INTERNATIONAL AIR LAW MOOT COURT COMPETITION 2022

CASE CONCERNING NATIONALITY OF AIRLINES

STATE OF ATLANTIS V. STATE OF MIDGARD

MEMORIAL SUBMITTED ON BEHALF OF STATE OF MIDGARD

TEAM NUMBER 6-RESPONDENT

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LIST OF ABBREVIATIONS

ASA	Air Services Agreement
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICAO Doc	International Civil Aviation Organization Document
ICJ	International Court of Justice
UN Doc	United Nations Document
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

LIST OF SOURCES

A. INTERNATIONAL CONVENTIONS AND DECLARATIONS

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (UN Charter)

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945)

Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT)

Manila Declaration on the Peaceful Settlement of International Disputes, was approved by resolution 37/10 (under the item Peaceful settlement of disputes between States) by the United Nations General Assembly on 15 November 1982.

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C. DOCUMENTS OF INTERNATIONAL ORGANIZATIONS AND ASSOCIATIONS

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STATEMENT OF RELEVANT FACTS

Atlantis and Midgard negotiated and signed a bilateral Air Services Agreement (ASA) on 20 January 2014, it entered in force on 1 March 2014. The ASA granted to the contracting parties rights for the conduct of international air transportation between their capitals by the designated airlines of each party. Atlantis designated for the purpose Atlantis Airlines, which was 100% owned by the State of Atlantis, Midgard designated Odin Airways also 100% owned by the State of Midgard.

In March 2020, global pandemic put Atlantis Airlines in serious financial difficulty. Since Atlantis was unable to provide the airline with the financial support needed, Atlantis adopted a decision to sell a portion of its shares in Atlantis Airlines in exchange for investments.

Atlantis had friendly relationship with Dorado, a wealthy neighboring country, which expressed interest in the investment. On 1 June 2020, Atlantis, Dorado's state-owned airline Golden Air and Ms Lemuria, an individual who is a national of Atlantis but is resident in Dorado, completed the transaction. Additionally, Atlantis, Golden Air and Ms Lemuria concluded a shareholders agreement, and Atlantis Airlines and Golden Air entered into a co-operation agreement.

The share capital of Atlantis Airlines includes 100,000 Class A "ordinary" shares and 50,000 Class B shares. As a result of the transaction, Golden Air purchased 49,000 Class A shares and 50,000 Class B shares; Ms Lemuria obtained 21,000 Class A shares; 30,000 Class A shares belong to Atlantis.

The relationship between Midgard and Dorado are highly tense due to conflict over a valuable museum object, consequently, there is no air services agreement between the states. Midgard was

highly worried about the implication of the named transaction, as it considered the Dorado's increased influence in the region and superiority of Golden Air's service in comparison with the ones of Odin Airways to be serious reasons for concern.

On 1 July 2020, the Civil Aviation Authority of Midgard (CAAM) started a procedure investigating the matter of Atlantis Airlines' compliance with the nationality requirements of the ASA. On 3 July 2020, Atlantis submitted required documents to the CAAM.

On 20 July 2020, Midgard notified Atlantis that the CAAM had concluded that Atlantis Airlines failed to satisfy the nationality conditions of the ASA and demanded that the transaction be reversed within 10 days, otherwise Midgard would invoke responsibility under the ASA. On 1 August 2020, on the grounds of Atlantis's refusal Midgard undertook suspension of Atlantis Airlines' tickets sales from its Middleville office and through its www.atlantisairlines.mi website, pending the resolution of consultations between Midgard and Atlantis.

Atlantis alleged Midgard's violation of the ASA and entered into consultations with Midgard. Throughout four weeks of consultations, Atlantis Airlines' were deprived of the right to sell tickets from its office in Middleville or its www.atlantisairlines.mi website.

On 31 August 2020, Midgard declared the consultations to be inconclusive and revoked Atlantis Airlines' operating authorization under Article 4(1) of the ASA. Atlantis reacted with the revocation of Odin Airways' permission to operate air services to Atlantis and brought a case against Midgard before the Court.

