

THE INTERNATIONAL LAW MOOT COURT COMPETITION

“ASIA CUP 2023”

IN THE INTERNATIONAL COURT OF JUSTICE



AT THE PEACE PALACE, THE HAGUE

NETHERLANDS

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

THE FEDERAL REPUBLIC OF AVALONIA

(Applicant)

v.

THE KINGDOM OF RIVIERA

(Respondent)

COUNTER-MEMORIAL FOR THE RESPONDENT

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PLEADINGS

I. THE COURT LACKS JURISDICTION *RATIONE TEMPORIS* TO ENTERTAIN AVALONIA’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

On 3 July 2022, Avalonia filed a claim against Riviera before the International Court of Justice (“**the Court**”) based on Article XXXI of the American Treaty of Pacific Settlement (“**the Bogotá Pact**”) against Riviera.¹ However, Riviera denounced the Bogotá Pact on 4 July 2022.² In accordance with *Caribbean Sea*, the denunciation of the Bogotá Pact results in a lapse of the Court’s jurisdiction at the date the denunciation took effect.³ Since Riviera’s denunciation of the Bogotá Pact took effect on 4 July 2022,⁴ the Court’s jurisdictional title lapsed on the same date. Consequently, as the Riviera Court of Cassation Judgment (“**Cassation Judgment**”), which occurred after 4 July 2022, is neither (A) a continuous nor (B) composite acts, the Court lacks jurisdiction *ratione temporis* to assess the aforesaid fact.

A. Both Bérénice II and Cassation Judgment are not a continuous act as a consequence of Decree Law 48/2022

Rainbow Warrior held that a continuous act is without interruption or suspension,⁵ for example through annulment of a legal effect of a judgment.⁶ It follows that the Bérénice II

¹ Statement of Agreed Facts (“**Facts**”), ¶33.

² Facts, ¶34.

³ *Alleged Violation of Sovereign Rights and Maritime Spaces in the Caribbean Sea, Nicaragua v. Colombia*, (Judgment), ICJ Rep. 2022 (“**Caribbean Sea**”), ¶40.

⁴ Facts, ¶34.

⁵ *Case Concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* (Award 1990), Ad Hoc Arbitration Vol. XX, ¶105; Loukis G. Loucaides, ‘The Concept of Continuing Violations of Human Rights’, (2007) Collected Essays on The European Convention on Human Rights, p. 19.

⁶ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Act with Commentaries, in Report of the ILC on the Work of Its Fifty-third Session, UN GAOR, 56th

Judgment (“*Bérénice II*”) was indeed continuous as it was first ruled by the Reine-Occidentale First Instance Tribunal and subsequently upheld by the Reine Court of Appeals.⁷ However, *Bérénice II* and its effects of allowing civil claims against Avalonia were annulled through Decree Law 48/2022 from 10 April 2022 to 10 July 2022.⁸ Consequently, as *Bérénice II* was ‘interrupted’ and effectively ceased, it is no longer continuous.⁹ Hence, the subsequent Cassation Judgment is not a continuation of *Bérénice II*.

B. Both *Bérénice II* and Cassation Judgment are not a set of composite acts

Composite acts are formed when acts are legally significant to each other,¹⁰ rendering it inseparable.¹¹ Since the Cassation Judgment upheld *Bérénice II* and maintained the allowance of civil claims against Avalonia,¹² the legal implications of *Bérénice II* remain unaffected by it. Hence, neither *Bérénice II* nor Cassation Judgment is composite in character.

II. 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*

On 10 November 2018, Riviera allowed civil claims against Avalonia in pecuniary claims relating to the Sainte Bérénice Massacre (“**the Massacre**”) on Riviera’s domestic

Sess., Supp. No. 10, at 43 (2001) UN Doc. A/56/10 (“**ARSIWA Commentary**”), Art. 35, ¶5; Art. 30, ¶3.

⁷ Facts, ¶¶14;18 ; ARSIWA Commentary, Art. 14, ¶5.

⁸ Facts, ¶¶30;35.

⁹ ARSIWA Commentary, Art. 14, ¶5; James Crawford, ‘Breach: the temporal element’, *State Responsibility The General Part* (CUP 2013) (“**Crawford**”), p. 265.

