the control under the corporation as the ability of taking relevant decisions within the legal person and impose those resolutions, which can be acquired by several means (for instance, by owning a controlling a block of shares).<sup>35</sup>

Thus, the State of Atlantis owned more voting shares, as well as more influence on the board of directors. The role of a CEO is, essentially, to provide an independent view to the board of directors on matters of strategy, performance and remuneration of executive directors.<sup>36</sup>

It follows that Atlantis Airlines is majority owned and effectively controlled by the State of Atlantis and its nationals.

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<sup>32</sup> *Compromis*, Appendix 1: Extract from Shareholders Agreement, Article 3(5).

<sup>33</sup> *Compromis*, Appendix 1: Extract from Shareholders Agreement, Article 4(1).

<sup>34</sup> Van Fenema, H.P. *Substantial ownership and effective control as airpolitical criteria*, in Masson-Zwaan, T.L., and Mendes de Leon, P.M.J. (eds.), *Air and space law: de lege ferenda*, The Hague: Kluwer, 1992, pp. 27-41, at p. 29.

<sup>35</sup> FATF Guidance on Transparency and Beneficial Ownership, October 2014, available at <https://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>.

<sup>36</sup> Ridley, A., Shepherd, C., *Company Law*, Routledge, 2015, p. 119.

**2. Atlantis Airlines has its principal place of business in Atlantis, and is not majority owned or effectively controlled by any third country or its nationals**

***a. Atlantis Airlines has its principal place of business in Atlantis***

As a general rule, nationality is derived from the fact of incorporation, that is, creation as a legal person, within a given system of domestic law.<sup>37</sup>

The world practice demonstrates that the location of company registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person.<sup>38</sup>

Pursuant to the ICAO comments to Article 3 of the Template Air Services Agreements<sup>39</sup> “*evidence of principal place of business includes such factors as: the airline is established and incorporated in the territory of the designating Party in accordance with relevant national laws and regulations, has a substantial amount of its operations and capital investment in physical facilities in the territory of the designating Party, pays income tax, registers and bases its aircraft there, and employs a significant number of nationals in managerial, technical and operational positions*”.<sup>40</sup>

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<sup>37</sup> Crawford J., *Brownlie's Principles of Public International Law*, Eighth ed., Oxford University Press, 2012, pp. 1029-1031.

<sup>38</sup> E.g. see CJEU case-law: C-264/96 *Imperial Chemical Industries v Colmer* [1998] ECLI:EU:C:1998:370; C-212/97 *Centros* [1999] ECLI:EU:C:1999:126.

<sup>39</sup> ICAO Doc 9587, *Policy and Guidance Material on the Economic Regulation of International Air Transport*, 3<sup>rd</sup> ed., ICAO 2008, Appendix 5.

<sup>40</sup> ICAO Doc 9587, *Policy and Guidance Material on the Economic Regulation of International Air Transport*, 3<sup>rd</sup> ed., ICAO 2008, Appendix 5, p. 11.

It is also a general understanding supported by the EASA that the concept of principal place of business means a permanent and regular place of transacting of general business, and would not include a temporary place of sojourn during ad hoc negotiations.<sup>41</sup>

Atlantis Airlines has at all times been and remains to be incorporated under the laws of Atlantis, and after the transaction it has remained as a distinct legal entity.<sup>42</sup> Moreover, under the Shareholders Agreement, Atlantis Airlines' principal place of business remained the same: its registered office is in Undersea City and is subject to taxation under Atlantis law.<sup>43</sup>

In addition, Atlantis Airlines operational and technical staff has remained to be based at Undersea City airport.<sup>44</sup> The airline's senior management is also based in Undersea City.<sup>45</sup> In addition, board meetings are expected to be partially held there.<sup>46</sup> Atlantis Airlines was also intended to continue flying to Midgard. And only 15% of its scheduled flights using wet leased aircraft from Golden Air. This number of flights is insignificant and does not change the principal place of business.

Thus, the principal place of business of Atlantis Airlines was and remains to be Atlantis.

