

INTERNATIONAL COURT OF JUSTICE



**THE PEACE PALACE,
THE HAGUE, THE NETHERLANDS**

**THE 2026 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION**

**THE CASE CONCERNING
THE GORDIAN GORGE**

**DOMINIAN OF ALEKOSTRIA
(*APPLICANT*)**

v.

**REPUBLIC OF RESTOVIA
(*RESPONDENT*)**

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The Dominion of Alekostria (“**Alekostria**”) and the Republic of Restovia (“**Restovia**”) wish to submit their Dispute regarding the Gordian Gorge to the International Court of Justice (“**ICJ**”) under a Special Agreement executed at The Hague on 12 September 2025, pursuant to Article 40(1) of the Statute of the ICJ.

Both Parties have agreed to submit to the jurisdiction of the ICJ pursuant to Article 36(1) of the Statute. Each Party has agreed to accept the final and binding judgment of the ICJ as provided in Article 5 of the Special Agreement and to implement the said judgment in good faith. Both Parties gave notice on 15 September 2025 to the ICJ of the execution of the Special Agreement. They have agreed that Alekostria would be the Applicant and Restovia would be the Respondent, without prejudice to any determination regarding the burden of proof.

STATEMENT OF FACTS

I. BACKGROUND

The Island of Pilemo has been inhabited continuously for at least 40,000 years, with Pilemon society organized at the village level under Elders who hold both spiritual and political authority. The Torngat Plateau in the Balor Mountains is the centre of Pilemon spirituality and the site of major ceremonies. The Gordian Gorge in the Plateau's northwest has been historically used for the spiritual training of Elders.

II. COLONIAL OCCUPATION

European colonial powers divided Pilemo in 1592 along a latitudinal line, placing the Plateau within what is now the Republic of Restovia ("**Restovia**"). The Pilemon population suffered a significant decline from over 300,000 to fewer than 100,000 by 1675 due to disease and displacement. In 1698, following increasing colonial incursions, the majority of the Pilemon Elders decided at a gathering at the Gordian Gorge to relocate their villages to the Plateau, and more than 60,000 individuals migrated to the area. A minority of twenty Elders dissented and led a migration to Isla Sollania in "The Crossing," insisting the Plateau remain a site of pilgrimage.

By the mid-19th century, droughts forced most Pilemons to return to lowland regions, although the Plateau retained its spiritual role. The Dominion of Alekostria ("**Alekostria**") and Restovia gained independence in 1888, with the boundary following the Balor Mountains and placing the Plateau entirely within Restovia.

III. PILEMON GOVERNANCE AND INTER-STATE ARRANGEMENTS

Both Alekostria and Restovia continue to recognise the authority of Elders. Alekostria has formally integrated Elders into its administrative structure, including a Council that meets twice annually, while Restovia acknowledges Elders in practice but does not provide statutory recognition.

The Union of Sollania ("**Sollania**") declared independence in 1950, establishing a system based on Pilemon customary laws. By the 1960s, Sollania expressed concerns regarding increasing commercialisation of the Plateau and sought durable assurances of continued access

and environmental protection. In 1971, Sollania initiated trilateral discussions, to which Alekostria expressed support for guaranteed access and shared governance among the Elders.

Restovia ultimately agreed to consult Elders before substantial changes to the Plateau. Two bilateral agreements entered into force in 1972: the ARPA and the SRPA contained common articles, with Article 17 requiring both States to take all steps within their jurisdiction and control to ensure Pilemons of all nationalities can access the Plateau, while Article 18 required Restovia to include duly authorized Pilemon representatives from both States in decision-making before any substantial change to the Plateau's condition.

III. DISCOVERY OF RARE EARTH DEPOSITS AND RESTOVIA'S MINING INITIATIVE

In October 2019, Restovia commissioned hyperspectral imaging, which revealed a large, rare-earth oxide deposit at shallow depths in the Gordian Gorge. On 1 October 2020, the Parliament issued a resolution characterising the discovery as of “*urgent and paramount importance*” and directing the government to develop exploitation plans. In early 2021, Restovia opened bidding for mining rights, requiring bidders to describe measures to protect sacred Pilemon sites and restore any damage, in cooperation with the Elders. Restovia also established an ICM through which Elders could review technical materials and submit comments.

Sollania's ambassador to Restovia categorically objected to the ICM, indicating that none of its Elders would participate, with the ICM described as “*in furtherance of a profanity.*” On 18 December 2020, Alekostria's Council of Elders issued a *communiqué* denouncing the project as a ‘sacrilegious assault’ and calling for suspension of the preparatory activities. Some Elders disagreed, stating that carefully regulated development might be compatible with tradition.

On 25 January 2021, Sollania declared that any unilateral decision without free, prior, and informed consent of all Pilemon peoples would violate Restovia's obligations under ARPA, SRPA, and customary international law.

IV. NEXCA BID AND CONSULTATION

NEXCA, a State-owned enterprise with independent legal personality, was created by statute. It required parliamentary authorization and foreign-policy clearance before undertaking

foreign projects. In March 2021, Alekostria’s Parliament authorized NEXCA to submit a bid, noting the strategic importance of rare earth minerals. On 2 April 2021, the Minister of Foreign Relations approved NEXCA’s participation.

On 5 August 2021, NEXCA submitted its bid, supervised by Liz Scott, a senior manager who held no government post. NEXCA simultaneously applied for a Restovian national security clearance, which was granted on 1 June 2022 after review supervised by Restovian official Ted Moore.

In 2022, Restovia hosted public presentations and Elder forums. Some from Alekostria and Restovia participated in the forums and proposed safeguards that bidders incorporated into revised project reports. Following the forums, a spokesperson stated that 120 Elders supported NEXCA’s bid, citing minimal anticipated impact and confidence arising from Elder Albert Ramaan’s presence on NEXCA’s Board.

VI. THE SARV INCIDENT

In early 2023, finalists conducted on-site surveys and NEXCA deployed SARV. On 3 February 2023, the SARV malfunctioned, abruptly accelerated, tragically killed security guard Domingo Montoya and damaged the Torngat Pedestrian Bridge.

A joint investigation conducted by the ILSA attributed the malfunction to malware infiltrating NEXCA headquarters, which resulted from failures to change default passwords and inadequate network segmentation. ILSA concluded that these failures occurred in Alekostria. Alekostria’s Minister of Mining acknowledged these failures and apologized to Restovia.

VII. CRIMINAL PROCEEDINGS AND EXTRADITION REQUEST

In May 2023, Restovia arrested Ted Moore for allegedly soliciting and receiving facilitation payments from Ms. Scott. Alekostria then received copies of the audio recordings pursuant to a mutual legal assistance treaty and charged Ms. Scott domestically with bribery of a foreign public official. She was convicted at trial, but her conviction was vacated on appeal.

On 21 December 2023, Restovia requested Ms. Scott’s extradition for providing a public servant with a personal benefit to influence duties. The 1965 Extradition Treaty requires that the proposed process comply with general principles of law recognized by civilized nations.

On 1 February 2024, the Alekostrian District Court ruled that extradition was impermissible under the 1965 Extradition Treaty because prosecution in Restovia would violate *ne bis in idem*. Alekostria’s Ministry of Foreign Relations then formally denied the request.

VIII. RESTOVIA’S EXCLUSION OF NEXCA AND SUBSEQUENT LITIGATION

In July 2024, Restovia disqualified NEXCA’s bid, citing concerns over corruption allegations and the SARV incident. The withdrawal by REL, left Hyperion Inc. as the only remaining bidder. On 19 July 2024, Restovia awarded the contract to Hyperion Inc., whose offer was €100 million lower, citing Parliament’s directive to proceed ‘with urgency.’

In September 2024, the estate of Mr. Montoya filed a wrongful death lawsuit in Restovia against NEXCA. NEXCA sought dismissal on grounds of state immunity. The Restovian district court rejected this claim, holding that NEXCA’s commercial activity and the territorial tort exception precluded immunity. The Supreme Court upheld the ruling.

