

INTERNATIONAL COURT OF JUSTICE

YEAR 2023

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General List

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3 April 2023

**ALLEGED VIOLATIONS OF IMMUNITIES FROM JURISDICTION AND
MEASURES OF CONSTRAINT**

(FEDERAL REPUBLIC OF AVALONIA v. KINGDOM OF RIVIERA)

ORDER

The International Court of Justice,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Articles 31, 44, 45, paragraph 1, 49, 61 and 80 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 3 July 2022, whereby the Federal Republic of Avalonia (hereinafter “Avalonia”) instituted proceedings against the Kingdom of Riviera (“Riviera”) with regard to a dispute concerning the alleged violations by Riviera of Avalonia’s jurisdictional immunities;

Having regard to the Order dated 20 July 2022, whereby the Court fixed initial time-limits for the filing, respectively, of the Memorial of the Applicant and the Counter-Memorial of the Respondent;

Whereas, by a letter dated 1 November 2022, the Agent of Avalonia requested the Court to extend the time-limit for the filing of the Memorial, explaining that the series of judicial decisions and political developments in Riviera subsequent to the filing of its Application which, in its view, form part of the dispute brought by its Application, shall also be taken into

considerations in its submissions;

Whereas, by a letter dated 3 November 2022, the Agent of Riviera expressed the disagreement of its Government with the request for an extension of the time-limit, stating that any facts or events subsequent to the lapse of the title of jurisdiction fall manifestly outside the Court's jurisdiction; whereas, the Agent added that its intention to make counter-claims in its Counter-Memorial;

Whereas, by a letter dated 6 November 2022, the Agent of Avalonia observed that nothing would prevent the Court from exercising its jurisdiction to entertain facts or events that occurred on and after 4 July 2022 and reiterated the reason stated in the letter dated 1 November 2022; whereas, the Agent also expressed the view of its Government that it should raise objections to the admissibility of any such counter-claims pursuant to Article 80, paragraph 3, of the Rules of Court;

Whereas, at a meeting held by the President of the Court with the Agents of the Parties on 15 December 2022, pursuant to Article 31 of the Rules, the Parties came to an agreement that any questions as to the Court's jurisdiction to entertain the Applicant's claims and to the admissibility of the Respondent's counter-claims shall be heard together in a single phase of the proceedings; whereas, at the same meeting, the Parties also agreed to prepare jointly a Statement of Agreed Facts, which provides factual developments of the present case and the Parties' submissions to be decided by the Court;

Whereas, on 31 March 2023, the Parties jointly communicated the attached Statement of Agreed Facts to the Registry of the Court;

Taking into account the agreement of the Parties,

Fixes the dates for the filing of the written pleadings and for the oral pleadings as the dates set forth in the Official Schedule of the 2023 Asia Cup International Law Moot Court Competition; and

Adopts the Official Rules of the 2023 Asia Cup International Law Moot Court Competition.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this third day of April, two thousand and twenty-three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Governments of Avalonia and Riviera, respectively.

(Signed)
President

(Signed)
Registrar

STATEMENT OF AGREED FACTS

ALLEGED VIOLATIONS OF IMMUNITIES FROM JURISDICTION AND MEASURES OF CONSTRAINT

(FEDERAL REPUBLIC OF AVALONIA v. KINGDOM OF RIVIERA)

31 March 2023

1. The Federal Republic of Avalonia (“Avalonia”) is a developed democratic country with a population of approximately 75 million and a gross domestic product of USD 65,000 per capita as of 2021. Its capital, Apricity, is regarded as one of the major international financial centres of the world.

2. The Kingdom of Riviera (“Riviera”) is a developed parliamentary constitutional monarchy with a population of approximately 40 million and a gross domestic product of USD 38,000 per capita as of 2021. It lies directly to the west of Avalonia, sharing a single border of approximately 350 kilometres. Its capital, Reine, consists of two administrative units, Reine-Orientale and Reine-Occidentale.

3. On 1 August 1940, Avalonia declared war on Riviera. Avalonia’s forces immediately occupied the border area of Riviera’s territory and, until the end of the war, perpetrated several atrocities against the population of that area. Among others, the Sainte Bérénice Massacre, a series of mass executions and indiscriminate killings of nearly 1,500 civilian population carried out by Avalonia’s occupying force, occurred in December 1943, around Lake Sainte Bérénice, located in the border area.