***b. Atlantis Airlines is not majority owned or effectively controlled by any third country or its nationals***

As already demonstrated above, Atlantis Airlines is majority owned by the State of Atlantis and its nationals.

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<sup>41</sup> Opinion No 05/2006 of the European Aviation Safety Agency for amending Commission Regulation (EC) No 2042/2003, available at <https://www.easa.europa.eu/document-library/opinions/opinion-052006>.

<sup>42</sup> *Compromis*, Appendix 2: Extract from Co-operation Agreement, Article 1(1).

<sup>43</sup> *Compromis*, Appendix 2: Extract from Co-operation Agreement, Article 1(2).

<sup>44</sup> *Compromis*, Appendix 2: Extract from Co-operation Agreement, Article 2(1).

<sup>45</sup> *Compromis*, Appendix 2: Extract from Co-operation Agreement, Article 2(2).

<sup>46</sup> *Compromis*, Appendix 2: Extract from Co-operation Agreement, Article 2(3).

As regards effective control over a private entity, as follows from the Court's judgment in *Nicaragua*, to establish such control the following legal test should be fulfilled: the entity should be completely dependent on the State for its funding, and control must be actually exercised.<sup>47</sup>

Furthermore, in respect of corporate legal entities specifically, structure and management of the entity should also be taken into account.<sup>48</sup> Control includes control in fact, including an ability to exercise substantial influence over the legal entity's management, operation and the selection of members of its board of directors or any other managing body.<sup>49</sup>

The legal test established in *Nicaragua* is clearly not met: Atlantis Airlines is not completely dependent on Dorado or its citizens, and they do not exercise control in fact.

Golden Air (owned by Dorado) owns 49 000 Class A shares,<sup>50</sup> which is a minority of voting shares. Although Golden Air also holds Class B shares,<sup>51</sup> they are not voting shares, and thus do not affect the operations of Atlantis Airlines.

Accordingly, Dorado has no effective control over Atlantis Airlines as has no significant influence on corporate decision-making. Dorado has a minority on the board of directors. General policy and financial matters are decided by a simple majority board of directors.<sup>52</sup> Thus,

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<sup>47</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, (Judgment, Separate Opinion of Judge Donoghue) 2015 I.C.J. Reports 665, para 110.

<sup>48</sup> CJEU: C-188/89 *Foster v. British Gas Plc.* [1991] ICR 84, para 4, *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-U.S.C.T.R 1986, p. 228; Wee, C. *Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility* ( International Commission of Jurists, Danish Section, 2008), pp. 27-28.

<sup>49</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 // Decision on Jurisdiction, para 170.

<sup>50</sup> *Compromis*, para 9.

<sup>51</sup> *Compromis*, para 9.

<sup>52</sup> *Compromis*, Appendix 1: Extract from Shareholders Agreement, Article 3.

the interests of Atlantis were fully represented in the board, while Dorado, being in the minority, cannot influence the decision on important corporate or business issues.

It follows that Atlantis Airlines is not majority owned or effectively controlled by any third country or its nationals.

In view of the above, Respondent had no right to revoke Atlantis Airlines' operational authorization as all conditions under Article 4(1)(a) are met, and no other grounds for revocation are present.

**C. MIDGARD'S ACTIONS IN SUSPENDING ATLANTIS AIRLINES' SALES OF TICKETS AND REVOKING THE OPERATING AUTHORITY OF ATLANTIS AIRLINES WERE THEREFORE IN VIOLATION OF THE ASA**

Under customary international law codified<sup>53</sup> by the ILC in its Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA')<sup>54</sup>, every internationally wrongful act of a State entails the international responsibility of that State.<sup>55</sup> There is an internationally wrongful act – either an action or an omission – where conduct is attributable to the State, and it constitutes a breach of an international obligation of that State.<sup>56</sup>

As already partially demonstrated above, [1] the suspension Atlantis Airlines' sales of

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<sup>53</sup> Crawford, J. *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries*, Cambridge University Press, 2002, pp. ix, 1.