IX. ICJ PROCEEDINGS

In January 2025, Alekostria objected to the Gordian Gorge project as inconsistent with ARPA and in March 2025, the parties agreed to submit their disputes to the ICJ. Sollania applied to intervene under Article 62 of the Statute, asserting a legal interest relating to the Plateau protection and rights of the Pilemons. Restovia objected, and the Court decided to join the question of the admissibility of Sollania’s intervention to the merits phase of the proceedings.

SUMMARY OF PLEADINGS

[A]

First, intervention under Article 62 of the ICJ Statute is procedural in nature, functioning as a conditional mechanism that precludes the requirement for a jurisdictional link or the consent of the principal parties.

Second, Union of Sollania (“**Sollania**”) has established a legal interest; its treaty-based interest arises from the identical nature of Articles 17 and 18 in the SRPA and ARPA, which creates a *res interpretata* interest through systemic integration.

Third, this interest meets the ‘may be affected’ threshold because the Court’s authoritative interpretation of FPIC and the sufficiency of the ICM will decisively influence Sollania’s constitutional *raison d’être* as a State where 95 percent of the population is of Pilemon descent.

Lastly, the object of intervention is proper as it seeks to protect Sollania’s distinct treaty rights from precedential prejudice and provides a unique indigenous perspective necessary from a specifically affected indigenous State.

[B]

First, the Republic of Restovia (“**Restovia**”) violated Article 18 of the ARPA, which mandates that Pilemon representatives be included in decision-making. Applying the principle of *effet utile*, this necessitates a participatory role far exceeding mere notification, requiring good-faith consent regarding a plateau inhabited for 40,000 years.

Second, Restovia breached the customary FPIC norm, which has attained the status of *lex lata*, as evidenced by widespread state practice and *opinio juris* from international treaty bodies. In any event, the project triggered a heightened FPIC standard because it involved large-scale mining and the use of explosives on a sacred site.

Accordingly, the ICM was fundamentally deficient; it was not prior, as it occurred after the tender announcement; it was not informed, as 1,000-page technical documents were provided

to remote villages with limited internet; and it was not legitimate, as it included less than 1% of the Pilemon population.

[C]

First, ne bis in idem is a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute. This principle is a common denominator across national legal systems, manifested as *autrefois acquit* in common law and the automatic extinguishment of the *action pinale* in civil. It is transposed into the international legal system through human rights instruments and the statutes of international criminal tribunals.

Second, Liz Scott's trial in Restovia would be incompatible with *ne bis in idem*, as the two requirements for its application are fulfilled. Under the finality requirement, Liz Scott's acquittal in the Dominion of Alekostria ("Alekostria") is final because all ordinary appellate remedies are exhausted, representing a substantive determination on the merits after a full trial and appeal. Under the identity requirement, the prosecution concerns the same acts (*idem factum*) because the Restovian charges are based on the very same alleged transaction i.e. the facilitation payment to Mr. Moore.

Lastly, Alekostria's proceedings were genuine, fulfilling its international duty under the principle of *aut dedere aut judicare*, and thus justifying the refusal of extradition.

[D]

First, NEXCA is an instrumentality of Alekostria entitled to presumptive immunity because it is a state organ performing sovereign functions, *acta jure imperii*, under the direct control of the Minister of Mining.

Second, the commercial activity exception does not apply as NEXCA's mining operations were a sovereign national security objective mandated by Parliamentary orders.

Third, the territorial tort exception is inapplicable because the alleged cybersecurity failures occurred at NEXCA's headquarters in Alekostria, failing the required *locus delicti* territorial nexus. Indeed, the causal chain was disrupted by a third-party malware attack, which served as the proximate cause of the injury.

PRELIMINARY PAGES

Lastly, NEXCA did not waive its immunity, as participation in a joint governmental investigation does not constitute consent to private civil litigation.

PLEADINGS

A. SOLLANIA SHOULD BE PERMITTED TO INTERVENE FOR SUBMISSION [B] AS A NON-PARTY UNDER ARTICLE 62 OF THE ICJ STATUTE.

The Dominion of Alekostria (“**Alekostria**”) submits that the Union of Sollania (“**Sollania**”) possesses both the procedural right and the substantive legal interest necessary to intervene with regard to Submission [B]¹ between Alekostria and the Republic of Restovia (“**Restovia**”).

The jurisdiction of the ICJ (“**this Court**”) under Article 62 of the ICJ statute (“**Article 62**”) is procedural and should apply when the criteria under Article 62 are fulfilled [1]. Moreover, Sollania fulfills all the requirements as per Article 81(5) of the Rules of Court, 1978 (“**Article 81(5)**”). It possesses an interest of a legal nature [2], which may be affected by the judgment of this Court [3], and the object of intervention is proper [4].

1. INTERVENTION UNDER ARTICLE 62 IS PROCEDURAL IN NATURE.

Article 62 is a procedure based, rather than a substantive jurisdiction of this Court [a].² Once the intervening party fulfills the requirement of Article 62, the consent of the parties is not required [b], and it precludes the requirement of a jurisdictional link [c].

a. Article 62(2) provides for a procedure-based intervention.

This Court has been clear that intervention does not start a new case³ and is dealt with separately from the merits of the issue itself.⁴ Sollania is using Article 62 to assert its legal

¹ Clarifications, ¶4.

² Territorial and Maritime Dispute (Nicaragua v. Colombia: Costa Rica intervening), Application to Intervene, Judgment, 2011 I.C.J. 348, 357-358, ¶22 (May 4) [“**Nicaragua v. Colombia**”].

³ Continental Shelf (Libyan Arab Jamahiriya/Malta: Italy intervening), Application to Intervene, Judgment, 1984 I.C.J. 3, 15-16, ¶21 (Mar. 21) [“**Libya/Malta**”].

⁴ Continental Shelf (Tunisia/Libyan Arab Jamahiriya: Malta intervening), Application to Intervene, Judgment, 1981 I.C.J. 3, 13, ¶17 (Apr. 14).

interests in a case that already exists.⁵ The wording of Article 62(2) establishes a conditional procedural mechanism that guides the Court's exercise of discretion.⁶ Thus, this Court should allow Sollania to intervene since the procedural grounds are satisfied.⁷

b. Article 62 does not necessitate the consent of the parties.

Intervention is allowed if the conditions of Article 62 are fulfilled, regardless of the interests of the principal parties.⁸ In *El Salvador/Honduras*, this Court allowed Nicaragua to intervene, despite opposition from both parties.⁹ Thus, Restovia need not consent to Sollania's intervention for it to be valid and allowed.

This Court is fully empowered to adjudicate the disputes between Alekostria and Restovia in their entirety, while duly considering Sollania's statements on Submission [B].¹⁰ *In casu*, Sollania is not requesting this Court to determine either its responsibility or that of any other non-conflicted State.¹¹ Consequently, the *Monetary Gold* doctrine¹² does not bar this Court from granting leave to intervene.

⁵ Libya/Malta, ¶11; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Application to Intervene, Order, 1999 I.C.J. 1029, 1034, ¶13 (Oct. 21).

⁶ Paolo Palchetti, *Opening the International Court of Justice to Third States: Intervention and Beyond*, 6 MAX PLANCK Y.B. U.N.L. 139, 140-145 (2002).

⁷ *Infra*, Submissions A.2-A.4.

⁸ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Application to Intervene, Judgment, 1990 I.C.J. 92, 133-134, ¶¶96-99 (Sept. 13) [**"El Salvador/Honduras"**].

⁹ El Salvador/Honduras, ¶¶73-76, 96-99.

¹⁰ Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, 1992 I.C.J. 240, 261-262, ¶55 (Jun. 26) [**"Nauru v. Australia"**].

¹¹ Christine Chinkin, *Article 62*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1331, 1368 (2019).

¹² Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Judgement, 1954 I.C.J. 19 (Jun. 15) (refusing jurisdiction because a decision required determining Albania's responsibility without its consent).

c. Article 62 precludes the requirement of a jurisdictional link.

