
2023 ASIA CUP INTERNATIONAL LAW MOOT COURT COMPETITION



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

**FEDERAL REPUBLIC OF AVALONIA
(APPLICANT)**

v.

**KINGDOM OF RIVIERA
(RESPONDENT)**

**IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS**

MEMORIAL OF APPLICANT

TABLE OF CONTENTS

| | |
|--|----|
| TABLE OF CONTENTS | ii |
| PLEADINGS | 1 |
| I. 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. | 1 |
| A. The Court has jurisdiction over all the facts under the Pact. | 1 |
| B. The Court has jurisdiction <i>ratione temporis</i> to entertain Avalonia’s claims. | 1 |
| i. Avalonia firstly submits under this prong that the Court’s mandate of its 2022 judgment is applicable. | 1 |
| a. Whether the impugned facts and events ‘arises directly out of the question which is the subject-matter of the application’ or whether they would ‘transform the nature of the dispute.’ | 1 |
| b. The ‘continuity’ and ‘connexity’ tests..... | 2 |
| ii. Arguendo, Avalonia submits that the focus needs to be given to the title of jurisdiction. | 3 |
| II. 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..... | 3 |
| A. Avalonia firstly submits that the issue is admissible..... | 4 |
| B. Avalonia secondly submits that Riviera has violated Avalonia’s jurisdictional immunity. | 4 |
| i. The territorial tort exception does not apply..... | 4 |

| | |
|--|----|
| ii. There is no exception for ‘jus cogens’ violation..... | 5 |
| iii. There is no exception for the right to get an effective remedy. | 6 |
| C. Riviera’s acts do not amount to lawful countermeasures..... | 6 |
| III. Counterclaims raised by Riviera as its submission (d) are inadmissible. | 7 |
| A. The counterclaim has no direct connection with the subject matter of the claim of the principal claim. | 7 |
| i. There is no factual connection. | 7 |
| a. The facts of the counterclaim and the principal claim arise out of different geographic locations and relate to different time periods. | 8 |
| b. The facts relied upon by each party are of different nature, in that they allege different types of conduct. | 8 |
| ii. There is no legal connection. | 8 |
| a. The legal principles relied upon by the Parties are different, and they are not pursuing the same legal aim in their respective claims..... | 8 |
| B. Even if the counterclaims are found to be directly connected with the principal claim, they are not within the jurisdiction of the Court. | 9 |
| i. The Court does not have jurisdiction as the Respondent could not establish that the matters presented in the counterclaim could not be settled by negotiations..... | 9 |
| IV. 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. | 9 |
| A. Avalonia did not violate Riviera’s immunity from enforcement by the motion for discovery. | 10 |

| | |
|--|----|
| i. Issuing government bonds by Riviera amounts to acta jure gestionis..... | 10 |
| ii. Riviera’s arbitration agreement amounts to a waiver of immunity..... | 11 |
| B. In any event, the motion for discovery was a valid countermeasure in response to the acts of the Rivieran Courts..... | 11 |
| C. In any event, Riviera cannot claim immunity from enforcement due to its own inconsistent behavior..... | 12 |
| SUBMISSIONS | 13 |

PLEADINGS

I. 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.

Avalonia has two main submissions regarding this- **A.** The Court has jurisdiction over all of the facts under the Pact of Bogota (Pact),¹ and **B.** The Court has jurisdiction *ratione temporis* over the impugned facts.

A. The Court has jurisdiction over all the facts under the Pact.

Applicant submits that for there to be jurisdiction under Article XXXI of the Pact, there must be a dispute when the application is filed,² which existed in the present case regarding the reparation.³ Moreover, the Pact will cease to be in force for Riviera after one year regardless of the language of the notice of the denunciation.⁴ Furthermore, it is submitted by Avalonia that any subsequent lapse of the jurisdiction after the filing of the application is irrelevant.⁵

B. The Court has jurisdiction *ratione temporis* to entertain Avalonia's claims.

i. Avalonia firstly submits under this prong that the Court's mandate of its 2022 judgment is applicable.

The International Court of Justice (ICJ) in 2022 concluded that impugned facts would fall under the jurisdiction *ratione temporis* in a similar case.⁶ The Court essentially used two tests-

a. Whether the impugned facts and events 'arises directly out of the question

¹ American Treaty on Pacific Settlement (adopted 30 April 1948, entered into force 6 May 1949) 30 UNTS 55 (Pact of Bogota).