¹⁰ *Alleged Violation of Sovereign Rights and Maritime Spaces in the Caribbean Sea, Nicaragua v. Colombia*, (Dissenting Opinion of Judge Nolte), ICJ Rep. 2022, ¶14; ARSIWA Commentary, Art.15, ¶2; Nick Gallus, ‘Recent Bit Decisions and Composite Acts Straddling The Date A Treaty Comes Into Force’ (2007) Vol. 56 No. 3 *The International and Comparative Law Quarterly*, pp. 492-494; Crawford, pp. 266-267.

¹¹ *Ireland v. The United Kingdom*, App No. 5310/71, (18 January 1978), ECtHR, ¶159.

¹² Facts, ¶36.

courts.¹³ Here, allowing civil claims against Avalonia is not contrary to Customary International Law (“CIL”) on jurisdictional immunity as (A) the Massacre violated the *jus cogens* norms and (B) in any event, justified through the territorial tort exception. (C) Additionally, the need for victims to obtain redress supersedes Avalonia’s jurisdictional immunity.

A. Avalonia is not entitled to jurisdictional immunity with respect to the Massacre as it is a violation to the *jus cogens* norms

The *jus cogens* norms, including a grave violation of International Humanitarian Law (“IHL”),¹⁴ shall take priority over any international law conflicting with it.¹⁵ This notion was affirmed by the Court,¹⁶ the International Criminal Tribunal for the former Yugoslavia,¹⁷ and supported by States,¹⁸ which further asserted that when immunity hinders the realization of *jus cogens*, immunity shall be lifted.¹⁹ *In casu*, Avalonia has gravely violated the IHL of *jus*

¹³ Facts, ¶14.

¹⁴ *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion 1996), ICJ Rep. 1996, ¶79; *Prosecutor v. Radislav Krstić*, (Judgment, Trial Chamber), ICTY IT T-98-33, (2001) (“*Krstić*”) ¶492; ILC, ‘Peremptory Norms of General International Law (*Jus Cogens*)’ Report of the ILC on the Work of Its Fifty-third Session, UN Docs A/7410 (“A/74/10”), Conclusion 23.

¹⁵ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, (Judgment), ICJ Rep. 2012, (“*Jurisdictional Immunities*”) ¶92; *South West Africa Cases, Ethiopia v. South Africa; Liberia v. South Africa*, (Dissenting Opinion of Judge Tanaka), ICJ Rep. 1966, p. 298; *Right of Passage over Indian Territory, Portugal v. India*, (Dissenting Opinion of Judge Fernandes), ICJ Rep. 1960, p. 135; A/74/20, Conclusion 3.

¹⁶ *Questions Relating Obligation to Prosecute or to Extradite, Belgium v. Senegal*, (Judgment), ICJ Rep. 2012 (“*Belgium v. Senegal*”), ¶¶74;99.

¹⁷ *Prosecutor v. Anto Furundzija*, (Judgment, Trial Chamber 1998), ICTY IT-95-17/1-T, (“*Furundzija*”), ¶153.

¹⁸ *Karla Christina Azeredo Venancio da Costa et.al v. Federal Republic of Germany*, (2021), Supreme Court of Brazil (“*Karla v. Germany*”), ¶¶24-25; Aziz Tuffi Saliba & Lucas Carlo Lima, ‘The Law of state immunity before the Brazilian Supreme Court: What is at Stake with the Changri-la Case?’ (2021) Vol. 18 No. 1 Brazilian Journal of International Law (“*Saliba & Lima*”), p. 53; *Hee Nam Yoo et.al v. Japan*, (Judgment 2021), Seoul Central District Court (“*Hee Nam Yoo v. Japan*”); ‘Distomo Massacre Case (*Greek Citizens v. Federal Republic of Germany*)’, (2009), p. 135, ILR 186 (“*Distomo*”), p. 515; *Luigi Ferrini v. Federal Republic of Germany*, (Judgment 2004), Italian Supreme Court of Cassation (“*Ferrini*”), ¶¶9.1-9.2.

¹⁹ *Belgium v. Senegal*, ¶¶74;99; *Furundzija*, ¶¶153;155; *Jurisdictional Immunities of the State, Germany v. Italy*, (Dissenting Opinion of Judge Yusuf), ICJ Rep. 2012, ¶28; *Jurisdictional*

cogens nature by committing the Massacre against 1,500 civilians.²⁰ Hence, Avalonia is not entitled to jurisdictional immunity for claims with respect to the Massacre.