4. On 1 September 1948, with the end of armed hostilities, Avalonia and Riviera concluded a Peace Treaty stipulating the legal and economic consequences of the war. Under Article 1 of the Treaty, Avalonia was obligated to pay compensation to Riviera. The payment was duly made in the form of a lump sum in accordance with the relevant provisions of the Treaty. According to Article 2 of the Treaty, the payment provided for in Article 1 “shall constitute final settlement between Avalonia and Riviera of all questions governed by the present Treaty.” Furthermore, Article 6 of the Peace Treaty reads as follows:

Without prejudice to any other dispositions in favour of Riviera and Riviera’s nationals, the Government of Riviera waives on its own behalf and on behalf of Riviera’s nationals all claims against Avalonia and Avalonia’s nationals outstanding as of the date of the end of the war, except those arising out of contracts and other obligations entered into, and rights acquired, before 1 August 1940.

5. The Government of Avalonia acknowledges that the acts described above in paragraph 3 were committed in violations of international humanitarian law. It contends, however, that its international responsibility arising out thereof has fully been discharged by the lump-sum payment pursuant to Articles 1 and 2 of the Peace Treaty. The Government of Riviera, for its part,

avers that some issues of victim reparations, including those arising out of the Sainte Bérénice Massacre, remain unsettled, notwithstanding the provisions of the Peace Treaty. All the subsequent attempts between the Parties to settle these “outstanding” issues failed, and consequently, no further arrangement of war compensation has been concluded or established.

6. The post-war reconstruction of the relations between the Parties was undergone, initially, by way of bilateral official development assistance provided by Avalonia to Riviera and, subsequently, by way of the involvement of Avalonia’s private sector. Since the 1970s, the Government of Avalonia actively promoted private investors to purchase sovereign bonds issued by the Government of Riviera in the Apricity financial market. The largest series of bonds is the one issued in 1982, the total amount of which was more or less equivalent half of the government budget of Riviera of the same year (“1982 Bonds” or “Amity Bonds”). Symbolising the post-war friendly relationship between the two countries, more than 25 per cent of the Amity Bonds were purchased and held by Apricity Bank N.A., a financial subsidiary of the largest business conglomerate in Avalonia. According to the terms of the bonds, all principal and accrued interest must be repaid by Riviera to bondholders on or before 23 November 2021.

7. Opinion polls conducted by Riviera’s national statistics centre consistently show that the vast majority of its population regards the economic recovery of Riviera, which underwent during the 1960s to 1980s, was largely due to Avalonia’s various cooperation both in official and private sectors. At the same time, the same surveys indicate the gradual rise of voice in young generations throughout the 2010s, according to which all the post-war “outstanding” issues between the Parties need to be settled, irrespective of whether the arrangements made by the previous generations were fruitful.

* *

8. On 10 August 2016, a parliamentary election was held in Riviera, which resulted in a historical victory of La Justicia, a newly established political party claiming to represent the voice of young generations. On the same day, La Justicia, having obtained an influential power in the parliament, released a press statement reiterating its campaign promises, *inter alia*, of the definitive settlement of the “outstanding” issues with Avalonia.

9. On 15 January 2017, a bill amending the Foreign State Immunities Act, proposed by the members of La Justicia, was passed by Riviera’s parliament. The newly incorporated Article 5bis and other relevant provisions of the Act are reproduced as follows:

Article 1: A foreign State is immune from the jurisdiction of any court in the Kingdom except as provided in the following provisions of this Act.

Article 5: A foreign State is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal injury or (b) any damage to or loss of property that occurs in the territory of the Kingdom.

Article 5*bis*: The preceding article applies to proceedings relating to pecuniary claims arising out of the act or omission of the armed forces of a foreign State while present in the Kingdom, except for those committed by visiting armed forces stationed based on the consent of the Government.

10. On the next day, Avalonia's Ministry of External Affairs wrote a Note Verbale to the Government of Riviera in which it stated, *inter alia*, that "the new legislation, if applied in practice, would have an adverse effect upon the relations between Avalonia and Riviera." The Government of Riviera, while referring to the separation of powers, merely acknowledged the receipt of the Note.