² *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 3, para 50; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Preliminary Objections) [1998] ICJ Rep 9, paras 43–45.

³ Statement of Agreed Facts (SAF), para 4,7.

⁴ Pact of Bogota (n 1), art LXI; *Nicaragua v Colombia* (Preliminary Objections) (n 2), para 48; SAF, para 33.

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) [2008] ICJ Rep 412, para 95; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 28, para 36; *Nottebohm case (Liechtenstein v Guatemala)* (Preliminary Objection) [1953] ICJ Rep 111, para 123; Samuel A Bleicher, 'ICJ Jurisdiction: Some New Considerations and a Proposed American Declaration' (1967) 6 Colum J Transnat'l L 61.

⁶ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Judgment) [2022] ICJ, para 261.

which is the subject-matter of the application’ or whether they would ‘transform the nature of the dispute.’⁷

In the present case, it is our submission that the impugned facts relating to the proceedings resuming against Avalonia clearly arise out of the subject matter of the application regarding the alleged violations of jurisdictional immunities of Avalonia by Riviera.⁸ Moreover, whether the denouncing state is trying to evade the Court’s jurisdiction is another important consideration while making this decision.⁹ In the present case, Avalonia submits that Riviera denounced the Pact right after Avalonia’s warning of bringing the suit before the ICJ.¹⁰

b. The ‘continuity’ and ‘connexity’ tests.¹¹

Avalonia submits that the impugned facts were just a ‘**continuation**’ of the violation of Avalonia’s jurisdictional immunity.¹² But even if it is assumed that the wrongful act in this case occurred after the lapse of the title of jurisdiction and not before, it is our submission under the ‘**composite act**’ approach that both previous and impugned facts will fall under the jurisdiction of the Court since they constitute a wrongful act in aggregate.¹³

⁷ *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Merits) [1974] ICJ Rep 175, para 72; *LaGrand (Germany v United States of America)* (Merits) [2001] ICJ Rep 466, para 45; *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240, paras 67, 69–70; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Jurisdiction and Admissibility) [2002] ICJ Rep 3, para 36.

⁸ SAF, para 33–36.

⁹ Ricardo Abello-Galvis and Walter Arevalo-Ramirez, ‘Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia, 2022): Commentary on the Case and the Judgment on the Merits by the International Court of Justice’(2023) 10 The Journal of Territorial and Maritime Studies, p 7.

¹⁰ SAF, para 18,19.

¹¹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, para 56, 88; *Nicaragua v Colombia* (Judgment) (n 6), para 44; Daniel Muller and Affef Ben Mansour, ‘Procedural Developments at the International Court of Justice’ (2009) 8 Law & Prac Int’l Cts & Tribunals 459; *Croatia v Serbia* (Preliminary Objections) (n 5) paras 79–80; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections)[1996] ICJ Rep 595, para 26.

¹² SAF, paras 35–36.

¹³ ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (DASR) [2001] UN Doc A/56/10, art 15, para 8,9; *Nicaragua v Colombia* (Judgment) (n 6) see Dissenting Opinion of Judge Nolte, para 14 and Dissenting Opinion of Judge Abraham, para 10; Pranav Ganesan and Laia Roxane Guardiola, ‘The ICJ judgment on

ii. Arguendo, Avalonia submits that the focus needs to be given to the title of jurisdiction.

Since, in the present case, the only basis of jurisdiction was claimed under Article XXXI of the Pact, Avalonia submits that the clause must be analyzed properly.¹⁴ Although VCLT has no retroactive effect,¹⁵ articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) will apply¹⁶ as they reflect Customary International Law (CIL).¹⁷ Firstly, Applicant submits that a good-faith interpretation of the clause considering its context, objects, and text suggests a broad approach.¹⁸ The object of the Pact is to reinforce the states' mutual commitments concerning judicial settlements.¹⁹ As for text, Articles XXXI and LVI jointly suggest that the application can be filed at any time within one year of denunciation.²⁰ Avalonia respectfully submits that a different conclusion cannot be reached, considering that claims arising from facts that occurs before the Pact comes into force for any party can be brought as well.²¹ Even the *travaux préparatoires* of the Pact suggests a broad scope of jurisdiction.²²

II. 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

Nicaragua v Colombia (2022): applying an established jurisdictional test or a problematic invention?' (2023) Journal of International Dispute Settlement, p 13.