CHRONOLOGY OF EVENTS

20 January 2014	Atlantis and Midgard signed the ASA.
1 March 2014	The ASA entered in force.
1 June 2020	Atlantis, Golden Air and Ms Lemuria completed the transaction.
1 July 2020	The CAAM launched investigation into the arrangements at Atlantis Airlines.
3 July 2020	Atlantis submitted required documents to the CAAM.
20 July 2020	Midgard notified Atlantis of the CAAM's conclusion and demanded that the transaction be reversed within **10** days.
1 August 2020	Midgard suspended ticket sales pending the resolution of consultations.
3 August 2020	Atlantis entered into bilateral consultations with Midgard.
31 August 2020	Midgard declared the consultations to have failed and revoked Atlantis Airlines' operating authorization.
1 September 2020	Atlantis revoked Odin Airways' operating authorization.

ISSUES

The State of Midgard will argue the following contentions:

a. Midgard was entitled to suspend Atlantis Airlines' sales of tickets pending resolution of the dispute, given the need for immediate action;

b. Midgard was entitled to revoke Atlantis Airlines' operational authorization under Article 4 of the ASA, given that:

i. Atlantis Airlines is not majority owned and effectively controlled by Atlantis and its nationals; and

ii. Atlantis Airlines:

1. Does not have its principal place of business in Atlantis; and/or

2. Is majority-owned and/or effectively controlled by Dorado and its nationals, and Dorado does not have an air services agreement with Midgard;

c. Midgard followed the required procedure for consultation;

d. Atlantis' retaliatory actions against Odin Airways are inappropriate, disproportionate and unlawful.

SUMMARY OF ARGUMENTS

Midgard asserts a treaty breach on the part of Atlantis and reinforces its position with the reference to the reciprocity principle. Taking into account this consideration, Midgard had no other legal option but to react to the violation, namely to invoke Article 60 of VCLT suspending the operation of the ASA as consequence of Atlantis's material breach and to suspend ticket sales. Midgard deems Atlantis's non-compliance with the nationality requirements to be a material breach of the ASA under Article 60(3b) of VCLT, since, in Midgard's view, the violation infringes its sovereignty rights and frustrates "object and purpose" of the agreement. In case of qualification of the suspension as a countermeasure, Midgard considers it proportionate, as the objective of suspension of ticket sales consisted in cessation of a treaty breach, while the measure in question was not excessive for the purpose of protection Midgard's sovereignty rights.

Consultations are considered "a variety of negotiations", so by applying the concept of indirect proof it leads to the fact that these bilateral consultations should not be conducted in bad faith. In this case Midgard ceased negotiations because of the evident lack of progress; there was not proves to state that Migard postponed consultations within unreasonable period of time or rejected Atlantis proposals; there was not violation of any ASA provisions as reserving the right to sell tickets does not mean restrictions to air services, while operating authorization was revoked after bilateral consultations what is permitted by the ASA. Duration of negotiations is determined by circumstances, so in this case lack of progress during multiple rounds served as an adamant proof to allow Midgard to stop negotiations. General principles as well as the ASA does not state about the prohibition of countermeasures during negotiations so reserving the right was an admissible measure.

JURISDICTION OF THE COURT

This dispute is brought under Article 36, Paragraph 1 of the Statute of the International Court of Justice [hereinafter referred to as "ICJ"]: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." The State of Atlantis and State of Midgrad both accept the compulsory jurisdiction of the ICJ.

ARGUMENTS

ARGUMENT A. MIDGARD WAS ENTITLED TO SUSPEND ATLANTIS AIRLINES SALES OF TICKETS PENDING RESOLUTION OF THE DISPUTE, GIVEN THE NEED FOR IMMEDIATE ACTION.

Midgard's allegation that Atlantis Airlines departs from the requirements under Article 4(1) of the ASA is based upon the legal and factual considerations presented below. Consequently, Midgard asserts that Atlantis Airlines' failure to comply with provisions of Article 4(1) of the ASA was a treaty breach and internationally wrongful act pursuant to Article 2 of the International Law Commission's Articles on State Responsibility (ARSIWA).