B. In any event, Riviera is allowed to enable civil claims against Avalonia by virtue of the territorial tort exception

Under CIL, the territorial tort exception waives jurisdictional immunity in pecuniary claims relating to acts attributable to a State resulting in the death or injury of a person in the forum State's territory.²¹ Although *Jurisdictional Immunities* previously concluded that territorial tort exception does not cover the conduct of armed forces,²² the development of international law signifies otherwise so long as it is a violation of IHL.²³ This has been recognized by States through the ruling of courts in Brazil,²⁴ Italy,²⁵ Korea,²⁶ Greece,²⁷ and Ukraine,²⁸ all of which cover territorial tort exceptions on armed forces occasioning death or injury as a result of violation of IHL.²⁹ Presently, Riviera allows civil claims against Avalonia

Immunities of the State, Germany v. Italy, (Dissenting Opinion of Judge Cançado Trindade), ICJ Rep. 2012 (“***Jurisdictional Immunities (Diss.Op Cançado Trindade)***”) ¶125; CAT, ‘Concluding Observations of the Committee against Torture: Canada’, Consideration of Reports Submitted by States parties under Art. 19 of the Convention, UN Docs CAT/C/CAN/CO/6, ¶15; *Al-Adsani v. The United Kingdom*, App No.35763/97, (21 November 2001), ECtHR, (“***Al-Adsani v. the UK***”) Joint Dissenting Opinion of Judge Rozakis and Caflisch joined by Judge Wildhaber, Costa, Cabral Barreto and Vajić, ¶3; *Al-Adsani v. the UK*, (Dissenting Opinion of Judge Loucaides), ECtHR.

²⁰ Facts, ¶5; *Krstić*, ¶492; A/74/20, Conclusion 23.

²¹ *Jurisdictional Immunities*, ¶64.

²² *Jurisdictional Immunities*, ¶78.

²³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Judgment), ICJ Rep. 1986, (“***Nicaragua***”) ¶207; Riccardo Pavoni, ‘Germany versus Italy reloaded: Whither a human rights limitation to state immunity?’ Vol.1 Questions of International Law, Napoli: Editoriale Scientifica (“***Pavoni***”), pp. 32-33.

²⁴ *Karla v. Germany*, ¶¶24-25; Saliba & Lima, p. 53.

²⁵ *Giorgio v. Federal Republic of Germany*, (2018), Appellate Court of Bologna; *Cavallina v. Federal Republic of Germany*, (2020), Appellate Court of Rome; *Ferrini*, ¶¶9.1-9.2.

²⁶ *Hee Nam Yoo v. Japan*, p.37.

²⁷ ‘Distomo Massacre Case (*Greek Citizens v. Federal Republic of Germany*)’, (2009), p.135, ILR 186 (“***Distomo***”), p. 521.

²⁸ *Plaintiff v. Russian Federation*, (2022), Supreme Court of Ukraine, accessed through <<https://opendatabot.ua/court/104086064-1eae19b6d6aa3a063c5eeee74373778e>>.

²⁹ *Distomo*, ¶515; Bohdan Kamaukh, ‘Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with regard to Tort Claims

on pecuniary claims concerning the Massacre during the 1940 war.³⁰ The claims relating to the Massacre fulfill the elements of territorial tort as it occurred within the territory of Riviera,³¹ occasioning death through violation of IHL,³² and is attributable to Avalonia.³³ Conclusively, Riviera is allowed to enable claims against Avalonia under territorial tort exception.

C. Additionally, the need for victims to obtain redress supersedes jurisdictional immunity

Goiburu et. al asserted that when a fundamental right was violated, the right to obtain redress will be characterized as a peremptory norm.³⁴ In consequence, the right to redress supersedes jurisdictional immunity,³⁵ as further affirmed by *Sehremelis*, which held that immunity cannot ‘impair the very essence of the author’s right’ to obtain redress.³⁶ Although the present Massacre is a violation of IHL of peremptory character,³⁷ the facts reflect a clear and consistent dissatisfaction with past attempts at war reparation from the victims.³⁸ Granting jurisdictional immunity to Avalonia would ‘impair the very essence’ of the victims right to

Brought by the Victims of the Russia-Ukraine War’ (2022) Access to Justice in Eastern Europe, p. 8; Daniel Franchini, ‘South Korea’s denial of Japan’s immunity for international crimes: Restricting or bypassing the law of state immunity?’ (2021) *Völkerrechtsblog*, p. 2; Pavoni, p. 25.

³⁰ Facts, ¶3.

³¹ Facts, ¶3.