¹⁴ SAF, para 33; *Nicaragua v Colombia* (Judgment) (n 6) see Dissenting Opinion of Judge Nolt, para 8, Separate Opinion of Judge Yusuf, para 6, Dissenting Opinion of Judge Abraham, para 5; and Declaration of Judge Bennouna, para 3; *Fisheries Jurisdiction* (n 7) para 72.

¹⁵ *ibid* art 4.

¹⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331 (VCLT), art 31, 32.

¹⁷ *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] ICJ Rep 53, para 48.

¹⁸ *Nicaragua v Colombia* (Judgment) (n 6) (Separate Opinion of Judge Tomka), para 14.

¹⁹ *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction and Admissibility) [1988] ICJ Rep 69, para 46.

²⁰ *Nicaragua v Colombia* (Judgment) (n 6) (Separate Opinion of Judge Tomka), para 10, 12.

²¹ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Preliminary Objection) [2015] ICJ Rep 592, para 21, as well as the Judgment on the Merits in the same case [2018] ICJ Rep 507, paras 19–83.

²² Ninth International Conference of American States held in Bogota (30 March–2 May, 1948), *Novena Conferencia Internacional Americana, Actas y Documentos*, Vol IV, pp 161–164 <<https://history.state.gov/historicaldocuments/frus1948v09/d44>> accessed on 27 June 2023.

domestic Courts.

Avalonia substantiates this issue in 3 parts- **A.** The issue is admissible, **B.** Riviera's act was a violation of Avalonia's jurisdictional immunity, and **C.** Riviera's act do not amount to lawful counter-measures.

A. Avalonia firstly submits that the issue is admissible.

The Court will adjudge if, when filing the application, the parties believe that the dispute settlement is not possible through usual diplomatic negotiations.²³ Presently, it is our humble submission that the disagreement between the parties make it evident that the parties were of this opinion.²⁴

B. Avalonia secondly submits that Riviera has violated Avalonia's jurisdictional immunity.

States have immunity from the domestic jurisdiction of all states for all their sovereign acts.²⁵

The forum Court needs to grant this immunity even when giving effect to a foreign judgment.²⁶

Moreover, Avalonia submits that to be a 'Persistent Objector,' a state must express its objection consistently from the beginning, which was not present in this case.²⁷ Lastly, Applicant submits that the following exceptions are not applicable-

i. The territorial tort exception does not apply.

ICJ found in 2012 that this exception does not extend to acts of the armed force of another state during an armed conflict in the territory of the forum state, similar to the facts of the present case.²⁸ The Court considered the United Nations (UN) and European convention,²⁹ national

²³ Pact of Bogota (n 1), art 2; *Nicaragua v Honduras* (Jurisdiction and Admissibility) (n 19) [1988] ICJ Rep 69, para 62.

²⁴ SAF, para 10,12,14,18,30.

²⁵ *Hoffmann v Dralle* [1950] 1 Ob 171/50; Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013), p 399–411; ILC, 'Yearbook of the International Law Commission' (1980) Vol II, p 147, para 26; *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment) [2012] ICJ Rep 99, para 57.

²⁶ *Germany v Italy* (Judgment) (n 25), para 127, 131.

²⁷ *North Sea Continental Shelf cases* (Judgment) [1969] ICJ Rep 3; MN Shaw, *International law* (8th edn, CUP 2017), p 68; SAF, para 30.

²⁸ *ibid* para 78; SAF, para 3.

²⁹ European Convention on State Immunity (adopted May 16 1972) 1495 UNTS 182, art 31 and *the travaux préparatoires* to art 12 of the United Nations Convention on Jurisdictional

legislations,³⁰ and national courts' decisions³¹ but did not find enough state practice or *opinio juris* to create an exception to the rule. Riviera might argue that a custom has developed ever since but it is Avalonia's humble submission that instant customs need even clearer proof of state practice and *opinio juris*³² and the state practice after 2012 further supports the Court's view.³³

ii. There is no exception for 'jus cogens' violation.

Avalonia firstly submits that, peremptory norms, which is a substantive matter, cannot be derogated by jurisdictional immunity, which is a procedural matter.³⁴ Secondly, this Court, after taking into account state legislations,³⁵ and national Court decisions,³⁶ did not find adequate state practice in this regard in its 2012 judgment.³⁷ Lastly, it is our humble submission that recent development also supports this view.³⁸

Immunities of States and their Property (adopted 2 December 2004) (UN Convention on State Immunity) UN Doc A/RES/59/38.