Sollania is not seeking to intervene as a disputing party; therefore, the question of a jurisdictional link does not arise.¹³ In *Costa Rica/Nicaragua*, this Court explained that the absence of a basis of jurisdiction between the intervenor and the parties does not matter for intervention under Article 62.¹⁴ This rule stems from the incidental nature of intervention, which falls within the jurisdictional framework already established by the main parties.¹⁵

2. SOLLANIA HAS AN INTEREST OF A LEGAL NATURE UNDER ARTICLE 81(5)(A).

This Court in *Nicaragua/Columbia* held that the intervener needs only to establish that its interest is affected, not necessarily its rights.¹⁶ The requirements for non-party intervention are less demanding, and an intervention can be allowed for interests less than those constituting the very subject matter of the decision.¹⁷

Sollania's legal interests arise from treaty-based [a] and Customary International Law ("Custom") based obligations [b].

a. Treaty based legal interest.

Sollania's treaty-based legal interest finds basis in both ARPA's interpretative framework [i] and Sollania's status as a negotiating State [ii].

¹³ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Application to Intervene, Order, 2011 I.C.J. 492, 502-503, ¶31 (Jul. 4) ["Germany v. Italy"].

¹⁴ Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua: Honduras intervening), Application to Intervene, Order, 2013 I.C.J. 259, 274, ¶27 (Apr. 17).

¹⁵ Statute of the International Court of Justice art.36, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 ["ICJ Statute"].

¹⁶ El Salvador/Honduras, ¶61; Nicaragua v. Colombia, ¶¶34-36.

¹⁷ El Salvador/Honduras, ¶¶57,73.

(i) Systemic integration and regional context establish Sollania's legal interest.

ARPA and SRPA contain common Articles 17 and 18.¹⁸ This structural similarity entails the application of systemic integration.¹⁹ The 1971 conference, where both treaties were concluded concurrently, confirms that the parties intended to establish a 'shared responsibility' among Elders from all three countries.²⁰

Interpreting the 'decision-making' standard in Article 18 of ARPA without reference to the 1971 discussions would ignore the regional purpose and context²¹ of the treaties. Thus, ARPA is not *res inter alio acta* (or a matter between other States) for Sollania, thereby underscoring its legal interest before this Court.²²

(ii) ARPA's provision of access rights to Sollanian Pilemons establishes a legal interest.

A right arises for non-party States where the parties intended to confer that right upon a group of States.²³ In ARPA, the parties expressly granted a 'right of access' to the Plateau to the Pilemons, 'regardless of nationality', which Alekostria affirmed was 'only fair' for all

¹⁸ Compromis, ¶18.

¹⁹ Vienna Convention on the Law of Treaties, art.31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 ["VCLT"]; *Ambatielos (Greece v. United Kingdom)*, Preliminary Objection, Judgement, 1952 I.C.J. 28, 44 (Jul. 1).

²⁰ Compromis, ¶15.

²¹ VCLT, art.32.

²² Budislav Vukas, *Treaties, Third-Party Effect*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2011), ¶5.

²³ VCLT, art.36(1); League of Nations, Official Journal, Special Supplement No. 3 (Oct. 1920) (indicating State practice); *France v. Switzerland (Free Zones Case)*, 1932 P.C.I.J. (ser. A/B), No. 46, ¶147 (Jun. 7).

Pilemons.²⁴ This ‘right of access’ enjoyed by Sollanian Pilemons under ARPA cannot be revoked by Restovia without Sollania’s consent,²⁵ and thus evidences Sollania’s legal interest.

Moreover, this legal interest engages a distinct perspective on the part of Sollania, different from that of Alekostria.²⁶

b. Customary legal interest.

Sollania invokes interests grounded in Custom and human rights norms protecting indigenous culture, religion, traditional lands, and the requirement of FPIC. These obligations possess an *erga omnes* character, involving collective rights of fundamental importance,²⁷ as argued in Submission [B.1.a]. These directly affect Sollania’s core community interests, as it is a State constitutionally governed by Pilemon traditions, where 95 percent of its population is of Pilemon descent.²⁸ Moreover, this interest is concrete, as returning Sollanian Pilemons have expressed spiritual concerns regarding Plateau over-commercialization since the 1960s.²⁹

Obligations *erga omnes* provide a sufficient ‘interest of a legal nature’ for the purposes of intervention under Article 62 of the Statute.³⁰ Judge Cançado Trindade encouraged intervention to “*contribute to the progressive development of international law [...] when matters*

²⁴ Compromis, ¶¶16-18.

²⁵ VCLT, art.37(2).

²⁶ *Infra*, Submission A.4.b.

²⁷ G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), art.25 [“**UNDRIP**”].

²⁸ Compromis, ¶13.

²⁹ Compromis, ¶15.

³⁰ Oil Platforms (Iran v. US: Iran intervening), Application to Intervene, Order, 1998 I.C.J. 288, ¶¶52-57 (Mar. 10); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order on the Request for the Indication of Provisional Measures, 2020 I.C.J. 3, ¶41 (Jan. 23) [“**Gambia v. Myanmar**”] (indicating provisional measures and recognizing standing based on the Genocide Convention’s *erga omnes partes* obligations).

of collective or common interest and collective guarantee are at stake”.³¹ Thus, intervention must be interpreted broadly in favour of Sollania where such obligations concern community interests it is uniquely positioned to represent.

3. SOLLANIA’S LEGAL INTERESTS MEET THE *MAY BE AFFECTED* THRESHOLD UNDER ARTICLE 81(5)(A).

Article 62 provides for a ‘may be affected’ standard under Article 62, which is intentionally quite low, and only requires a reasonable chance of an impact, rather than certainty.³² In this case, obligations under SRPA will be affected [a] and so will customary and environmental obligations [b].

a. Obligations under SRPA *may be affected*.

Restovia has already indicated that it considers ARPA and SRPA to be of the same nature and therefore requires the same standards. When announcing the ICM, Restovia said it would comply with the “*obligations under ARPA and SRPA*” without drawing any distinction between them.³³ In its future dealings with Sollania, Restovia will refer to this Court’s ARPA interpretation as the most authoritative evidence of SRPA’s requirements.³⁴

As this Court observed in *Libya/Malta*, such potential effects on the legal situation of a third State will fall within Article 62, even where no formal binding force is present.³⁵ Thus, this

³¹ Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Order on the Declaration of Intervention by New Zealand, 2013 I.C.J. 3, ¶76 (Feb. 6), (Cançado Trindade, J., separate opinion).

³² Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16-July 24, 1920, 735.

³³ Compromis, ¶20.

³⁴ Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Merits, Judgement, 2002 I.C.J. 303, 431 ¶268 (Oct. 10) (directing Nigeria to treat the Yaoundé declaration interpretation as authoritative for future Cameroon transactions).

³⁵ Libya/Malta, ¶40.

Court's detailed examination of FPIC standards and the sufficiency of mechanisms such as the ICM will be determinative for how SRPA is subsequently interpreted.

b. Cultural and environmental obligations of Sollania may be affected.

If this Court considers the mining project, which was carried out with limited consultation, to be in accordance with international law, then this will confirm a permissive standard, limiting Sollania's capacity to request higher protection.³⁶ Restovia will maintain that this Court has, in fact, authoritatively decided that such procedures fulfill treaty and customary obligations.³⁷

As a State created specifically to conserve Pilemon law and the Plateau's sanctity, the decrease of protection standards is a threat to Sollania's constitutional *raison d'être*.³⁸ Since the Pilemons were artificially divided by colonial partition, Sollania has a legal interest in protecting this transboundary indigenous right to collectively safeguard the Plateau's sanctity.³⁹ This Court's logic will either support or contradict Sollania's assertion that the Gorge's exploitation necessitates the Pilemon's unanimous consent, which in turn affects its legal interests.⁴⁰

4. SOLLANIA'S OBJECT OF INTERVENTION IS PROPER AS UNDER ARTICLE 81(5)(C).

Sollania's object is proper because it aims to protect its own legal interest from the adverse effects of this judgment [a], and this object is neither duplicative nor outside the scope of the issues being considered [b] by this Court.

³⁶ Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, IACtHR (ser. C) No. 245, ¶¶156-167 (June 27, 2012) [**"Sarayaku"**].