11. On 1 May 2017, Les Enfants de Bérénice, an association under the law of Riviera created with a view to taking proceedings on behalf of relatives and heirs of persons killed during the Sainte Bérénice Massacre, filed a case against Avalonia before the Tribunal of First Instance in Reine-Orientale. In seeking the payment of a fixed amount of compensation, Les Enfants de Bérénice invoked the new Article 5*bis* of the Foreign State Immunities Act to affirm the jurisdiction of the Tribunal.

12. On 15 December 2017, the Tribunal of First Instance in Reine-Orientale delivered a judgment dismissing the civil claim of Les Enfants de Bérénice by upholding the jurisdictional immunity of Avalonia. It held, *inter alia*, that "the application of the new Article 5*bis* of the Act would contravene the relevant rules of international law and therefore the Tribunal should not be bound by it" (the "*Bérénice (I)* Judgment"). On the same day, Avalonia's Ministry of External Affairs issued a press release in which it welcomed the outcome of the decision. Les Enfants de Bérénice, for its part, appealed.

13. On 1 February 2018, an overseas branch of Les Enfants de Bérénice brought a motion before the Tribunal of First Instance in Reine-Occidentale to seek recognition and enforcement of a foreign judgment rendered by a court of a third country, wherein pecuniary claims of Les Enfants de Bérénice against Avalonia were largely upheld, and the jurisdictional immunity of Avalonia was accordingly denied.

14. On 10 November 2018, the Tribunal of First Instance in Reine-Occidentale delivered an interlocutory decision upholding the recognition of the foreign judgment at hand. It held, *inter alia*, that "within the constitutional order of Riviera, lower courts are generally bound by the will of legislators" (the "*Bérénice (II)* Judgment"). On the same day, having been delivered a judgment denying its jurisdictional immunity, the Government of Avalonia wrote a Note Verbale to the Government of Riviera in which it stated that "the judgment rendered today is violative of customary international law concerning sovereign immunity so that it shall be annulled or reversed". Avalonia appealed.

15. On 20 January 2019, the Reine Court of Appeals, having received the two separate appeals from Les Enfants de Bérénice and Avalonia containing the same legal questions, decided to refer to the Constitutional Court of Riviera as to the constitutionality of Article 5*bis* of the Foreign

Sovereign Immunities Act.

16. On 30 May 2020, the Constitutional Court of Riviera affirmed the constitutionality of Article 5*bis* and found that lower courts are bound to apply it. It held, *obiter*, that: “the judgment of the International Court of Justice delivered on 3 February 2012 cannot call the conclusion as to the constitutionality of Article 5*bis* into question insofar as the applicable rules of customary international law has been evolving since then”.

17. On 30 June 2021, the Reine Court of Appeals, having received the judgment of the Constitutional Court, rendered its own judgments in the two appealed cases. First, the Court of Appeals reversed the *Bérénice (I)* Judgment by denying the jurisdictional immunity of Avalonia before it. As to the merits of the case, it upheld the claim of Les Enfants de Bérénice for the payment of a certain amount as compensation. Second, the Court of Appeals dismissed the appeal made by Avalonia and maintained the *Bérénice (II)* Judgment. As a result, it recognised the effect of the foreign judgment in which the jurisdictional immunity of Avalonia before the court of the third country was denied.

18. On the same day, Avalonia’s Ministry of External Affairs wrote a Note Verbale to the Government of Riviera stating, *inter alia*, that “the two judgments rendered today are flagrant violations of Avalonia’s jurisdictional immunities under customary international law. The Government of Avalonia intends to bring the case to the International Court of Justice unless every effort to annul or reverse these judgments is made within a reasonable period of time”. At the same time, Avalonia in both cases further appealed to the Court of Cassation, the highest court in Riviera.

19. On 4 July 2021, Riviera gave notice of denunciation of the American Treaty on Pacific Settlement it signed on 30 April 1948, officially designated, according to Article LX thereof, as the “Pact of Bogotá” (hereinafter referred to as such), by means of a diplomatic Note from the Minister for Foreign Affairs to the Secretary-General of the Organization of American States, the successor to the Pan-American Union. That notice stated that Riviera’s denunciation “takes effect with regard to procedures that are initiated after the present notice, in conformity with Article LVI”.

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20. In early July 2021, several newspapers in Riviera reported that Les Enfants de Bérénice was going to attach Avalonia’s properties belonging to a cultural centre located in Riviera. The centre, which was organised as a form of public-private partnership and funded by the Government of Avalonia and Avalonia’s private sectors, was intended to promote cultural exchanges between Avalonia and Riviera.