³⁰ *Germany v Italy* (Judgment) (n 25), para 71. See State Practice of the United Kingdom, Singapore, Canada, Australia, Israel, South Africa, Argentina, Japan, and the United States.

³¹ *Germany v Italy* (Judgment) (n 25), para 72,77. See State Practice of France, Slovenia, Poland, Belgium, Serbia and Brazil.

³² Martin Dixon, *International Law* (7th edn, OUP 2013), p 36.

³³ *Korean comfort women v Japan* [2021] 2016 Ga Hab 580239; Shin Ji-hye, 'Seoul Court Dismisses Lawsuit on Japan's Wartime Forced Labor', *The Korea Herald* (7 June 2021) available at <<http://www.koreaherald.com/view.php?ud=20210607000944>> accessed on 22 June 2023; Case No 943/1741/19 (Judgment of the Supreme Court, 22 October 2021); Case No 712/10119/20-II (Judgment of the Supreme Court, 22 September 2021); Decree-Law No 36/2022 of 30 April 2022, art 43.

³⁴ *Al-Adsani v United Kingdom* (2001) application No 35763/97 and *Kalogeropoulou and ors v Greece and Germany*; Stefan Talmon, 'Jus Cogens after *Germany v Italy*: Substantive and Procedural Rules Distinguished' (2012) 25 *Leiden Journal of International Law* 979, p 986.

³⁵ *General exceptions to the jurisdictional immunity of a foreign state* (2023) 28 USC 1605A.

³⁶ *UK Jones v Saudi Arabia* [2007] 129 ILR 629; *Canada-Bouzari v Islamic Republic of Iran* [2004] 243 *Dominion Law Reports* (DLR), 4th Series, p 406; Slovenia- Case No Up-13/99.

³⁷ *Germany v Italy* (Judgment) (n 25), para 97.

³⁸ Letter from Jeroen Re Court, Member of Dutch House of Representatives to Trent Franks and Steven Cohen, Chairman and Ranking Minority Member of the Subcomm on the Constitution and Civil Justice Committee on the Judiciary (July 12, 2016) <https://www.almonitor.com/pulse/files/live/sites/almonitor/files/documents/2016/JASTA_Motie%20Re_Court_Unofficial_English_Translation.pdf> accessed on 25 June, 2023; Official at Ministry of Foreign Affairs: JASTA Great Concern to Community of Nations Objecting to Erosion of Principle of Sovereign Immunity, *Saudi Press Agency* (Sept 29, 2016) <<http://www.spa.gov.sa/viewstory.php?lang=en&newsid=1543953>> accessed 25 June, 2023.

iii. There is no exception for the right to get an effective remedy.

Avalonia humbly submits that this right is inapplicable in the present case and does not have the CIL status.³⁹ *Arguendo*; this right has to be interpreted harmoniously with other principles of international law.⁴⁰ Further, this defense is not applicable as in the present case, all avenues of seeking remedy were not exhausted as no civil suit was filed in Avalonia regarding this.⁴¹ In any event, it is Applicant's submission that the peace treaty finally and conclusively closed all scopes for bringing subsequent suits,⁴² and any further solution lies in diplomacy.⁴³

C. Riviera's acts do not amount to lawful countermeasures.

Countermeasures can only preclude the wrongfulness of a state if it is given by way of executive orders, and not solely by judicial decisions.⁴⁴ Moreover, a countermeasure needs to be proportional⁴⁵ *i.e.*, there can be no better alternative,⁴⁶ which was absent in the present case as Riviera could have continued diplomatic talks or even filed suit before Avalonia's domestic Courts first.⁴⁷ Lastly, Avalonia respectfully submits that the procedural requirement of giving

³⁹ SAF, para 37; UNHRC, *General Comment no 31, The nature of the general legal obligation imposed on States Parties to the Covenant* (2004).

⁴⁰ *Case of Jones and others v UK* [2014] appl nos 34356/06 and 40528/06; Anne Peters, 'Let Not Triepel Triumph—How to Make the Best Out of Sentenza No 238 of the Italian Constitutional Court for a Global Legal Order' (judgments in cases *Ashingdane v United Kingdom* [1985]; *Waite and Kennedy v Germany* [1999]; *TP and KM v United Kingdom* [2001]; *Z and ors v United Kingdom* [2001]; *Cordova v Italy* [2003]; *Ernst v Belgium* [2003]).