³⁷ *Compromis*, ¶15; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, 2002 I.C.J. 625, 634, ¶¶14, 125-150 (Dec. 17).

³⁸ *Compromis*, ¶¶6,13,34; *Gambia v. Myanmar*, ¶41.

³⁹ UNDRIP, art.36(1).

⁴⁰ *Sarayaku*, ¶¶160-169; *ACHPR v. Kenya (Ogiek)*, Appl. No. 006/2012, ACtHPR, ¶¶199-209 (May 26, 2017).

a. Sollania’s object is to protect its legal interests against the adverse effects of a judgement.

Article 59 of the ICJ Statute offers only formal protection, as this Court’s reasoning carries significant interpretative authority that influences future disputes.⁴¹ Given the insufficiency of Article 59 to shield against such factual and precedential prejudice,⁴² intervention under Article 62 is a necessary object of intervention to protect Sollania’s distinct treaty rights and prevent their effective determination in its absence.⁴³

b. Sollania’s object is to provide a specifically affected indigenous State’s perspective.

This Court’s decision in *Australia/Japan* demonstrates its openness regarding the legitimacy of foreign and indigenous experiences or engagements with them.⁴⁴ A Pilemon-governed State like Sollania can provide a unique perspective on traditions that help elaborate on the obligations of States, how they affect the Pilemons, and propose regional solutions, such as the ‘trilateral fund’.⁴⁵

Moreover, Sollania’s explicit indication of willingness to initiate separate proceedings implies that it acknowledges the necessity of different jurisdictional titles for future contentious claims.⁴⁶ Thus, Sollania’s objective remains secondary to the bilateral dispute and is limited to the existing issues.

⁴¹ SHABTAI ROSENNE, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE 112 (1993).

⁴² *Libya/Malta* (Jennings, J., dissenting), ¶34.

⁴³ *Nauru v. Australia*, ¶69.

⁴⁴ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Application to Intervene, Judgment, 2014 I.C.J. 226, 240, ¶13 (Mar. 31).

⁴⁵ *Compromis*, ¶¶13-15.

⁴⁶ *Compromis*, ¶55.

B. RESTOVIA HAS BREACHED TREATY AND CUSTOMARY INTERNATIONAL LAW OBLIGATIONS RELATED TO CONSULTATION AND FREE, PRIOR, AND INFORMED CONSENT IN CONDUCTING ITS PROPOSED DEVELOPMENT OF THE GORDIAN GORGE.

Indigenous land, viewed communally and culturally, is as legitimate as State-granted title.⁴⁷ The Torngat Plateau (“**Plateau**”) has been continuously inhabited by humans for at least 40,000 years⁴⁸ and the Pilemon peoples are entitled to the right of self-determination.⁴⁹ Such continuous occupation creates *sui generis* rights⁵⁰ that predate and survive colonial sovereignty.⁵¹

Restovia breached ARPA, which was specifically negotiated to ensure that the Pilemon peoples are included in decision-making by obtaining good faith consent [1]. Restovia failed to meet the specific duty of obtaining FPIC as per Custom [2].

1. RESTOVIA BREACHED ITS TREATY OBLIGATIONS UNDER ARTICLE 18 OF ARPA.

ARPA mandates that, when substantial changes are undertaken on the plateau, the FPIC of the Pilemons must be obtained [a]. Furthermore, Article 18 must be interpreted in conjunction with Custom based standards [b].

⁴⁷ Case of the Sawhoyamaya Indigenous Community v. Paraguay, Merits, Reparations, & Costs, Judgment, IACtHR (ser. C) No. 146, ¶76 (Mar. 29, 2006).

⁴⁸ Compromis, ¶1.

⁴⁹ International Covenant on Civil and Political Rights, art.1, 999 U.N.T.S. 171 (Dec. 16, 1966) [“**ICCPR**”]; International Covenant on Economic, Social and Cultural Rights, art.1, 993 U.N.T.S. 3 (Dec. 16, 1966) [“**ICESCR**”]; UNHRC, CCPR General Comment No. 12, ¶2, HRI/GEN/1/Rev.9 (Mar. 13, 1984).

⁵⁰ Western Sahara, Advisory Opinion, 1975 I.C.J. 12, Part II (Oct. 16).

⁵¹ East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90, ¶¶29,102 (Jun. 30); Erica-Irene A. Daes (Special Rapporteur), *Indigenous Peoples’ Permanent Sovereignty over Natural Resources*, ¶13, E/CN.4/Sub.2/2004/30 (Jul. 13, 2004).

a. The phrase included in decision-making under Article 18 provides for FPIC.

The broad scope of the term “*included in decision-making*” necessitates FPIC as confirmed by textual interpretation [i] drafting history [ii] as well as a teleological interpretation of Article 18 [iii].

(i) *Textual interpretation mandates FPIC.*

The operative phrases of Article 18, like “*included in decision-making*,” carry context.⁵² ARPA’s inclusion of ‘decision-making’ provides the “*explicitly stipulat[ed]*” authority for ‘consent’ under international law.⁵³ This safeguard ensures that outcomes “*emanate from [the] free will*” of Pilemons, making Elders’ consent under ARPA is ‘legally binding.’⁵⁴ Accordingly, Pilemon representatives must participate as actors in the formation of state will, and not as external advisers.

(ii) *Drafting history supports FPIC.*

The negotiation history shows that Alekostria initially aimed for the Elders to ‘share responsibility for its management’ while Restovia ultimately did not cede full sovereignty, the resulting Article 18 requires explicit ‘inclusion in decision-making’ prior to major changes.⁵⁵

This wording implies a participatory role far exceeding mere notification or providing an ‘opportunity to be heard.’⁵⁶ This history confirms that a high degree of participation, approaching joint management, is the standard for matters impacting sacred places.

⁵² VCLT, art.31.

⁵³ Jutta Brunnée, *Consent*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2022), ¶11.

⁵⁴ *Id.*

⁵⁵ Compromis, ¶¶16-17.

⁵⁶ UN ECOSOC, Views adopted by the Committee under the Option Protocol to the ICESCR, concerning communications No. 251/2022 and No. 289/2022, E/C.12/76/D/251/2022 (Dec. 9, 2024).

(iii) Teleological interpretation requires more than baseline consultation.

The principle of *effet utile* requires that inclusion must be interpreted to impose obligations beyond what would be required by international law, absent the treaty.⁵⁷ Otherwise, Article 18 would merely replicate baseline consultation requirements, rendering the specific treaty commitment superfluous.⁵⁸

The objective of the ICM process should be to facilitate an agreement among the parties.⁵⁹ Yet, no mechanism existed for Elders to vote on proposals, condition approval on specific safeguards, or reject proposals, violating Article 18 obligations.⁶⁰

b. In any event, Article 18 must be interpreted consistently with subsequent practice and customary obligations.

All three nations voted for UNDRIP in 2007, showcasing a shared commitment to uphold FPIC. Sollania's 2021 note invoked FPIC obligations, and Restovia's notice of tender noted that FPIC would be required under ARPA.⁶¹

Interpretation must, therefore, be guided by *systemic integration* taking into account relevant rules of international law applicable between the parties.⁶² Indigenous treaties, in

⁵⁷ VCLT, art.31.

⁵⁸ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, 2011 I.C.J. 70, ¶134 (Apr. 1); Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, ¶51 (Feb. 3).

⁵⁹ Mauro Barelli, *Free, Prior and Informed Consent in the Aftermath of the U.N. Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*, 16 INTL' J. HUM. RTS. (2012).

⁶⁰ UN-REDD Programme, Handbook on Free, Prior and Informed Consent (2013) (recognised FPIC methods including representative decision-making bodies with voting, safeguard conditions, and outright rejection right).

⁶¹ Compromis, ¶¶20,23,58.

⁶² Report of the International Law Commission to the General Assembly, 58 G.A.O.R. Supp. No. 10, 13, A/CN.4/L.702 (2006).

particular, should be interpreted alongside the evolving corpus of international human rights law.⁶³

2. RESTOVIA BREACHED THE CUSTOMARY FPIC NORM.

FPIC, deriving from the right of self-determination of indigenous peoples, has attained the status of Custom, evidenced by state practice, *opinio juris*, and treaty law [a]. Restovia's (in)actions in respect of its proposed project in the Gordian Gorge, violated FPIC [b].

a. Prevailing international opinion and practice establish FPIC as Custom.