<sup>54</sup> *Articles on the Responsibility of States for Internationally Wrongful Acts*, UN Doc A/RES/56/83 (2002) ('ARSIWA').

<sup>55</sup> ARSIWA, Article 1; *Italy v. France (Preliminary Objections) (The Phosphate in Morocco Case)* (1923) PCIJ Ser. A/B, No. 74, at 28; *Great Britain v. Spain (The Spanish Zone of Morocco Claims)* (1925) 2 RIAA 615, at 641; *Germany v. Poland (Jurisdiction) (The Chorzów Factory Case)* (1927) PCIJ Ser. A, No. 9, at 21.

<sup>56</sup> ARSIWA, Article 2; *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, I.C.J. Reports 1980, p. 3, at 28, paras 63, 67; *United States v. Mexico (The Dickson Car Wheel Company Case)* (1931) RIAA 1, at 668, 678; *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 4, at pp. 22-23.

tickets and revocation of its operation authorization were in violation of several provisions of the ASA. [2] The said actions are attributable to Midgard, as under customary international law it bears international responsibility for the actions of both its *de jure* and *de facto* state organs.

**1. By suspending Atlantis Airlines' sales of tickets and revoking its operating authority Midgard violated Articles 2, 4, 6, 7 and 15 of the ASA**

As already demonstrated above, suspension of Atlantis Airlines' sales of tickets was in violation of Articles 6, 7 and 15 of the ASA.

In the same vein, revocation of the operating authorization of Atlantis Airlines was in violation of Articles 4 and 7 of the ASA, namely: (i) Respondent revoked the airline's operating authorization in absence of any grounds prescribed under Article 4(1) of the ASA, and it failed to comply with the mandatory 60-day consultations procedure under Article 4(2) of the ASA; and (ii) Respondent encouraged and enforced an act of unfair competition, by discriminating Atlantis Airlines and limiting its freedom to compete on the market, as guaranteed under Article 7(1,2) of the ASA.

As regards the violation under Article 2 of the ASA, it should be recalled that the said article provides that each Party shall grant to the other Party the right to conduct international air transportation by the Designated Airlines of the other Party, including the right to fly across its Territory, to make stops in its Territory for non-traffic purposes and for the purposes of taking up and discharging international traffic in passengers, baggage, cargo and mail. The said rights are obtained through the granting of the operating authorizations to the Airline designated by the other Party, as prescribed in Article 3(2) of the ASA.

By revoking the said operating authorization without any legitimate grounds, Respondent thus breached its obligations under Article 2 of the ASA, so long as it failed to provide to Applicant the right for the conduct of air transportation by its Designated Airline.

It follows that Respondent is in breach of Articles 2, 4, 6, 7 and 15 the ASA.

## 2. The said actions are attributable to Midgard

Under customary international law codified in Article 4 of *ARSIWA*, conduct of any State organ shall be considered an act of that State under international law.<sup>57</sup> Under another customary rule codified in Article 5 of *ARSIWA*, an entity that is not a *de jure* organ of the State but is empowered to exercise State's functions should be considered as a *de facto* State organ, and conduct of such entity shall be attributable to the State.<sup>58</sup>

The decisions to discontinue consultations and to revoke Atlantis Airlines' operation authorization were made by the State of Midgard itself<sup>59</sup> – thus the attributability is evident in this instance.

As regards the decisions of the CAAM, it should be noted that the said authority is designated as the Aeronautical Authority of Midgard within the meaning of Article 1(a) of the ASA,<sup>60</sup> and was thus acting within the scope of its authority granted under the ASA, as long as it was “*authorized to perform ... functions ... exercised*” by the Ministry of Transport and Communications of Midgard. Accordingly, the CAAM should be regarded as a *de facto* state organ, as it was exercising elements of the governmental authority and providing state functions prescribed under Article 6 of the Chicago Convention and Articles 3 and 4 of the ASA – namely, the granting, revocation and suspension of operating authorizations to airlines designated by the other Party. Accordingly, this conduct is likewise attributable to Midgard.