⁴¹ *Jurisdictional Immunities of the State (Germany v Italy)* (Counter-Memorial of Italy) [2009], para 4.100; SAF, para 11–19.

⁴² SAF, para 4.

⁴³ *Germany v Italy* (Judgment) (n 25), para 104; *Korean comfort women v Japan* (n 32); Shin Ji-hye (n 32).

⁴⁴ Daniel Franchini, 'State Immunity as a Tool of Foreign Policy: The Unanswered Question' (2019) *Virginia Journal of International Law*, p 38; A Atteritano, 'Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years' (2009) 19 *Italian Yearbook of International Law*, p 33, 36.

⁴⁵ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, para 85; DASR (n 13), art 41, 45, 48(2)(b); KCCR [2011] 2006 HunMa788/Unconstitutional; *Germany v Italy* (Judgment) (n 25) (Dissenting Opinion of Judge Trindade), para 71.

⁴⁶ *Amerada Hess Shipping Corp v Argentine Republic* [1987] 830 F 2d 421.

⁴⁷ *Abelesz v Magyar Nemzeti Bank* [2012] 692 F 3d 661; *Cassirer v Kingdom of Spain* [2010] 461 F Supp 2d 1157; *Agudas Chasidei Chabad of US v Russian Fed'n* [2008] 528 F 3d 934; *Princz* [1992] 813 F Supp 22.

sufficient notice to the other state was also not met.⁴⁸

III. Counterclaims raised by Riviera as its submission (d) are inadmissible.

The Applicant submits that the admissibility of a counterclaim includes both the jurisdictional requirement and the direct connection requirement⁴⁹ as required by Rule 80 paragraph 1 of the Rules of the Court. In examining those requirements, the Court is not bound to follow the sequence set out in that Article⁵⁰ *i.e.*, the Court may first consider the requirement of direct connection.⁵¹

A. The counterclaim has no direct connection with the subject matter of the claim of the principal claim.

The Court, in its discretion, shall assess whether there is a sufficient connection between the counterclaim and the principal claim, and the degree of connection between the claims must be assessed both in fact and in law.⁵²

i. There is no factual connection.

Regarding the connection in fact, the Court has assessed whether the facts relied upon by each party relate to the same factual complex, including the same geographical area or the same time period⁵³ and whether the facts relied upon by the parties are of the same nature, *i.e.*, they allege

⁴⁸ Maurice Kamto, 'The Time Factor in the Application of Countermeasures', in *The Law Of International Responsibility*, p 1170; *Gabčíkovo-Nagymaros Project* (Judgment) (n 45), para 84; DASR (n 13), art 52 (1).

⁴⁹ *Jurisdictional Immunities of the State (Germany v Italy)* (Counter-Claims: Order) [2010] ICJ Rep 310, para 14; *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)* (Counter-Claims: Order) [2013] ICJ Rep 200, para 20; *Dispute over the Status and Use of The Waters of the Silala (Chile v Bolivia)* (Judgment) [2022] ICJ, para 131.

⁵⁰ *Nicaragua v Costa Rica* (Counter-Claims: Order) (n 49), para 27.

⁵¹ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Counter-Claims: Order) [2017] ICJ Rep 289, para 21.

⁵² *Oil Platforms (Islamic Republic of Iran v United States of America)* (Counter-Claims: Order) [1998] ICJ Rep 190, para 37; *Chile v Bolivia* (Judgment) (n 49) para 135.

⁵³ *Nicaragua v Colombia* (Counter-Claims: Order) (n 51), para 25. See also *Nicaragua v Costa Rica* (Counter- Claims: Order) (n 49), para 34; *Croatia v Serbia* (Preliminary Objections) (n 5), para 34; *Islamic Republic of Iran v United States of America* (Counter-Claims: Order) (n 52), para 38.

similar types of conduct.⁵⁴

a. The facts of the counterclaim and the principal claim arise out of different geographic locations and relate to different time periods.