FPIC is categorized as an established norm within Custom. A rule of Custom exists where there is “*a general practice accepted as law*”, requiring sufficiently general and consistent state practice [i] and acceptance of that practice as legally obligatory (*opinio juris*) [ii].⁶⁴ *Arguendo*, there is a heightened FPIC standard in the context of large-scale projects and hazardous materials. [iii].

(i) State Practice

The ICJ in *North Sea Continental Shelf* affirmed that state practice must be extensive and uniform.⁶⁵ In assessing generality, emphasis is on the extent to which those states which are particularly involved in the relevant activity (or ‘specifically affected’ states) have participated

⁶³ Reynato S. Puno, *Free, Prior and Informed Consent in the Philippines: Regulations and Realities* 4 (Oxfam Am. Briefing Paper, Sept. 2013).

⁶⁴ ICJ Statute, art.38(1)(b).

⁶⁵ *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgement, 1969 I.C.J. 3, ¶74 (Feb. 20).

in practice.⁶⁶ Moreover, the requirement of FPIC is to be only ‘sufficiently uniform’ across specifically affected states.⁶⁷

‘Specifically affected’ states like Ecuador⁶⁸ and Bolivia⁶⁹ have constitutionalised FPIC requirements, and the authorities in the Philippines,⁷⁰ Malaysia,⁷¹ Australia,⁷² Peru,⁷³ and Panama⁷⁴ have adopted specific legislation providing for FPIC. Both the Inter-American⁷⁵ and African⁷⁶ human rights systems, covering the great majority of indigenous-bearing states, have treated FPIC as a binding legal requirement. Furthermore, the threshold of minority protection under bilateral instruments transcends general consultation and involves ‘effective participation’ in decisions involving them.⁷⁷

(ii) *Opinio Juris*

The International Law Association has affirmed that Custom requires States to respect

⁶⁶ ILC, *Draft Conclusions on the Identification of Customary International Law with Commentaries*, Commentary to conclusion 8, A/73/10 (2018) [**“CIL Draft Conclusions”**].

⁶⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Jurisdiction and Admissibility, Judgement 1986 I.C.J. 14, ¶186 (Jun. 27) [**“Nicaragua v. US”**] (uniformity of State practice does not have to be established with a standard of absolute rigour).

⁶⁸ Constitution of the Republic of Ecuador (2008), art.57.

⁶⁹ Constitution of the Plurinational State of Bolivia (2009), art.30.

⁷⁰ Indigenous Peoples’ Rights Act, 1997, Rep., Act No.8371, §3(g), §7(c), §32.

⁷¹ Access to Biological Resources and Benefit Sharing Act, 2017, Act No.795, §23.

⁷² Aboriginal Land Rights (Northern Territory) Act, 1976, Act No. 191.

⁷³ Ley del Derecho a la Consulta Previa, Act. No. 29785.

⁷⁴ Consulta y Consentimiento Previo, Libre e Informado, Act No. 28090-A.

⁷⁵ *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, & Costs, Judgment, IACtHR (ser. C) No. 172, 134 (Nov. 28, 2007) [**“Saramaka”**]; Sarayaku, ¶177.

⁷⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Appl. No. 276/2003,

indigenous autonomy and self-government, identifying FPIC as an essential component of that obligation.⁷⁸ The UN Expert Mechanism recognizes FPIC as integral to the Custom based norm of self-determination, characterizing it as approaching, and in some respects reflecting, a peremptory norm.⁷⁹

The consistent practice of UN treaty bodies demonstrates *opinio juris*.⁸⁰ The CERD,⁸¹ the HRC⁸² and the ICESCR⁸³ have required States to obtain the ‘informed consent’ of indigenous peoples for projects affecting their lands, affirming the positive nature of these obligations.

UNGA resolutions can constitute evidence of Custom when they are intended to have normative character and receive widespread acceptance.⁸⁴ Moreover, UNGA has adopted the FPIC provisions under UNDRIP.⁸⁵

ACHPR ¶¶290-291 (Feb. 4, 2010).

⁷⁷ G.A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Dec. 18, 1992); Elizabeth F. Defeis, *Minority Protections and Bilateral Agreements: An Effective Mechanism*, 22 U.C.L. S.F. INTL. LAW. REV. 2 (1999).

⁷⁸ International Law Association, *Rights of Indigenous Peoples*, Res. 5/2012, 2, 5 (2012).

⁷⁹ UN Expert Mechanism on the Rights of Indigenous Peoples, *Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, ¶¶30, 41, A/HRC/EMRIP/2010/1 (Jul. 23, 2010).

⁸⁰ ILC, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries*, conclusion 14, A/73/10 (2018).

⁸¹ International Convention on the Elimination of All Forms of Racial Discrimination, arts. 2(1)(c), 5(d)(v), Dec. 21, 1965, 660 U.N.T.S. 195; CERD, *General Recommendation No. XXIII (51) on Indigenous Peoples*, art.4(d), A/52/18, annex V (Aug. 18, 1997).

⁸² ICCPR, art.27; UNHRC, *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, ¶¶7.6-7.7, CCPR/C/95/D/1457/2006 (Apr. 24, 2009).

⁸³ ICESCR, art.15; ICESCR, CESCR General Comment No. 21, ¶¶36-37, E/C.12/GC/21 (Dec. 21, 2009).

⁸⁴ UN, Yearbook of the ILC, 2018, Volume II (2), ¶8, A/73/10 (2019); *Nicaragua v. US*, ¶¶188-191.

⁸⁵ UNDRIP, arts. 10, 11(2), 19, 28(1), 29(2), 32(2).

(iii) Arguendo, there is a heightened FPIC standard for large-scale development projects and hazardous materials.

FPIC must be obtained from stakeholders for projects that (a) are large-scale; (b) have a major impact on indigenous territory; or (c) risk depriving peoples of the capacity to use and enjoy their lands.⁸⁶

In *Saramaka People v. Suriname*, ‘large-scale’ is understood not as a narrow quantitative metric but encompasses activities capable of significantly affecting the integrity of indigenous territory, natural resources, or the community’s ability to meaningfully occupy and use its lands.⁸⁷

The development in the Gorge was to exploit massive deposits of rare earth oxides, resources critical to national security,⁸⁸ and anticipated revenues exceeding €100 million.⁸⁹ Furthermore, FPIC is also mandatory where hazardous materials are stored or disposed.⁹⁰ Rare earth extraction involves hazardous processes, reflected in the Elders’ concerns about ‘use of explosives’.⁹¹ Restovia’s delegation of remediation responsibilities to bidders further demonstrates its awareness of the environmental and cultural harm involved.⁹²

Accordingly, the project physically alters a sacred site and entails hazardous materials, triggering the heightened FPIC standard.

⁸⁶ Saramaka, ¶129; James Anaya (Special Rapporteur), *Report on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, ¶47, A/HRC/12/34 (Jul. 15, 2009).

⁸⁷ Saramaka, ¶¶133-137.

⁸⁸ Compromis, ¶¶19-20.

⁸⁹ Compromis, ¶48.

⁹⁰ UNDRIP, art.29(2); Mauro Barelli, *Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)*, in *THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY* 255 (2018).

⁹¹ Compromis, ¶31.

⁹² Compromis, ¶20.

b. The ICM process failed to meet the FPIC standard.

Consultations must be conducted in good faith, in a manner appropriate to the circumstances, and by obtaining consent.⁹³ Thus, consultation must be a genuine instrument of participation grounded in dialogue, trust, and mutual respect. Restovia’s ICM process violated FPIC because consent was not free [i], prior [ii] and informed [iii] under Custom based requirements.

(i) Free consent was not obtained.

The elders’ *communiqué* denouncing the October 2020 resolution authorising exploitation of the deposits and demanding its suspension evidenced strong opposition and the absence of consent. Restovia nevertheless disregarded this to comply with the Parliament’s mandate to proceed “*with urgency*”,⁹⁴ and the project was never genuinely open to reconsideration.