As an injured state, Midgard was therefore entitled to react to the named treaty breach and internationally wrongful act, since it was not bound with the obligation from the moment of Atlantis's violation thereof. In support of its position Midgard refers to the advisory opinion of the ICJ in the *Namibia case* where the Court indicated that *"a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship"*[1].

With special regard to the fact that the relationship between Midgard and Atlantis before the treaty breach on the side of the latest were reciprocal by its legal nature[2], Midgard deemed it impossible to maintain conditions under which Atlantis could still take advantage of the ASA.

In addition, Atlantis's treaty breach impaired Midgard's rights under ASA directly and seriously, hence, measures reacting thereto had to be possibly immediate so that the wrongdoing lasted for minimum time period and caused minimum damages on the part of Midgard. In the view of this

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[1] Namibia case (1971), para 91.

[2] Abeyratne, R. (2014). Convention on International Civil Aviation. A Commentary, Cham, p. 102.

circumstance, Midgard resorted to the suspension of ticket sales pending resolution of the dispute as immediate action under Article 4(2) of the ASA.

However, in customary international law and treaty law, there are certain procedural conditions to be satisfied in case of a reaction to a treaty breach. In case at hand, Midgard performed its procedural duties, which is proven below.

Based on the arguments given above, Midgard asserts its right to undertake certain measures in response to Atlantis's violation.

Suspension of the operation of a treaty under Article 60 of Vienna Convention

Midgard alleges qualification of suspension of ticket sales as suspension of the operation of the ASA under Article 60(1) of Vienna Convention on the Law of Treaties (Vienna Convention). The specified provision stipulates that *"a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part"*.

Midgard considers Atlantis's treaty breach to be material pursuant Article 60(3b) of Vienna Convention as a *"violation of a provision essential to the accomplishment of the object or purpose of the treaty"*. In the wording of arbitral award on *Tacna-Arica case*, Atlantis's violation established *"such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement"*[3].

In this regard, Midgard emphasizes that the purpose of an air service agreement consists in a bilateral exchange of flight permissions between nations *"without prejudice to full rights of*

[3] Tacna-Arica Arbitration (1925).

sovereignty"[4]. The ASA between Midgard and Atlantis was concluded due to the mutual understanding developed to that moment with the purpose of establishing air service between the states[5]. Consequently, the agreement was designed strictly for bilateral cooperation and did not imply any possibility of third parties' involvement in the relationship, since gaining access to a contracting party's airspace without its explicit permit would be violation of Articles 1 and 6 of Chicago Convention and a severe infringement of state's rights of sovereignty.

Furthermore, air service agreement is based upon friendly relations between nations, which grant them a right to expect from each other conforming conduct[6]. The relationship between Midgard and Dorado are complicated by an unsettled dispute and are characterized as highly tense. For this reason Midgard does not intend to tolerate the presence of Dorado's airlines in its airspace.

Taking into consideration arguments stated above, Midgard views Atlantis Airlines' non-compliance with the nationality requirements of Article 4(1) of the ASA as a material breach, i.e. the breach frustrating the object and purpose of the agreement.

As the operation of the ASA was suspended due to the breach on the side of Atlantis, Midgard's suspension of rights derived from the Article 6 of the ASA did not constitute a breach.

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[4] Proceedings of the International Civil aviation Conference, Chicago, Illinois, November1–December 7 1944, Vol I & II (Washington, D.C.: U.S. Government Printing Office, 1948) at 42–43.3Id. 43.6 Preamble

[5] As stated in the preamble of the ASA, "for the purpose of establishing air services".

[6] Proceedings of the International Civil aviation Conference, Chicago, Illinois, November1–December 7 1944, Vol I & II (Washington, D.C.: U.S. Government Printing Office, 1948) at 42–43.3Id. 43.6 Preamble

Suspension of ticket sales as a countermeasure

Without prejudice to Midgard's position as to the absence of violations on its side, Midgard claims that in case of qualification its action as a countermeasure it would be proportionate and justifiable, so that its alleged wrongfulness was precluded.