Therefore, the wrongful conduct invoked is attributable to Midgard.

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<sup>57</sup> *Claim of the Salvador Commercial Company* (1902) USFR 838, at 837; *Claims of Italian Nationals Resident in Peru* (1901) 15 RIAA 395, at 399.

<sup>58</sup> Dixon, *Textbook on International Law* (6th edition, Oxford University Press, 2007), p. 247; Crawford, *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries* (Cambridge University Press, 2002), p. 98.

<sup>59</sup> *Compromis*, para 17.

<sup>60</sup> *Clarifications*, para 29.



In view of the foregoing, Midgard bears international responsibility for the breach of the ASA.

**D. ATLANTIS' RETALIATORY ACTIONS AGAINST ODIN AIRWAYS ARE APPROPRIATE, PROPORTIONATE AND LAWFUL**

[1] The revocation by Atlantis of Odin Airways' operational authorization was an appropriate, proportionate and lawful countermeasure to the wrongful conduct of Midgard.

[2] Alternatively, Applicant's actions shall be regarded as a lawful suspension of the ASA, as Respondent committed a material breach thereof.

**1. Revocation by Atlantis of Odin Airways' operational authorization was an appropriate, proportionate and lawful countermeasure to the wrongful conduct of Midgard**

As held in the factually similar case of *Air Services Agreement of 27 March 1946 (U.S. v France)*, "if a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "counter-measures".<sup>61</sup>

Under Article 22 of *ARSIWA*, wrongfulness of an act is precluded if it constitutes a lawful countermeasure. Violation of treaty obligations justifies resort to countermeasures by the injured State,<sup>62</sup> provided that it is taken specifically with the aim to bring a State back into

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<sup>61</sup> *Case Concerning the Air Services Agreement of 27 March 1946 (United States of America v France)*, 9 December 1978, 18 RIAA 416, para 81.

<sup>62</sup> *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, (Judgment) 1997 I.C.J. Reports 7, paras 83, 106; *Portuguese Colonies case (Naulilaa incident)* [1928] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, pp. 1025-1027; *Cysne* [1930] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1057.

compliance with its legal obligations,<sup>63</sup> is non-forcible,<sup>64</sup> proportionate,<sup>65</sup> reversible and temporary.<sup>66</sup>

The revocation by Atlantis of Odin Airways' operational authorization meets the said legal test. Firstly, it was done specifically in response to Respondent's prior internationally wrongful act towards Applicant – i.e., first the restriction of Atlantis Airlines commercial rights, and then revocation of its operational authorization without any valid grounds.

Secondly, the countermeasure was clearly non-forcible.

Thirdly, its temporary and reversible character is attested by the fact that Applicant was the Party which initiated the present proceedings,<sup>67</sup> which demonstrated Applicant's will to resolve all differences with Respondent and resume the operation of the ASA.

And lastly, the countermeasure was proportionate as it exactly mirrored the actions taken by Respondent, and was thus commensurate with the injury suffered by Applicant and its airline.

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<sup>63</sup> Ibid., ARSIWA, Article 49(1).

<sup>64</sup> ARSIWA, Article 50(1)(a), pp.131-132, paras 4-5; UNGA Resolution A/RES/25/2625, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, adopted on 24 October 1970, UN Doc A/RES/25/2625, Annex, first principle; *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, 1949 I.C.J. Reports 4, p. 35; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment, 1986 I.C.J. Reports 14, ¶249.

<sup>65</sup> ARSIWA, Article 51, pp. 134-135, paras 1-7; *Portuguese Colonies case (Naulilaa incident)* [1928] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, p. 1028; *Case Concerning the Air Services Agreement of 27 March 1946 (United States of America v France)*, 9 December 1978, 18 RIAA 416; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, (Judgment) 1997 I.C.J. Reports 7, para 85.