³² Facts, ¶¶3;5.

³³ Facts, ¶¶3;5.

³⁴ *Goiburu et. al v. Paraguay, Merits, Reparations, and Costs*, Judgment (22 September 2006), IACtHR, ¶131.

³⁵ *Jurisdictional Immunities*, (Diss.Op Cançado Trindade), ¶138; *Jurisdictional Immunities* (Diss.Op. of Judge Yusuf), ICJ Rep. 2012, ¶28.

³⁶ *Sehremelis et.al v. Greece* (2006) Comm. 1507/2006, CCPR/C/100/D/1507/2006 (“*Sehremelis v. Greece*”), ¶10.5; Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights Cases, Materials, and Commentary*, (OUP 2013), pp. 874-875; A/74/10, Conclusion 3.

³⁷ *Krstić*, ¶492; A/HRC/44/38, ¶33.

³⁸ Facts, ¶7.

obtain redress as no other redress is available to them.³⁹ Consequently, the need for victims to obtain redress supersedes Avalonia's jurisdictional immunity.

III. COUNTER-CLAIMS RAISED BY RIVIERA AS ITS SUBMISSION (IV) ARE ADMISSIBLE

Pursuant to Article 80 (1) Rules of the Court, Riviera's submission of the Counter-Claims concerning Avalonia's violation of Riviera's state immunity from measures of constraint ("MoC") and principle of non-intervention under CIL is admissible since they (A) are directly connected to the Principal Claim and (B) falls within the Court's jurisdiction.⁴⁰

A. The Counter-Claims are directly connected to the Principal Claim

The Counter-Claims are admissible as they are directly connected (1) in facts and (2) in law with the Principal Claim.⁴¹

1. *The Counter-Claims and Principal Claim are directly connected in facts*

³⁹ *Sehremelis v. Greece*, ¶10.5; see also *Bernadette Faure v. Australia* (2001), Comm 1036/01, CCPR/C/85/D/1036/2001, ¶7.4; United Nations General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2006) UN Doc A/RES/60/147, ¶11.

⁴⁰ International Court of Justice's Rules (adopted 14 April 1978, entered into force 1 July 1978) ("Rules of the Court"), Art. 80; Facts, ¶39.

⁴¹ *Rules of the Court*, Art. 80 (1); *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda*, (Counter-Claims, Order of 29 November 2001), ICJ Rep. 2001 ("*Armed Activities*"), ¶36; *Certain Activities Carried Out by Nicaragua in the Border Area, Costa Rica v. Nicaragua*; *Construction of a Road in Costa Rica along the San Juan River, Nicaragua v. Costa Rica*, (Counter-Claims, Order of 18 April 2013), ICJ Rep. 2013 ("*Certain Activities*"), ¶32; *Oil Platforms, Islamic Republic of Iran v. United States of America*, (Counter-Claims, Order of 10 March 1998), ICJ Rep. 1998 ("*Oil Platforms*"), ¶37; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia*, (Counter-Claims, Order of 17 December 1997), ("*Bosnian Genocide*"), ¶33; *Caribbean Sea*, (Counter-Claims, Order of 18 April 2013), ¶23.

The facts regarded in both claims are directly connected since they share the same (a) time period,⁴² and (b) nature.⁴³

a. The facts in the Counter-Claim and the Principal Claim share the same time period

Caribbean Sea held that ‘same time period’ requirement is fulfilled when the facts in both claims are intersected within the same time frame.⁴⁴ Here, Riviera’s Counter-Claims concern the facts from 20 July 2021 to 1 June 2022, which resulted in the issuance of the Discovery Order (“**Order**”).⁴⁵ Meanwhile, Avalonia’s Principal Claim concerns the facts from 15 December 2017 to 15 October 2022, which concerns various rulings of Riviera’s courts.⁴⁶ As there was a clear intersection of facts in 2022, both Claims share the same time period.

b. The facts in the Counter-Claim and the Principal Claim share the same nature

Croatia v. Serbia ruled that both claims shared the same nature when the counter-claims existed as a response to the facts within the principal claim.⁴⁷ *In casu*, as a response to the *Bérénice II* concerned by the Principal Claim,⁴⁸ Apricity Bank N.A. expressed its regret by selling the 1982 Bonds to Investment Loans and Securities Management (“**ILSEC**”),⁴⁹ who later submitted a dispute to the London Court of International Arbitration (“**LCIA**”).⁵⁰ This finally led to the issuance of the Order in the LCIA Award enforcement proceeding in

⁴² *Certain Activities*, (Counter-Claims, Order of 18 April 2013), ¶32; *Caribbean Sea* (Counter-Claims, Order of 15 November 2017), ¶24; *Bosnian Genocide*, (Counter-Claims, Order of 17 December 1997), ¶34; *Oil Platforms*, (Counter-Claims, Order of 10 March 1998), ¶38.