(ii) Prior consent was not obtained.

The Pilemons were required to be consulted at all stages of the process, including prior to the adoption of administrative measures affecting them with ample time for internal debate and decision making.⁹⁵

Restovia initiated bidding in early 2021, and the ICM was established only after the tender announcement.⁹⁶ Pilemon input occurred nearly two years later, during the selection of the

⁹³ CERD, *Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador*, ¶16, CERD/C/62/CO/2, (Jun. 2, 2003).

⁹⁴ Compromis, ¶20-22.

⁹⁵ ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, 1650 U.N.T.S. 383, art.15(2) [“**ILO Convention**”]; UNDRIP, arts. 19, 32(2), UN ECOSOC, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, ¶46, E/C.19/2005/3 (Feb. 17, 2005).

⁹⁶ Compromis, ¶21.

contract, rather than at the initial policy decision,⁹⁷ thereby violating the *prior* requirement of FPIC.

(iii) *Informed consent was not obtained.*

Indigenous peoples must have full information about the scope and impact of the proposed development activities on their lands, resources and well-being.⁹⁸ Consultations must also be undertaken using culturally appropriate procedures.⁹⁹

Furthermore, the Environmental Impact Assessment is considered a Custom¹⁰⁰ and must objectively assess the possible impact on the land and people, ensuring that members are aware of the potential environmental and health risks.¹⁰¹ Restovia's process was deficient,¹⁰² mirroring the failures condemned in *Sarayaku*.¹⁰³

The DPRs, each exceeding 1,000 pages of technical material, were provided to remote Pilemon villages with limited telephone and internet access. At the six-hour consultation forums, bidders occupied most of the agenda, leaving Elders approximately ninety minutes for questions. The Pilemons take decisions based on collective consensus and less than one percent cannot be

⁹⁷ Compromis, ¶29.

⁹⁸ Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, IACtHR, ¶131 (Dec.27, 2002) [**“Carrie Dann”**].

⁹⁹ ILO Convention, art.12; Saramaka, ¶130; Sarayaku, ¶201; James Anaya (Special Rapporteur) *Report on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, ¶33, A/HRC/12/34/Add. 6 (Oct. 5, 2009).

¹⁰⁰ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Order on the Request for the Indication of Provision Measures, 2006 I.C.J. 113, ¶204 (Jul. 13).

¹⁰¹ Sarayaku, ¶¶205-207.

¹⁰² Compromis, ¶¶20, 29, 33.

¹⁰³ Sarayaku, ¶207 (observing that the Environmental Impact Assessment was prepared without the Sarayaku people's participation, conducted by a private subcontractor without evidence of State oversight, and failed to consider the social, spiritual, or cultural impacts of the planned activities).

expected to take a decision on behalf of the whole.¹⁰⁴ Therefore the ICM process violated the Custom-based FPIC norms.

C. ALEKOSTRIA DID NOT VIOLATE THE EXTRADITION TREATY BY REFUSING TO SURRENDER LIZ SCOTT, AS HER TRIAL IN RESTOVIA WOULD BREACH *NE BIS IN IDEM*, A GENERAL PRINCIPLE OF LAW WITHIN THE MEANING OF THE TREATY.

Alekestria lawfully refused Liz Scott’s extradition in compliance with the 1965 Extradition Treaty (“**Treaty**”).¹⁰⁵ Article 4 permits extradition only where the requesting State’s proceedings are compatible with “*general principles of law recognized by civilized nations*,” (“**General Principles**”) as defined in Article 38(1)(c) of the ICJ Statute.¹⁰⁶

Ne bis in idem (“**the Principle**”), which prohibits double prosecution for the same matter, constitutes such a General Principle [1]. As Ms. Scott was finally acquitted in Alekestria for the same conduct underlying Restovia’s charges, her prosecution in Restovia was barred [2]. Moreover, Alekestria’s proceedings being genuine and cannot be vitiated [3].

1. *NE BIS IN IDEM* CONSTITUTES A GENERAL PRINCIPLE WITHIN THE MEANING OF THE TREATY.

Ne bis in idem is a General Principle born out of national legal systems.¹⁰⁷ This Court, therefore, must determine whether the Principle is common to national legal systems [a], and is transposable to the international legal system [b].¹⁰⁸

¹⁰⁴ Carrie Dann, ¶140 (stating that all the people have to be informed); Compromis, ¶9-13.

¹⁰⁵ Compromis, ¶14.

¹⁰⁶ *Id.*; ICJ Statute, art.38(1)(c) (defining General Principles as fundamental legal concepts, e.g., good faith, estoppel, *res judicata*, commonly recognized across major domestic legal systems worldwide).

¹⁰⁷ ILC, *Draft Conclusions on General Principles of Law*, conclusion 3(a), A/CN.4/L.1018 (2025) [“**GPL Draft Conclusions**”].

¹⁰⁸ GPL Draft Conclusions, conclusions 4-6.

a. *Ne bis in idem* is common to the national legal systems.

The Principle is widely recognised across domestic legal systems [i] and reflects the criminal law manifestation of the universally accepted doctrine of *res judicata* [ii].

(i) Universal domestic recognition.

The term civilized nations in Article 38(1)(c) refers to the ‘community of nations’.¹⁰⁹ General Principles do not require uniform codification, but the recognition of ‘basic principles’ or ‘common denominators’ underlying those national laws.¹¹⁰

Common law countries like the United States,¹¹¹ United Kingdom,¹¹² Canada,¹¹³ and Australia¹¹⁴ rely on pleas like *autrefois acquit* or *autrefois convict*, emphasizing individual protection. Civil law countries like France,¹¹⁵ Germany,¹¹⁶ Italy¹¹⁷ and Spain,¹¹⁸ extinguish the criminal claim (*action pinale*) and the state action automatically comes to an end once the case is finally determined. Meanwhile, Nordic systems (Sweden, Finland) normally issue administrative sanctions after criminal judgments, thus combining different punitive models.¹¹⁹ Therefore, *ne bis idem* is common to and borne out of the domestic legal systems.

¹⁰⁹ GPL Draft Conclusions, conclusion 2; Marcelo Vázquez-Bermúdez, (Special Rapporteur) *Second Report on General Principles of Law*, ¶13, A/CN.4/741 (Apr. 9, 2020).

¹¹⁰ Prosecutor v. Furundžija, IT-95-17/1-T, Judgment, ¶178 (I.C.T.Y. Dec. 10, 1998); Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T, Judgment, ¶439 (I.C.T.Y. Feb. 22, 2001).

¹¹¹ U.S. CONST. AMEND. V.

¹¹² Criminal Procedure and Investigations Act, 1996, c. 25, §54(1)-(2).

¹¹³ Charter of Rights and Freedoms §11(h), Const. Act 1982.

¹¹⁴ Evidence Act 1995 pt 3.11, div.2 §101.

¹¹⁵ Code de procédure pénale, 1958, art.6.

¹¹⁶ Strafprozessordnung, 1877, §545.

¹¹⁷ Const., 1948, art.25.

¹¹⁸ Const. art.25.

¹¹⁹ Rikoslainkäyttölaki [RLL] 6/1939 §12 (Fin.); Brottsbalk (1962:700) ch.33 §1 (Swed.).

(ii) Criminal application of res judicata.

The Principle is fundamentally the criminal law application of the broader doctrine of *res judicata*, which ensures the finality of judgments¹²⁰ and is recognized as a General Principle.¹²¹ The PCIJ in its records identifies *res judicata*'s binding authority as an example of a General Principle.¹²² Thus, for many years, the negative implications of *res judicata* have been expressed through *ne bis in idem*.¹²³

b. The Principle is transposed into the international legal system.

Ne bis in idem is reinforced internationally through human rights instruments [i], international criminal tribunals [ii], extradition treaty practice [iii], and the underlying rationale of legal certainty and individual protection [iv].

(i) Human rights instruments support recognition.