Midgard's allegation is based upon the provision of Article 22 of the ARSIWA that precludes wrongfulness of an action if it meet certain requirements. In order to interpret this rule, one should turn to the judgment of the ICJ on *Gabčíkovo-Nagymaros Project case*[7] where the Court indicated that countermeasure should have a proper objective and be *"commensurate with the injury suffered"*[8].

The aim of suspension of ticket sales consisted in cessation of a treaty breach and inducement of Atlantis to conform to the provisions of the ASA. With the measure Atlantis Airlines was not deprived from its commercial rights under Article 2 of the ASA completely, nevertheless, the measure in question served as a compelling claim to stop non-compliance and provided confirmation of Midgard's intention to defend its sovereignty rights.

In legal doctrine and practice, there exists a wide range of opinions on the matter of assessing proportionality of countermeasures[9]. In this respect, the arbitral tribunal in *Air Service Agreement case* provides the starting point of any argumentation on the matter. According to this arbitral award, countermeasures should stay *"within the limits set by the general rules of international*

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[7] Gabčíkovo-Nagymaros Project case, para. 85 et seq.

[8] Ibid.

[9] For instance, Elagab, O. Y. (1986). The legality of non-forcible counter-measures in international law (Doctoral dissertation, University of Oxford), p. 145-165.

law"[10]. The Tribunal highlighted that by judging proportionality *"it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach"*[11]. Midgard accentuates that Atlantis's treaty breach questions Midgard's rights of sovereignty and therefore constitutes a grave violation of international law.

The arbitral award quoted above is also relevant by virtue of its similarity to the circumstances of the case at hand. In the *Air Service Agreement case,* the USA undertook immediate actions in response to France's alleged treaty breach prior to the procedure of dispute settlement; the Tribunal subsequently recognized the actions as legitimate[12].

Summarizing the presented arguments, Midgard considers its action to be legitimate in case of qualification as a countermeasure.

B. MIDGARD WAS ENTITLED TO REVOKE ATLANTIS AIRLINES' OPERATIONAL AUTHORIZATION UNDER THE ASA.

Effective control plays a significant meaning for parties of the ASA because according to the ASA[13] failure to comply with the criteria of effective control leads to such adverse consequences as revocation and suspension of authorization. There is no generally accepted definition of effective control. However, based on the meaning of the ASA, effective control is possibility and opportunity to influence the company's activities by different means. The provisions of Article 2.9 of the

[10] France v. United States (1978) Air Services Agreement Case, para. 81

[11] Ibid., para. 83.

[12] Ibid.

[13] Article 4 of the ASA.

Regulation (EC) No 1008/2008 of the European Parliament and of the Council (invoked here solely as an example of state practice) define such means: *(a) the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking".*

In the Case of Diallo the International Court of Justice considered that therefore very large part of the parts sociales[14] were owned by Mr. Diallo, allowing him to be fully in charge and in control of that company.[15]

Moreover, The European Commision has interpreted the ownership of airlines in one of its decision and defined that "substantial ownership is broadly considered to mean more than 50 percent equity ownership[16]".

It is the fact that 49,000 Class A shares were sold to Golden Air , which is 100% owned by the State of Dorado and 21,000 Class A shares to Ms Lemuria, who is resident in Dorado and 50,000 Class B shares to Golden Air. To sum up, 70,000 Class A voting shares and 80 % of all shares are factually owned by entities or residents of the State of Dorado. So that, no decision of the general meeting of shareholders can be made without the votes of Golden Air and Ms Lemuria.

Due to the Article 2 of the Shareholders Agreement decisions of the general meeting shall be decided by majority of 75% or simple majority.

Taking all these points into consideration, one would said that the decisions of Atlantis

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[14] In this case: capital of the company is divided into equal socials.

[15] Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), judgment of 24 May 2007, p. 42

[16] Commission Decision No. 9514041EC on a Procedure Relating to the Application of the Council Regulation 2407192 (Swissair/Sabena), 0.1. (1995) L 239/19.

Airlines is totally controlled by the State of Dorado on behalf of Golden Air and Dorado nationals.