The Applicant submits that the facts relied on by the Applicant in support of their claim have taken place in Riviera between 2017 and 2021,⁵⁵ whereas the facts relied on by the Respondents in support of the counterclaim have taken place in Avalonia in 2022.⁵⁶ Therefore, there exists no temporal or geographic connection between the facts relied on by the respective parties.

b. The facts relied upon by each party are of different nature, in that they allege different types of conduct.

The facts underpinning Riviera's counterclaims are of a different nature as those underpinning Avalonia's principal claims in so far as they allege to impugn different types of conduct of the domestic Courts of the Applicant⁵⁷ and the Respondent respectively.⁵⁸

ii. There is no legal connection.

Regarding the connection in law, the Court has assessed whether there is a direct connection between the counterclaim and the principal claim in terms of the legal principles or instruments relied upon and whether the parties were pursuing the same legal aim by their respective claims.⁵⁹

a. The legal principles relied upon by the Parties are different, and they are not pursuing the same legal aim in their respective claims.

The rules of CIL governing immunity from measures of constraints and those governing

⁵⁴ *Nicaragua v Colombia* (Counter-Claims: Order) (n 51), para 25. See also *Nicaragua v Costa Rica* (Counter- Claims: Order) (n 49), para 33; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Counter-Claims: Order) [2001] ICJ Rep 660, para 38.

⁵⁵ SAF, paras 9,11,13,14–17.

⁵⁶ *ibid* para 27.

⁵⁷ *ibid*.

⁵⁸ *ibid* paras 14–17.

⁵⁹ *Nicaragua v Colombia* (Counter-Claims: Order) (n 51), para 25. See also *Nicaragua v Costa Rica* (Counter- Claims: Order) (n 49), para 35; *Bosnia and Herzegovina v Yugoslavia* (Preliminary Objections) (n 11), para 35; *Islamic Republic of Iran v United States of America* (Counter-Claims: Order) (n 52), para 38; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Counter-Claims: Order) [1999] ICJ Rep 983; *Democratic Republic of Congo v Uganda* (Counter-Claims: Order) (n 54), paras 38 and 40.

jurisdictional immunity are distinct and must be applied independently.⁶⁰ In its counterclaims, Riviera invokes law regarding immunity from measures of constraints,⁶¹ whereas, in its principal claims, Avalonia refers to CIL relating to the jurisdictional immunity of a State.⁶² Therefore the legal principles relied upon by the parties are different, and they are also not pursuing the same legal aim in their respective claims.

B. Even if the counterclaims are found to be directly connected with the principal claim, they are not within the jurisdiction of the Court.

The requirements of admissibility of counterclaim are cumulative,⁶³ and if either of the two requirements is not satisfied, the Court should not entertain the counterclaim.⁶⁴ However, even if the counterclaims are found to be directly connected with the principal claim, they are not within the jurisdiction of the Court.

i. The Court does not have jurisdiction as the Respondent could not establish that the matters presented in the counterclaim could not be settled by negotiations.

The respondent was unable to provide evidence showing that neither of the Parties could plausibly maintain that the dispute between them could be settled by direct negotiations through the usual diplomatic channels.⁶⁵ The fact that the Avalonian Courts took no further action in this regard after the sixty days grace period expired⁶⁶ indicates that the matter could have been settled through negotiations. Therefore, the counterclaims are inadmissible for want of jurisdiction and direct connection with the principal claim.

IV. 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.

⁶⁰ *Germany v Italy* (Judgment) (n 25), paras 113, 114.

⁶¹ SAF, para 27.

⁶² *ibid* para 18.

⁶³ *Nicaragua v Colombia* (Counter-Claims: Order) (n 51), para 20.

⁶⁴ *ibid*.

⁶⁵ *Nicaragua v Colombia* (Counter-Claims: Order) (n 51), para 74; *Nicaragua v Colombia* (Preliminary Objections) (n 2), para 95; *Islamic Republic of Iran v United States of America* (Counter-Claims: Order) (n 52), para 33.

⁶⁶ SAF, para 29.

Riviera's status as a state has no bearing on its obligations as a contractual entity, *i.e.*, under *lex contractus*⁶⁷ and since immunity from enforcement is no longer absolute, according to the restrictive immunity approach enforcement measures can be taken against foreign property.⁶⁸

A. Avalonia did not violate Riviera's immunity from enforcement by the motion for discovery.

The presumption of immunity is rebuttable in two cases: [i] the act involved amounts to *acta jure gestionis*⁶⁹ or [ii] the immunity is waived by the state.⁷⁰

i. Issuing government bonds by Riviera amounts to acta jure gestionis.