Article 14(7), ICCPR, binding on both Parties, prohibits retrial after conviction or acquittal in accordance with domestic law.¹²⁴ In *Sergey Zolotukhin v. Russia*, the ECtHR determined that a second prosecution for the same essential facts would be in violation of Article 14(7), ICCPR.¹²⁵

¹²⁰ Prosecutor v. Gaddafi, ICC-01/11-01/11, Decision on the Admissibility Challenge by Dr. Saif Al-Islam Gaddafi Pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, ¶36 (Apr. 5, 2019); Semanza v. Prosecutor, ICTR-97-20-A, Decision, ¶¶74-77 (May 31, 2000); Prosecutor v. Nzabirinda, ICTR-2001-77-T, Sentencing Judgment, ¶46 (Feb. 23, 2007).

¹²¹ Trail Smelter Arbitration (U.S. v. Canada), Award, 3 R.I.A.A. 1905, 1950-1951 (1941).

¹²² Factory at Chorzów (Poland v. Germany), Judgment on Interpretation of Judgment No. 7, 1927 P.C.I.J. (ser. A) No. 13, at 27 (Sept. 16) (Anzilotti, J., dissenting).

¹²³ BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 337 (Stevens & Sons Ltd. 1953); Report of the Preparatory Committee on the Establishment of an International Criminal Court, 51 G.A.O.R. Supp. No. 22, 39, ¶170, A/51/22 (1996).

¹²⁴ ICCPR, art.14(7); Compromis, ¶58.

¹²⁵ *Sergey Zolotukhin v. Russia*, Appl. No. 14939/03, ¶¶84-85 (ECtHR, Feb. 10, 2009) [“*Sergey Zolotukhin/Russia*”].

Moreover, the principle is an internationally recognised human right contained in regional instruments.¹²⁶ Although these instruments are generally limited to intra-state application, their widespread existence constitutes powerful evidence of recognition by the ‘community of nations’.¹²⁷

(ii) International criminal tribunals apply the Principle.

The application of *ne bis in idem* has played a greater role in areas involving non-state actors, such as international criminal law.¹²⁸ The Statutes of the ICC,¹²⁹ ICTY,¹³⁰ and International Criminal Tribunal for Rwanda¹³¹ all incorporate the Principle, pointing to its importance in the international legal order.¹³² *Prosecutor v. Nshogoza* also affirmed that the Principle is a “long-standing general principle of law applicable in international tribunals and domestic jurisdictions”.¹³³

¹²⁶ Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art.4, Nov. 22, 1984, Eur.T.S. No. 117; American Convention on Human Rights art.8(4), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Arab Charter on Human and Peoples’ Rights, art.19(1), Sept. 15, 1994–May 22, 2004, 42 I.L.M. 758.

¹²⁷ A and B v. Norway, Appl. No. 24130/11 & 29758/11, ¶¶5-16 (ECtHR, Nov. 15, 2016) (Pinto de Albuquerque, J., dissenting).

¹²⁸ Report of the International Law Commission to the General Assembly, 72 G.A.O.R. Supp. No. 10, 229-230, ¶15, A/72/10 (2017).

¹²⁹ Rome Statute of the International Criminal Court, art.36, July 17, 1998, 2187 U.N.T.S. 90 [“**Rome Statute**”].

¹³⁰ Statute of the International Criminal Tribunal for the Former Yugoslavia, art.10, S/RES/827 (1993).

¹³¹ Statute of the International Criminal Tribunal for Rwanda, art.9, S/RES/955 (1994).

¹³² Kai Ambos, *The International Criminal Court and the Traditional Principles of International Cooperation in Criminal Matters*, 9 FYBIL 413, 420 (2000).

¹³³ *Prosecutor v. Nshogoza*, ICTR-07-91-T, Decision on Defense Request for Order for Cooperation of the Republic of Rwanda and the United Republic of Tanzania, ¶10 (Jul. 28, 2009).

(iii) Treaty practice in extradition mandates refusal.

It is widely accepted that the Principle is a rule of *lex lata* (existing law) in extradition.¹³⁴ Treaties consistently require refusal where the requested State has rendered a final judgment (indirect application) or prohibit prosecution after a foreign final judgment (direct application).¹³⁵ While both forms confirm that respecting Alekostria’s final decision is required under the General Principle provision of the Treaty, Alekostria’s prior, final acquittal triggers the mandatory indirect bar. This is the necessary conclusion of respecting the finality of its own judicial process.¹³⁶

(iv) The Principle’s rationale demands international recognition.

The Principle protects individuals from repeated prosecution, ensuring legal certainty (*sécurité juridique*)¹³⁷ and preventing harassment.¹³⁸ Having stood trial and been finally acquitted, Ms. Scott is entitled to rely on that decision and cannot be constantly threatened with renewed prosecution. To compel extradition where it would violate *ne bis in idem* would subvert the Treaty’s express terms and undermine the protective safeguards the Parties negotiated.

2. THE ALEKOSTRIAN ACQUITTAL IS FINAL AND CONCERNS THE SAME ACTS.

The final acquittal of Ms. Scott in Alekostria meets the necessary legal [a] and factual identity [b] requirements to trigger the protection mandated by the Treaty.

¹³⁴ GAIANE NURIDZHANIAN, THE PRINCIPLE OF NE BIS IN IDEM IN INTERNATIONAL CRIMINAL LAW, 36-39 (2024).

¹³⁵ Convention Implementing the Schengen Agreement, art.54, June 19, 1990, 2000 O.J. (L 239) 19; Council Framework Decision, 2002/584/JHA, art.3(2), 2002 O.J. (L 190) 1.

¹³⁶ Clarifications, ¶4.

¹³⁷ Juliette Lelieur, “*Transnationalising” Ne Bis in Idem: How the Rule of Ne Bis in Idem Reveals the Principle of Personal Legal Certainty*, 9 UTRECHT LAW REVIEW 198, 202-203 (2013) [“Lelieur”].

¹³⁸ Prosecutor v. Katanga, ICC 01/04-01/07-1213, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, ¶48 (Jun. 16, 2009).

a. The Alekostrian decision is final.

A decision is ‘final’ when ordinary appellate remedies have been exhausted [i]. The application of the Principle is restricted to cases where the prior proceedings resulted in a final judgment on merits and *arguendo*, even a dismissal, is accepted as final [ii].

(i) All remedies have been exhausted.

Domestic law and procedure are the starting point for determining the availability of ‘ordinary’ remedies of appeal.¹³⁹ The review of a case on appeal or a retrial ordered on appeal is generally considered part of the same set of proceedings; thus, the Principle is not engaged until the appeal process is complete.¹⁴⁰ Ms. Scott’s proceedings involved a full trial, a conviction, and a subsequent successful appeal resulting in an acquittal.¹⁴¹ Alekostria’s court explicitly confirmed the final effect of the acquittal by concluding that the Restovian prosecution would constitute double jeopardy.¹⁴²

(ii) Full trial followed by dismissal is a substantive determination on merits.

The CJEU mandates the interpretation of the ‘final judgment’ notion,¹⁴³ to extend protection beyond formal merits to procedural matters like lack of evidence or limitation

¹³⁹ UNHRC, CCPR General Comment No. 32, ¶47, CCPR/C/GC/32 (Aug. 23, 2007); *Mihalache v. Romania*, Appl. No. 54012/10, ¶115 (ECtHR, Jul.8, 2019); *Case of Herrera Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, IACtHR (ser. C) No. 107, ¶159 (July 2, 2004); *Case of Mohamed v. Argentina*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, IACtHR (ser. C) No. 255, ¶¶123-124 (Nov. 23, 2012).

¹⁴⁰ Gerard Conway, *Ne Bis in Idem in International Law*, 3 INT’L CRIM. L. REV. 3, 217, 228 (2003) [“Conway”].

¹⁴¹ *Compromis*, ¶43.

¹⁴² *Compromis*, ¶46; *Clarifications*, ¶4.