Ms Lemuria as resident of Dorado plays important role in effective control of Atlantis Airlines. According to the Shareholders agreement so long as Ms Lemuria holds not less than 21,000 Class A shares, she shall be entitled to be a member of the board and to act as its chairperson; and she shall be appointed Chief Executive Officer.[17] Futhermore, it is said that the board of directors shall delegate day-to-day management to the Chief Executive Officer.[18]

2. Atlantis Airlines does not have its principal place of business in Atlantis.

Despite the fact that the Atlantis airline is established and incorporated in the territory of the designating Party in accordance with relevant national laws and regulations and pays income tax, registers and bases its aircraft Atlantis airlines does not meet other criteria place of business.

Firstly, Atlantis Airlines' senior management shall will be expected to travel to Golden Air's headquarters in Goldtown, Dorado regularly as required.

Secondly, Atlantis Airlines' board meetings shall be split between Undersea City and Goldtown, Dorado[19]. So that, the fact of Atlantis airline's incorporation in Undersea City does not mean that the place of business locates in Undersea city. Besides, the splitting Atlantis Airlines' board meetings between Undersea City and Goldtown mean that Atlantis Airlines has not independent control and management in Undersea city according these facts.

Dorado does not have the air services agreement with Midgard due to ongoing political tensions. However, it is impossible to regulate air services between Atlantis Airlines and Odin

[17] Article 3.5, 4 of the Shareholders agreement

[18] Article 3.2 of the Shareholders agreement

[19] Article 2.3, 2.4 of the Extract from Co-operation Agreement

Airways without such air services agreement because Atlantis Airlines is majority owned and effectively controlled by Dorado and its nationals.

C. MIDGARD FOLLOWED THE REQUIRED PROCEDURE FOR CONSULTATION.

Referring to the general duty to negotiate in Art. 33 of the UN Charter[20], there is a need for collating terms "negotiation" and "consultation" as the latter is absent in the raw of possible means of disputes settlement in the UN Charter. In their dissenting opinions in Mavrommatis[21], Judges Moore and Pessoa referred to negotiations as the "legal and orderly administrative process by which governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle, their differences" and as "debate or discussion between the representatives of rival interests, discussion during which each puts forward his arguments and contests those of his opponent". As for consultations, under Handbook on the Peaceful Settlement of Disputes between States[22] it "may be considered as a variety of negotiations". This statement is provided in a set of Conventions[23]. Bearing in mind Art. 15 of the ASA and the information stated above, in this case bilateral consultations are considered to be equivalent to negotiations, where the

[20] United Nations Charter.

[21] Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.]. (ser. A) No. 2, at 62-63 (Aug. 30) (Moore J., dissenting). 12. Id. at 91 (Pessoa, J., dissenting).

[22] OLA/COD/2394. Handbook on the Peaceful Settlement of Disputes between States.

[23] Art.84 of the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character; Art. 41 of the 1978 Convention on Succession of States in Respect of Treaties; Art. 42 of the 1983 Convention on the Succession of State Property, Archives and Debts

Contracting Parties agreed upon that such alternative to negotiations should be conducted before submitting for decision to the International Court of Justice.

Resolution 53/101 adopted by the General Assembly Principles and guidelines for international negotiations envisage that negotiations (consultations in this case) should be conducted in good faith and be meaningful. The duty to conduct negotiations in good faith also follows from the more general obligations set out in the Manila Declaration on the Peaceful Settlement of International Disputes[24]. This concept was proved in practice by the judge order in result of Lake Lanoux Arbitration (France/Spain)[25] and by separate opinion of Judge Bedjaoui during Gabčíkovo-Nagymaros Project (Hungary/Slovakia) case as "this obligation flows not only from the Treaty itself, but also from general international law"[26].

Applying the concept of indirect proof, some acclaimed scholars unveil the concept of bad faith of negotiations. Bad faith is intertwined with a set of characteristics as such as following: unjustifiably breaking off the negotiations, creating abnormal delays, disregarding the agreed procedures, or systematic refusal to take into consideration adverse proposals or interests can amount to breaches of good faith[27]. Midgard conducted none of them. ***First***, cessation of the bilateral consultations is backed up by the absence of progress after numerous rounds of talks. ***Second***, there is no information serving as evidence to prove that Midgard postponed undertaking decisions within a reasonable period. ***Third***, compelling all actions undertaken by both parties, it

[24] Manila Declaration on the Peaceful Settlement of International Disputes. 1982.