21. On 20 July 2021, Apricity Bank N.A., the largest private financial contributor to the centre, issued a press release expressing its deep regret as to the behaviour of Les Enfants de Bérénice insofar as the series legal actions would destroy the post-war friendly relations of the two

countries. It also blamed the Government of Riviera, especially the Prime Minister, for his “almost complete lack of involvement in the ongoing controversial judicial proceedings”. It eventually announced that “Apricity Bank N.A. is no longer interested in possessing the Amity Bonds, the large amount of which will therefore be circulated in the market in coming days.”

22. Immediately after the announcement of Apricity Bank N.A., rating agencies downgraded Riviera’s debt, including the Amity Bonds. Against the backdrop of Riviera’s already-known state of financial distress due to the COVID-19 pandemic, bonds issued by Riviera were sold and purchased at a market price of less than a third of the face value. Among the purchasers of the distressed 1982 Bonds was Investment Loans and Securities Management (“ILSEC Management”), a hedge fund organised under the law of the Cayman Islands. A local financial newspaper reported that ILSEC Management purchased approximately 25 per cent of the 1982 Bonds in the Apricity financial market by the end of September 2021.

23. On 1 November 2021, the Government of Riviera initiated a sovereign debt restructuring which would be implemented through an exchange of outstanding bonds for new titles. The new titles were to consist of new bonds with lower interests and longer tenors. The consent solicitation, which was launched and addressed to all the bondholders of the 1982 Bonds, was due to expire on 14 November 2021. On the next day, the result of the consent solicitation was announced: approximately 74.25 per cent of the participating bondholders voted in favour of the exchange, failing to meet the qualified majority voting threshold of 75 per cent under the terms of the 1982 Bonds, which was required to accept the exchange offer.

24. On 23 November 2021, being unable to repay, the Government of Riviera issued an official statement acknowledging that it defaulted on the outstanding 1982 Bonds.

25. By notice of arbitration dated 1 December 2021, ILSEC Management commenced arbitral proceedings against Riviera to seek the repayment of the face value of the 1982 Bonds and accrued interests. On 14 February 2022, an arbitral tribunal duly established and administered under the auspices of the London Court of International Arbitration fully upheld the contractual claims of ILSEC Management (the “LCIA Award”).

26. On 18 February 2022, ILSEC Management petitioned the Federal District Court of Apricity to seek the recognition and enforcement of the LCIA Award. It also sought information about the assets and property of Riviera located in the territory of Avalonia. Counsel for Riviera, for its part, filed an objection to that motion.

27. On 1 April 2022, Federal District Judge Melissa Satomozza, in addition to rendering a decision recognising the effect of the LCIA Award, granted the motion for discovery sought by ILSEC Management, which anticipated sanctions in cases of non-compliance in the following terms:

The Kingdom of Riviera shall produce all information responsive to ILSEC Management wherever located in Avalonia within 60 days of the date of this order.

In the event of failure, any property of the Kingdom in the territory of Avalonia except diplomatic or military property is deemed to be used for commercial activity.

28. On 2 April 2022, the Ministry of Foreign Affairs of Riviera wrote a Note Verbale to its counterpart of Avalonia, in which it stated that “the discovery order issued by Judge Satomozza constitutes a flagrant breach of obligations under the customary rules of sovereign immunities from measures of constraint; it also breaches obligations derived from the principle of non-intervention enshrined in the Charter of the United Nations.” It accordingly expressed its intention not to abide by the discovery order.

29. Subsequently, the 60-day grace period prescribed by the discovery order lapsed on 1 June 2022 and, accordingly, the effect of sanction anticipated in the order came into force under the law of Avalonia. Notwithstanding this, no further action taken by ILSEC Management or by Judge Satomozza has been reported until today.

* *

30. On 10 April 2022, the Prime Minister of Riviera adopted Decree-Law No. 48/2022, which entered into force on the same day. It obliged the courts of Riviera to freeze all proceedings against Avalonia and to withhold newly brought cases against Avalonia. According to the relevant provisions of the Constitution of Riviera, decree-laws, which are temporary measures adopted by the Prime Minister “in exceptional cases of necessity and urgency”, “shall lose effect as of the date of adoption if they are not converted into law by the approval of the parliament within ninety days.” On the same day, the Prime Minister’s office issued a press release in which it stated that “the adopted Decree-Law is urgently needed not to aggravate the present circumstances in and out of Riviera. Prime Minister will endeavour and commit to convert the Decree-Law into ordinary law”.