⁴³ *Bosnian Genocide*, (Counter-Claims, Order of 17 December 1997), ¶34; *Oil Platforms*, (Counter-Claims, Order of 10 March 1998), ¶38; *Armed Activities*, (Counter-Claims, Order of 29 November 2001), ¶38; *Certain Activities*, (Counter-Claims, Order of 18 April 2013), ¶33; *Caribbean Sea*, (Counter-Claims, Order 15 November 2017), ¶24.

⁴⁴ *Caribbean Sea*, (Counter-Claims, Order of 15 November 2017), ¶¶44;47.

⁴⁵ Facts, ¶¶21-29.

⁴⁶ Facts, ¶¶12-17; 31-33.

⁴⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia v. Serbia*, (Judgment), ICJ Rep. 2015, ¶123.

⁴⁸ Facts, ¶20.

⁴⁹ Facts, ¶¶21; 22.

⁵⁰ Facts, ¶25.

Avalonia's Court, which is the main concern of the Counter-Claims.⁵¹ This signifies that the facts in Riviera's Counter-Claims are a response to the facts within the Principal Claim. *Ergo*, the facts in both claims share the same nature.

2. *The Counter-Claims and Principal Claim are directly connected in law*

A direct connection in law is apparent when the counter-claims and the principal claim are of the same legal bases or the same legal aim to determine a certain legal responsibility.⁵² Presently, both Parties mainly rely upon the CIL of state immunity as their legal bases, which covers jurisdictional immunity,⁵³ and MoC.⁵⁴ Additionally, both Parties pursue the same legal aim to determine the alleged violations of their respective obligations under CIL of state immunity.⁵⁵ Hence, the facts regarded in both claims are directly connected in law.

B. The Counter-Claims fall within the Court's jurisdiction

Caribbean Sea held that once the Court's jurisdiction has been established, it has the responsibility to deal with all its phases, including counter-claims.⁵⁶ *In casu*, Avalonia established the Bogotá Pact as the jurisdictional basis for the proceeding on 3 July 2022.⁵⁷ Since the Bogotá Pact was still in force on the filing of the application,⁵⁸ the Counter-Claims fall within the Court's jurisdiction.

⁵¹ Facts, ¶27.

⁵² *Certain Activities*, (Counter-Claims, Order of 18 April 2013), ¶32; *Bosnian Genocide*, (Counter-Claims, Order of 17 December 1997), ¶35; *Oil Platforms*, (Counter-Claims, Order of 10 March 1998), ¶38; *Armed Activities*, (Counter-Claims, Order of 29 November 2001), ¶¶38;40.

⁵³ Facts, ¶18.

⁵⁴ Facts, ¶28.

⁵⁵ Facts, ¶¶38;39.

⁵⁶ *Caribbean Sea*, (Counter-Claims, Order of 15 November 2017), ¶67.

⁵⁷ Facts, ¶33.

⁵⁸ Facts, ¶33.

IV. 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

On 1 April 2022, Avalonia issued an Order against Riviera to disclose information regarding its assets and properties (“**Assets**”) located in Avalonia.⁵⁹ Presently, Avalonia has breached its international obligations since (A) the issuance of the Order as a MoC is unlawful under CIL and (B) the issuance of the Order and the sanction within violate the principle of non-intervention under CIL.

A. The issuance of the Order as a measure of constraint is unlawful under CIL

Under CIL,⁶⁰ the issuance of the Order violates Riviera’s state immunity from MoC since (1) Riviera has never expressly consented to it and (2) in any event, Riviera has never impliedly consented. Moreover, (3) Riviera’s Assets are immune from the Order.

1. Riviera has never expressly consented to the issuance of the Order

Consent to the adjudication proceeding does not automatically constitute consent to a MoC.⁶¹ As such, CIL requires another express consent from a State to lawfully issue a MoC.⁶²

⁵⁹ Facts, ¶27.