[25] Lake Lanoux Arbitration (France V. Spain). 1957.

[26] Gabčíkovo-Nagymaros Project (Hungary/Slovakia). 1993.

[27] John G Laylin and Rinaldo L Binachi, 'The Role of Adjudication in International River Disputes: The Lac Lanoux Case'.1959.

is evident that the operational authorization (Art. 3 of the ASA) is distinct from the right to sell transportation (Art. 6), i.e. restrictions on ticket sales does not mean is it impossible to fly. Under the ASA the operational authorization was revoked after failed bilateral consultations. Thus, from this point of view Midgard's actions fit in the established by the ASA rules. The ASA itself does not stipulate detailed process of consultation, for example in contrast to the case Pulp Mills on the River Uruguay (Argentina v. Uruguay)[28]. Art. 15 of the ASA refers to it mere as a way to settle any dispute followed by submission to the International Court of Justice in case of failed consultations. ***Fourth***, available background information does not give insight into the process of four-week consultations, to this end, Midgard cannot be blame for downplaying Atlantis proposals.

Negotiations, consultations in the present case, are determined by their duration. A number of prominent authors are in unison upon the idea that negotiations are to be of reasonable time, which is specified on the case-by-case basis. However, the others state that even the fact that a long period of time has passed is not dispositive of the question whether the negotiation process has been exhausted.[29] Under Handbook on the Peaceful Settlement of Disputes between States[30] "the time-frame for the negotiation process varies according to the circumstances. The process may be concluded in a few days or may extend over several decades". For instance, the arbitral tribunal in Government of Kuwait/American Independent Oil Company envisaged that "good faith as properly to be understood; sustained upkeep of the negotiations over a period appropriate to the

[28] Pulp Mills on the River Uruguay (Argentina v. Uruguay). 2006.

[29] Legal Consequences for States of the Continued Presence of South Africa In Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion I.C.J. Reports 1971, p. 44, para. 85 and the arbitral tribunal in Government of Kuwait v. American Independent Oil Company 66 I.L.R. 518, 578

[30] OLA/COD/2394. Handbook on the Peaceful Settlement of Disputes between States.

circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise" [31] in other words duration is not determined by the longevity of negotiations. Lack of progress after multiple rounds can be considered as a mentioned circumstance, which is a prerequisite for filing a petition to the International Court.

Now turning to the fact that during consultations Midgard took countermeasures against Atlantis by suspending the latter's right to sell tickets. However, it is worth pointing out that the arbitral tribunal in Air Service Agreement (France/USA)[32] acknowledged the permissibility of countermeasures by a victim party within the context of an ongoing negotiation as long as the dispute at issue is sub judice[33] as "*under present-day international law States have not renounced their right to take counter-measures in such situations*". To this end, Midgard adhered to the general principle of good faith from this prospective.

From an examination of the history of the negotiations it is impossible to find any proper basis for the conclusion that Midgard acted in bad faith. The record fails to show that Midgard has ever arbitrarily refused to negotiate with Atlantis the provision of nationality requirements. Thus, it is clearly seen that Midgard meets all the conditions for good faith in the present case and meaningful negotiations, consultations in this case, and cannot be held responsible for violating required procedure for consultation.

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[31] The American Independent Oil Company v. The Government of the State of Kuwait. 1979.

[32] Air Service Agreement of 27 March 1946 between the United States of America and France. 1978.

[33] Barnidge R. The International Law as a Means of Negotiation Settlement. Fordham International Law Journal. 2013.