The Applicant submits that the acts of a state done in the course of commercial activities are not immune from measures of constraints.⁷¹ In determining whether a transaction is commercial,⁷² reference should be made primarily to its nature and not its purpose.⁷³ Issuance of government bonds,⁷⁴ acting as guarantor of bonds,⁷⁵ and the unilateral rescheduling of payment of these bonds have been held to constitute commercial activity.⁷⁶ Issuance of

⁶⁷ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China [1990] 29 LLM 1511, art 153; WTO Press Release, 'Trade Policy Review: Macau, China' (July 2001) WT/TPR/S/82, 12, 18; IMF Press Release, 'IMF Offers Membership to Republic of Kosovo' (May 8, 2009) Press No 09/158; Tai-Heng Cheng, 'Why New States Accept Old Obligations' (2011) U Ill L Rev 1.

⁶⁸ Hazel Fox, *The Law of State Immunity* (OUP, 2nd edn 2008) p 464–473; Gerhard Hafner, *State Practice Regarding State Immunities* (M Nijhoff Publishers, 2006) p 18, 59–68; Report of Special Rapporteur, Seventh Report on Jurisdictional Immunities of States and their Property (1985) UN Doc A/CN.4/388 and Corr 1 (E only) & Corr 2 (F only) p 42–44.

⁶⁹ *Weston Compagnie de Finance et D'Investissement (SA v Ecuador)* (1993) 823 F Supp 1106; *Alcom Ltd v Republic of Colombia* [1984] 127 ILR 170; *Leasing West v Democratic Republic of Algeria* [1986] 116 ILR 526; *Leica AG v Central Bank of Iraq and State of Iraq* [2001] (Brussels Court of Appeal) JT 6.

⁷⁰ United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004) (UN Convention on State Immunity) UN Doc A/RES/59/38, arts 18, 19.

⁷¹ *Alcom v Republic of Colombia* (n 69), pp 180, 181.

⁷² UN Convention on State Immunity (n 70), art 19(c).

⁷³ United States Foreign Sovereign Immunities Act (USFIA) [1976], s 1603(d); Canada State Immunity Act [1982] s 2; Hazel Fox (n 68), p 604, 608.

⁷⁴ *Argentina v Weltover* [1992] 504 US 607; *Morris v China* [2007] 478 F Supp 2d 561; *Velasco v Indonesia* [2004] 370 F 3d 392; *Turkmani v Bolivia* [2002] 193 F Supp 2d 165; *Central Bank v Cardinal* [2001] Lloyd's Rep Bank 1, para 11.

⁷⁵ *Socie'te' Bauer-Marchal v Gouvernement Turc, France* [1965] 47 ILR 155.

⁷⁶ *Republic of Argentina v Weltover Inc* [1992] 119 L Ed 2d 394, p 509.

government bonds, being *jure gestionis*, property belonging to the defaulting state has been attached to secure claims arising from the issue of bonds.⁷⁷ Riviera's issuance of government bonds clearly amounts to commercial activity and thus is not immune from enforcement of the arbitral award.⁷⁸ Since property other than public service assets do not enjoy immunity under CIL,⁷⁹ Avalonia's motion for discovery which exempted military and diplomatic property⁸⁰ is lawful.

ii. Riviera's arbitration agreement amounts to a waiver of immunity.

Both international conventions⁸¹ and national legislations⁸² have acknowledged the validity of waiving immunity from enforcement measures, including an implied waiver by agreeing to arbitration.⁸³ Arbitration agreement constitutes not only a waiver of immunity from jurisdiction, but also a waiver of immunity from execution.⁸⁴ Therefore, the Applicant submits that Riviera has waived its immunity from enforcement by submitting to the arbitration agreement with ILSEC.

B. In any event, the motion for discovery was a valid countermeasure in response to the acts of the Rivieran Courts.

⁷⁷ *KK Oesterreichisches Finanzministerium v Dreyfus* [1918] Tribunal fédéral suisse, ATF 44 I 49, 5 Ann Dig (1929–1930) 122, para 2; *Greek Republic v Walder and Others* [1930] Tribunal fédéral suisse, ATF 56 I 237, 5 Ann Dig (1929–1930) 121.