⁶⁰ *Jurisdictional Immunities*, ¶118; *Société Nationale Algérienne de Transport et de Commercialisation des Hydrocarbures Sonatrach v. Migeon*, (Judgment 1985), France Court of Cassation, (1st Civil Chamber, 1985), Bull civ. I, N° 236, p. 211; *US FSIA 1976*, §1610(a)(2); *Diana Gayle Abbott v. República de Sudáfrica*, (Judgment 1992), Spain Constitutional Court, STC 107/1992 (“*Abbot v. Sudáfrica*”), pp. 16-17; *Alcom Ltd. v. Republic of Colombia*, (1984) UKHL 1 AC 580 (“*Alcom v. Colombia*”), p. 604; Civil Procedural Code of the Republic of Kazakhstan Art. 492.

⁶¹ *Jurisdictional Immunities*, ¶113; United Kingdom state immunity Act 1978 (“**UK SIA 1978**”) §13(3); Austria Introductory Law to the Law on Jurisdiction Art. IX; Russian Law on Jurisdictional Immunities, Art. 6(2); *US FSIA 1976*, §1604; 1609; *Alcom v. Colombia*, p. 600; *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania* (2006) EWCA Civ 1529, ¶135; *AIG Capital Partners, Inc v. Kazakhstan* (2005) EWHC 2239 (Comm), ¶42.

⁶² See *Jurisdictional Immunities*, ¶118.

In this case, although Riviera had consented to the LCIA Arbitration, Riviera has never expressly consented to the issuance of the Order.⁶³ Hence, the express consent requirement was not fulfilled.

2. *In any event, Riviera has never impliedly consented to the Order*

Under CIL, when a foreign State has already allocated its Assets in a proceeding, it amounts to an implied consent to MoC.⁶⁴ Moreover, State's consent to be bound in a treaty that governs the enforcement of a foreign arbitral award also amounts to an implied consent.⁶⁵ *In casu*, Riviera has never allocated any of its Assets in Avalonia for the LCIA Award enforcement proceeding. Additionally, both States are not parties to any treaty which would imply such consent.⁶⁶ Thus, Riviera has never impliedly consented to the Order.

3. *Riviera's Assets are immune from the Order*

Under CIL, immunity from MoC is granted to a foreign State unless the MoC is directed to the properties for commercial purposes.⁶⁷ The burden to prove the commercial character of the properties falls upon the plaintiff, where in case of doubt, they remain immune from the MoC.⁶⁸ Here, since ILSEC as the plaintiff has never determined nor indicated which Riviera's

⁶³ Facts, ¶25; *Clarifications*, ¶2.

⁶⁴ Belgium Judicial Code, Art. 1412, §2 of the; Switzerland Federal Act on Debt Collection and Insolvency of 11 April 1889, Art. 92(1)(11); Spain Law on the Privileges and Immunity of Foreign States, Art. 18; Republic of Kazakhstan Civil Procedural Code, Art. 492 (1); France Code of Civil Enforcement Proceedings, Art. 111-1-2; *Société Nationale Algérienne de Transport et de Commercialisation des Hydrocarbures Sonatrach v. Migeon*, (Judgment 1985), France Court of Cassation, (1st Civil Chamber, 1985), Bull civ. I, N° 236, p. 211.

⁶⁵ Xiao Dong Yang, *State Immunity in International Law* (Cambridge University Press 2012) ("**Xiao Dong Yang**"), p. 325.

⁶⁶ Facts, ¶37.

⁶⁷ *Eurodif v. Iran*, p. 2; *Abbott v. Sudáfrica*, pp. 16-17; US FSIA 1976, §1610(a)(2); UK SIA 1978, §13(4); Canadian State Immunity Act 1985, §5; Singapore State Immunity Act 1979 ("**SG SIA 1979**"), §15(4); Australia Foreign State Immunities Act 1985 ("**AUS FSIA 1985**"), §32(1); South Africa Foreign States Immunities Act 1981, §14(3). See *Jurisdictional Immunities*, ¶118.

⁶⁸ Peter Fritz Walter, *Evidence and Burden of Proof in Foreign Sovereign Immunity Litigation* (Sirius-C Media Galaxy LLC 2017) ("**Peter Fritz**"), p. 36; Xiao Dong Yang, p. 420; *Alcom v. Colombia*, p. 604; *Philippine Embassy Bank Account Case*, (Judgment 1977), Germany Federal Constitutional Court, BVerfGE 46, 342 ("**Philippine Embassy**"), ; 65 ILR 146, 150;

Assets are of commercial purposes, ILSEC was clearly under a doubt about Riviera's Assets in Avalonia.⁶⁹ Hence, Riviera's Assets are immune from the Order as a MoC.