D. ATLANTIS' RETALIATORY ACTIONS AGAINST ODIN AIRWAYS ARE INAPPROPRIATE, DISPROPORTIONATE AND UNLAWFUL.

Since Atlantis insists that Midgard's actions were in violation of the ASA, Atlantis's measure adopted in retaliatory for revocation of Atlantis Airlines' operating authorization has to satisfy the conditions of a countermeasure pursuit Article 22 of the ARSIWA, i.e. to be appropriate, proportionate and lawful. Without affecting Midgard's position as to the absence of treaty breach on its side, Midgard claims that Atlantis's revocation of Odin Airways' operating permission does not meet the requirements of a justifiable countermeasure.

In legal doctrine, legal notion of "appropriate countermeasure" is associated with the measure's accordance with *"the purpose of having the violations stopped"*[34]. In the wording of the Article 49(1) ARSIWA, countermeasures should be taken only *"in order to induce that State to comply with its obligations"*. This approach to the "appropriateness" was reflected in the practice, e.g. in arbitral award on the *Brazil-Export Financing Programme for Aircraft case*[35]. Midgard deems it obvious that Atlantis took retaliatory actions against Odin Airways solely out of vengeance on Midgard for its legitimate actions against Atlantis Airlines.

Proportionality is a crucial principle of assessing countermeasures defined in the judgement of the ICJ on *Gabčíkovo-Nagymaros Project* case, where the Court indicated that *"countermeasure must be commensurate with the injury suffered, taking account of the rights in question"*. Furthermore, some recent works on the matter of proportionality develop so-called instrumental

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[34] T. M. Franck (2008). On Proportionality of Countermeasures in International Law. , 102(4), 715–767, p. 744.

[35] Brazil-Export Financing Programme for Aircraft (2000). Para 3.44-45.

approach[36]. According to this theory, execution of a countermeasure are restricted to scope that is necessary to obtain redress[37].

Applying the first concept of proportionality, Atlantis's retaliatory actions cannot be considered proportionate. Midgard's losses caused by Atlantis's revocation of permission substantially exceed Atlantis's losses caused by Midgard's revocation of operating authorization, since Odin Airways is 100% owned by Midgard, while Atlantis possesses only 30% of Atlantis Airlines' Class A "ordinary" shares, hence, Midgard incurs far more losses than Atlantis.

Viewing the case from the instrumental perspective, one will conclude that Atlantis's actions are also disproportionate, as it is impossible to assume that Atlantis's retaliatory actions against Odin Airways were necessary to force Midgard to renounce its claims regarding nationality requirements and to reset Atlantis Airlines' operation authorization.

Lawfulness of a countermeasure is determined by the provisions Article 22 of the ARSIWA which stipulates that *"the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State".* The lawful essence of a legitimate countermeasure can be distorted by an improper objective or disproportionality[38].

As it was argued above, Atlantis's retaliatory actions against Odin Airways fail to confirm to the requirements of appropriateness and proportionality and are therefore unlawful.

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[36] Cannizzaro, E. (2001). The Role of Proportionality in the Law of International Countermeasures. European Journal of International Law, 12(5), 889-916, p. 891.

[37] Elagab, O. Y. (1986). The legality of non-forcible counter-measures in international law (Doctoral dissertation, University of Oxford) with reference to Grafrath and Steiniger, "Kodifikation der völkerrechtlichen Verantwortlichkeit", Neue Justiz, OP. cit., p. 255 et seq.

[38] Agenda item 162: Report of the International Law Commission on the work of its fifty third session -State Responsibility Statement by Dr. P. S. Rao, Additional Secretary (L&T), Ministry of External Affairs on November 1, 2001

SUBMISSIONS

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

a. Midgard was entitled to suspend Atlantis Airlines' sales of tickets pending resolution of the dispute, given the need for immediate action;

b. Midgard was entitled to revoke Atlantis Airlines' operational authorization under Article 4 of the ASA, given that:

i. Atlantis Airlines is not majority owned and effectively controlled by Atlantis and its nationals;

ii. Atlantis Airlines:

1. Does not have its principal place of business in Atlantis;

2. Is majority-owned and/or effectively controlled by Dorado and its nationals, and Dorado does not have an air services agreement with Midgard;

c. Midgard followed the required procedure for consultation;

d. Atlantis' retaliatory actions against Odin Airways are inappropriate, disproportionate and unlawful.

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