⁷⁸ *Svenska Petroleum v Lithuania* [2006] EWCA Civ 1529, paras 132–3.

⁷⁹ *Condor and Filvem v Minister of Justice* [1992] 101 ILR, p 394; *Cabotent v NIOC* [1970] 1 NYIL (1970) 225; 47 ILR 138; *Philippine Embassy Bank Account Case* [1977] 164 ILR, confirmed in the *NIOC Revenues Case* [1983] 65 ILR 215.

⁸⁰ SAF, para 27.

⁸¹ UN Convention on State Immunity (n 70), art 19(1); European Convention on State Immunity (adopted May 16 1972) 1495 UNTS 182, art 31.

⁸² USFIA (n 73), s 1610(a)(1); The United Kingdom State Immunity Act [1978] s 13(3); Australia Foreign States Immunities Act [1985] s 31; Canada State Immunity Act [1982] art 12(1)(a); Pakistan State Immunity Ordinance [1981] s 14(3); Singapore State Immunity Act [1985] s 15(3); South Africa Foreign States Immunities Act [1981] s 14(2).

⁸³ UN Convention on State Immunity (n 70), art 17; *Creighton Ltd v Minister of Finance of Qatar and Others* [2000] 127 ILR 154; *Libyan American Oil Company v Libya* [1980] Case No Ö 261/79, 20 ILM 893.

⁸⁴ *Creighton v Qatar* (n 83); *Collavino Incorporated v Yemen (Tihama Development Authority)* [2007] ABQB 212, para 139; *Libyan American Oil Company v Libya* [1980] Svea Hovrett, 20 ILM 89, 62 ILR 225.

Countermeasures are a part of customary international law⁸⁵ imposed by an aggrieved state in response to an internationally wrongful act⁸⁶ by another state. Riviera's violation of the jurisdictional immunity of Avalonia constituted an internationally wrongful act⁸⁷ even if it is lawful under the internal law of Riviera.⁸⁸ The countermeasure also met the requirements under international law, as it was temporary, reversible,⁸⁹ and the procedural requirements⁹⁰ were also met as Avalonia called upon Riviera before passing the motion.⁹¹

C. In any event, Riviera cannot claim immunity from enforcement due to its own inconsistent behavior.

To bring a claim before the Court, a State must 'be consistent in its attitude to a given factual or legal situation'⁹² as one should not benefit from his or her own inconsistency'.⁹³ This principle is identified as estoppel.⁹⁴ Since Riviera itself infringed Avalonia's jurisdictional immunity, it cannot claim violation on the part of Avalonia.

⁸⁵ *Air Service Agreement of 27 March 1946 between the United States of America and France* [1978]18 UN Rep Int'l Arbitral Awards 417, para 81; *Gabčíkovo-Nagymaros Project* (Judgment) (n 45), 55.

⁸⁶ ILC, Responsibility of States for Internationally Wrongful Acts (ASR) [2001] UN Doc A/56/49(Vol I)/Corr 4, art 22.

⁸⁷ ASR (n 86), art 2; *Phosphates in Morocco, United States Diplomatic and Consular Staff in Tehran* (Judgment) [1980] ICJ Rep 3, para 56, 90. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 226; *Gabčíkovo-Nagymaros Project* (n 45), para 78.

⁸⁸ ASR (n 86), arts 2,4; *Phosphates in Morocco, United States Diplomatic and Consular Staff in Tehran* (Judgment) (n 87), para 56, 90. See also *Nicaragua v United States of America* (Jurisdiction and Admissibility) (n 87), para 226; *Gabčíkovo-Nagymaros Project* (n 45), para 78.

⁸⁹ ASR (n 86), art 49.

⁹⁰ *ibid* art 52(1)(a).

⁹¹ SAF paras 14, 18.

⁹² Iain MacGibbon, 'Estoppel in International Law' (1958) 7 INT'L COM L Q 468.

⁹³ *Legal Status of Eastern Greenland* [1933] PCIJ Series A/B No 53, para 71, 73; *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 39 (Separate Opinion of Judge Alfaro); *North Sea Continental Shelf Cases* (Judgment)(n 27) 120 (Separate Opinion of Judge Ammoun).

⁹⁴ *Cambodia v Thailand* (Merits) (n 32), para 39 (Separate Opinion of Judge Alfaro).

SUBMISSIONS

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.

Respectfully submitted on behalf of the Applicant.