B. The issuance of the Order and the sanction within violate the principle of non-intervention under CIL

Under CIL, the principle of non-intervention governs that States are prohibited from intervening a State's internal affairs in a coercive manner.⁷⁰ Presently, Avalonia violates the principle of non-intervention since the issuance of the Order and the sanction within (1) intervenes with Riviera's internal affairs and (2) is coercive.

1. The issuance of the Order and the sanction within intervenes in Riviera's internal affairs

States are prohibited to intervene in another State's internal affairs,⁷¹ such as being compelled to disclose confidential information to protect its national security interest.⁷² Furthermore, the proprietary rights to determine the status of its properties constitutes a State's internal affairs.⁷³ Here, the Order compels Riviera to disclose its potentially confidential information with a threat of unilateral change of status of Riviera's Assets.⁷⁴ As a sovereign

Iraq v. Vinci Construction Grands Projets SA, (Judgment 2002), Belgium Court of Appeal, Appeal Judgment, ILDC 49 (BE 2002) ("*Iraq v. Vinci*"), ¶A9, <<https://opil.ouplaw.com/display/10.1093/law:ildc/49be02.case.1/law-ildc-49be02>>.

⁶⁹ Facts, ¶¶26;27.

⁷⁰ *Nicaragua*, ¶¶202;205.

⁷¹ *Nicaragua*, ¶205.

⁷² ILC, Draft Articles on Jurisdictional Immunities of States and Their Property Commentary, Art. 22, ¶2; European Convention on State Immunity Explanatory Report, ¶71; Mathias Audit, 'Immunity from Execution and Domestic Procedural Rules Preventive Control, Burden of Proof and Discovery' (2019) *The Cambridge Handbook of Immunities and International Law* ("*Audit*"), p. 387; *Philippine Embassy*, ¶133; *Kenyan Diplomatic Residence Case*, (Judgment 2003) Germany Federal Supreme Court, No. IXa ZB 19/ 03, p. 11; *Iraq v. Vinci*, ¶25; Xiao Dong Yang, p. 421; *Liberian Eastern Timber Corporation v. Government of Republic of Liberia*, 659 F.Supp. 606, 610 (D.D.C. 1987); *Birch Shipping v. Embassy of United Republic*, 507 F.Supp. 311, 313 (D.D.C. 1980).

⁷³ Peter Tzeng, 'The State's Right to Property Under International Law' (2016) Vol. 25 No. 1805 *The Yale Law Journal*, pp.1807;1808; *Audit*, p. 387.

⁷⁴ Facts, ¶27.

State, Riviera must not be compelled to disclose confidential information to Avalonia's Court for the protection of their national security interest. Moreover, the unilateral change of status within the Order intervenes with Riviera's proprietary rights. Thus, the Order and the sanction falls within Riviera's internal affairs.

2. The Sanction within the Order is coercive as it deprives Riviera's choices over its internal affairs

Nicaragua stipulated that the act of intervention is wrongful when it uses methods of coercion.⁷⁵ The inclusion of sanctions within constitutes coercion as it forces a State to comply with the Order.⁷⁶ Here, the Order forces Riviera to disclose confidential information that could threaten its national security or renounce its proprietary rights.⁷⁷ *Ergo*, the sanction within the Order deprives Riviera's choices over its internal affairs.

⁷⁵ *Nicaragua*, ¶205; Maziar Jamnejad & Michael Wood, 'The Principle of Non-Intervention', (2009) Vol. 22 No. 2 Leiden JIL pp. 345;348; James D. Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility' (2007) No. 40 Vanderbilt Journal of Transnational Law, p. 619.

⁷⁶ Facts, ¶27; *Audit*, p.387;389; *NML Capital, Ltd. v. Republic of Argentina*, (Order of 12 August 2015), 09-cv-01708-TPG (S.D.N.Y 2015), p. 3.

⁷⁷ Memorial.IV.B1.

PRAYER FOR RELIEF

For the foregoing reasons, the Kingdom of Riviera requests the Honorable Court to adjudge and declare that:

I. 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;

II. 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*;

III. Counter-Claims raised by Riviera as its submission (IV) are admissible;

IV. 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.

Respectfully submitted,

AGENTS FOR RIVIERA