<sup>66</sup> ARSIWA, Article 49(2,3), pp.130-131, paras 6-9; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, (Judgment) 1997 I.C.J. Reports 7, para 87.

<sup>67</sup> *Compromis*, para 19.

It follows that Applicant's actions constitute a lawful countermeasure taken against Midgard to bring it back into compliance with the ASA.

**2. Alternatively, Applicant's actions shall be regarded as a lawful suspension of the ASA, as Respondent committed a material breach thereof**

Under Article 60(1) of the VCLT, a material breach of a bilateral treaty by a party entitles the other to terminate the treaty or suspend its operation.<sup>68</sup>

A breach is deemed material if it envisages violation of a provision "*essential to the accomplishment of the object or purpose of the treaty*".<sup>69</sup>

In the present case the breaches committed by Respondent undermine the very legal force of the ASA. The essence of the said agreement is captured in its preamble which is vitally important for interpretation of a treaty.<sup>70</sup>

Namely, the said preamble stresses that the ASA is concluded specifically "*for the purpose of establishing air services, supplementary to the [Chicago] Convention*".

The actions taken by Respondent cut off all possibilities for Atlantis Airways – the only Designated Airline of Applicant – to render any kind of air services in or to Midgard and its

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<sup>68</sup> *Tacna-Arica Question (Chile v. Peru)*, 2 R.I.A.A. 921, at 944 (1925); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, paras 94-95; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, (Judgment) 1997 I.C.J. Reports 7, para 106; *Rainbow Warrior (New Zealand v. France)*, 20 R.I.A.A. 215, ¶75 (1990); *Arbitration Between the Republic of Croatia and the Republic of Slovenia (Croat./Slovn.)*, Partial Award, (Perm. Ct. Arb. 2016), paras 204, 210; Simma, B., *Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law*, 20 Austrian J. Pub. & Int'l L. 5, at 33 (1970).

<sup>69</sup> VCLT, Article 60(3); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, paras 96, 98.

<sup>70</sup> *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, (Judgment) 1997 I.C.J. Reports 7, para 15; *Case concerning rights of nations of the United States of America in Morocco (France v. United States)* (Judgment) 176 I.C.J. Reports 1952, p. 196; *Asylum Case (Colombia v. Peru)* (Dissenting Opinion of Judge Azevedo) 1950 I.C.J. Reports 266, p. 282.

citizens or visitors. This is clearly not supplementary but inferior to what is granted under the Chicago Convention.

Due to such fundamental breach of the ASA of the obligations essential to the accomplishment of the object or purpose of this treaty Applicant lawfully deemed the ASA as suspended, and thus was no longer obliged to grant or maintain in force any operational authorizations to Odin Airways.

As already demonstrated above, the said measure was appropriate and proportionate to the harm suffered by Applicant and its nationals.

Accordingly, Applicant's actions in revoking operational authorization of Odin Airways may also be regarded as a lawful suspension of the ASA, as Respondent had committed a material breach thereof.

**SUBMISSIONS**

***May it please the Court, for the foregoing reasons, the State of Atlantis respectfully requests the Court to adjudge and declare that:***

- a. Midgard did not have the right to suspend Atlantis Airlines' sales of tickets under Article 6 of the ASA, and in particular Midgard did not follow the required procedure for consultation;
- b. Midgard did not have the right to revoke Atlantis Airlines' operational authorization under Article 4 of the ASA, given that:
  - (i) Atlantis Airlines is majority owned and effectively controlled by Atlantis and its nationals; and/or
  - (ii) Atlantis Airlines has its principal place of business in Atlantis, and is not majority owned or effectively controlled by any third country or its nationals;
- c. Midgard's actions in suspending Atlantis Airlines' sales of tickets and revoking the operating authority of Atlantis Airlines were therefore in violation of the ASA;
- d. Atlantis' retaliatory actions against Odin Airways are appropriate, proportionate and lawful.

The Honourable Court is further requested to declare such guidelines as it deems fit and essential in the present case.

Respectfully submitted,  
Agents for the Applicant