31. On 11 April 2022, a bill giving permanent effect to Decree-Law No. 48/2022 was proposed to the parliament of Riviera. The bill was then placed on the agenda of the parliament for the next several weeks.

32. Towards the end of June 2022, several local political magazines published articles denouncing the misappropriation of public funds by a secretary of the Prime Minister’s office, who was in charge of national stimulus programmes to counter the effect of the COVID-19 lockdown. On 30 June 2022, the Prime Minister’s office issued a press release in which it denied the allegations. The parliament’s attention centring on this scandal brought the debate over Decree-Law No. 48/2022 to a halt.

33. On 3 July 2022, Avalonia filed with the Registry of the International Court of Justice an Application instituting proceedings against Riviera with regard to a dispute concerning the alleged violations by Riviera of Avalonia’s jurisdictional immunities. In its Application, Avalonia seeks to found the jurisdiction of the Court on Article XXXI of the Pact of Bogotá it signed on 30 April 1948. No other basis of jurisdiction of the Court was invoked by Avalonia.

34. On 4 July 2022, Pact of Bogotá ceased to be in force with respect to Riviera pursuant to Article LVI (see paragraph 19 above).

35. On 9 July 2022, a motion to vote on the bill giving permanent effect to Decree-Law No. 48/2022 was blocked by the members of La Justicia. On the next day, the 90-day grace period lapsed and, accordingly, the Decree-Law lost effect “as of the date of adoption” pursuant to the relevant provisions of the Constitution.

36. On 15 October 2022, Riviera’s Court of Cassation, having resumed proceedings brought by Les Enfants de Bérénice against Avalonia, rendered its judgments dismissing appeals from Avalonia. Accordingly, the *Bérénice (II)* Judgment and the decision of the Reine Court of Appeals reversing the *Bérénice (I)* Judgment, both denying the jurisdictional immunities of Avalonia before Riviera’s courts, were sustained. While Les Enfants de Bérénice, having definitively obtained the status of judgment-creditor, has not yet applied for the enforcement of the judgments until today, more than thirty lawsuits of similar nature brought by individuals and associations against Avalonia are now pending before the courts of Riviera.

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37. Aside from the Pact of Bogotá referenced elsewhere in this Statement, Avalonia and Riviera have at all relevant times been Members of the United Nations and parties to the Statute of the International Court of Justice and the Vienna Convention on the Law of Treaties. Neither Applicant nor Respondent is a party to any other multilateral or bilateral agreement relevant to the present proceedings, such as the United Nations Convention on Jurisdictional Immunities of States and Their Property and the European Convention on State Immunity.

* *

38. The Federal Republic of Avalonia respectfully requests the Court to adjudge and declare that:

- (a). The Court has jurisdiction to entertain the dispute brought to it by Avalonia in its entirety consisting of all facts and events as described in the Statement of Agreed Facts;
- (b). Riviera has breached, and continues to breach, its obligations to respect Avalonia’s jurisdictional immunities under customary international law by allowing civil claims concerning the Sainte Bérénice Massacre to be brought against Avalonia before its domestic courts;
- (c). Counter-claims raised by Riviera as its submission (d) are inadmissible;
- (d). Avalonia acts in conformity with its international obligations, *inter alia*, to respect Riviera’s immunity from measures of constraint by allowing the issuance of the discovery order dated 1 April 2022 and by maintaining the prescribed legal consequence thereof.

39. The Kingdom of Riviera respectfully requests the Court to adjudge and declare that:

- (a). The Court lacks jurisdiction *ratione temporis* to entertain Riviera's claims insofar as they are based on facts or events that occurred after the lapse of the title of jurisdiction on 4 July 2022;
- (b). Riviera has never breached its obligations to respect Avalonia's jurisdictional immunities under customary international law in light of facts and events that fall within the scope of the Court's jurisdiction *ratione temporis*;
- (c). Counter-claims raised by Riviera as its submission (d) are admissible;
- (d). Avalonia has breached, and continues to breach, its international obligations, *inter alia*, to respect Riviera's immunity from measures of constraint by allowing the issuance of the discovery order dated 1 April 2022 and by maintaining the prescribed legal consequence thereof.