¹⁴³ *Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge*, ECLI:EU:C:2003:87, ¶45 (Feb. 11, 2003).

periods.¹⁴⁴ This extensive bar applies only if the prior decision followed a detailed investigation. This was done by Alekostria in the trial stage.¹⁴⁵ Thus, even though Ms. Scott’s acquittal stemmed from a due process failure (lack of notice of the right to silence), transnational jurisprudence rejects strict formalism regarding the merits.¹⁴⁶

Moreover, Judge Geoffrey, in *Prosecutor v. Gbagbo and Blé Goudé*, held that while a decision of no case to answer is not a formal acquittal, it “*has an equivalent legal effect in that the accused is formally cleared of all charges and cannot be tried again for the same facts and circumstances*”.¹⁴⁷ The ECtHR affirmed that a finding on evidence failing to meet the standard of proof is substantive.¹⁴⁸ Since the acquittal followed a full trial process, not a mere prosecutorial discontinuance without assessment of the person’s criminal responsibility,¹⁴⁹ this standard is met. Restovia must therefore respect this final judicial disposal under the principle of mutual trust.¹⁵⁰

b. The Restovian prosecution concerns the same acts i.e., *idem factum*.

The identity requirement is satisfied because a conduct-based test is applicable [i], which is met where the underlying conduct is equivalent across jurisdictions [ii], and the allegations in both States arise from the same conduct [iii].

¹⁴⁴ Criminal Proceedings Against Giuseppe Francesco Gasparini and Others, ECLI:EU:C:2006:610, ¶¶27-33 (Sept. 28, 2006).

¹⁴⁵ Compromis, ¶42.

¹⁴⁶ Compromis, ¶43.

¹⁴⁷ *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-1263-AnxB-Red, Reasons of Judge Geoffrey Henderson, ¶17 (16 Jul. 2019).

¹⁴⁸ Criminal Proceedings Against Klaus Bourquain, ECLI:EU:C:2008:708, ¶37 (Dec. 11, 2008) [“**Bourquain**”]; Sergey Zolotukhin/Russia, ¶116.

¹⁴⁹ *Marguš v. Croatia*, Appl. No. 4455/10, ¶120 (ECtHR, Nov. 13, 2012).

¹⁵⁰ *Bourquain*, ¶37.

(i) The applicable standard is *idem factum*.

The central issue of ‘identity’ (*idem*) requires determining whether the protection applies only to the ‘same offence’ (*in abstracto* or *idem crimen*) or the ‘same act’ or ‘conduct’ (*in concreto* or *idem factum*).¹⁵¹ In transnational cases, only the *idem factum* approach guarantees effective protection because, while the underlying facts are the same, the *idem crimen* across jurisdictions invariably differ.¹⁵²

The Rome Statute prohibits re-trial by the ICC for the ‘same conduct’ already tried domestically.¹⁵³ The ICC Appeals Chamber confirms that “*it is the alleged conduct, as opposed to its legal characterisation, that matters.*”¹⁵⁴ This approach aligns with the conduct-based *ne bis in idem* test, provided in regional courts including the IACtHR,¹⁵⁵ ECJ¹⁵⁶ and ECtHR.¹⁵⁷ Thus, the prevailing standard is the *idem factum* test.

(ii) *Idem factum* is confirmed by equivalence and mitigation.

A foreign judgment will bar renewed prosecution where the social and legal-political valuation of human acts in the different countries is equal or equivalent.¹⁵⁸ This is analogous to the requirement of double criminality in extradition law,¹⁵⁹ which is satisfied as both States criminalize the underlying conduct i.e., bribery.

¹⁵¹ Conway, 227, 228.

¹⁵² Lelieur, 205.

¹⁵³ Rome Statute, art.20(3).

¹⁵⁴ Prosecutor v. Al-Senussi, ICC-01/11-01/11-565, Judgment, ¶119 (Jul. 24, 2014) [“**Al-Senussi**”].

¹⁵⁵ Case of Loayza-Tamayo v. Peru, Merits, Judgment, IACtHR (ser. C) No. 33, ¶¶66, 77 (Sept. 17, 1997).

¹⁵⁶ L’eoold Henri van Esbroeck, ECLI:EU:C:2006:165, ¶36-38 (Mar. 9, 2006).

¹⁵⁷ Sergey Zolotukhin/Russia, ¶¶33-39, 79-82.

¹⁵⁸ Corte Costituzionale, sez. un., 18 aprile 1967, n.48 (1967) 3 Rivista Di Diritto Internazionale Privato E Processuale 580 (It).

¹⁵⁹ Conway, 231.

(iii) The allegations relate to identical conduct.

Alekestria's court determined that Restovia's pending charge was based on the "very same alleged transaction" as Alekestria's charge.¹⁶⁰ The material facts are the same, i.e., the alleged facilitation payment to Mr. Moore between 2021 and 2022.¹⁶¹ Since the underlying culpable conduct is factually identical, the legal differences in nomenclature or characterization used by Restovia are immaterial under *idem factum*.¹⁶²

3. THE ALEKOSTRIAN PROCEEDINGS WERE GENUINE.

The prohibition on *bis* (a second prosecution) is lifted only where prior proceedings were fundamentally flawed or designed as a facade.¹⁶³ A 'lack of proper appraisal of law or fact' does not constitute an exception to *ne bis in idem*, as reflected in the ICC's drafting history.¹⁶⁴

Alekestria initiated genuine criminal action by immediately arresting and charging Ms. Scott after receiving evidence through mutual legal assistance with a full jury trial, conviction and acquittal on appeal.¹⁶⁵ The Court of Appeal vacated the conviction not for lack of evidence, but to uphold a constitutional guarantee applicable to all accused people. The State fulfilled its duty, deriving from the principle of *aut dedere aut judicare*, to genuinely prosecute the accused within its national system.¹⁶⁶ Thus, Alekestria's refusal to extradite does not breach the Treaty.

¹⁶⁰ Compromis, ¶46.

¹⁶¹ Compromis, ¶41.

¹⁶² Sergey Zolotukhin/Russia, ¶31.

¹⁶³ Al-Senussi, ¶¶218-228.

¹⁶⁴ Doudou Thiam, (Special Rapporteur) *Eighth Report on the Draft Code of Crimes against the Peace and Security of Mankind*, ¶93, A/CN.4/430 (Apr. 6, 1990) (this exception was proposed but did not survive subsequent drafts).

¹⁶⁵ Compromis, ¶¶42-43.

¹⁶⁶ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. UK), Provisional Measures, Order, 1992 I.C.J. 3, 51, 82 (Apr. 14) (Weeramantry, J. and Ajibola, J., dissenting).

D. RESTOVIA VIOLATED INTERNATIONAL LAW WHEN IT REFUSED TO GRANT STATE IMMUNITY TO NEXCA IN THE WRONGFUL DEATH SUIT FILED BY THE ESTATE OF DOMINGO MONTOYA.

State immunity protects states and their instrumentalities from foreign proceedings.¹⁶⁷ NEXCA is entitled to presumptive immunity from jurisdiction in the wrongful death suit brought by Domingo Montoya’s estate.

NEXCA is an instrumentality of Alekostria, and even if characterized as a distinct entity, its mining activities are *acta jure imperii*, entitling it to immunity [1]. The exception to immunity, applicable to both commercial activities [2] and territorial torts [3], does not apply in this scenario. Lastly, no actions taken by NEXCA can be considered a waiver of immunity [4].

1. NEXCA, BEING AN INSTRUMENTALITY OF ALEKOSTRIA, IS ENTITLED TO IMMUNITY.

The Custom on state immunity is reflected in the UNCJISP.¹⁶⁸ The UNCJISP also aligns with (D)ARSIWA’s attribution principles¹⁶⁹ when it purports that instrumentality status requires entities to be both “*entitled to perform and actually performing acts in the exercise of sovereign authority of the State.*”¹⁷⁰ NEXCA is a state organ [a]; its separate personality does not preclude immunity when acting under sovereign authority [b] in strategic resource exploitation [c].

¹⁶⁷ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgement, 2012 I.C.J. 99, ¶57 (Feb. 3) [“**Jurisdictional Immunities**”].

¹⁶⁸ *Id.*, ¶56.

¹⁶⁹ ILC, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, arts.4-5, A/56/10 (2001),

¹⁷⁰ G.A. Res. 59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property, (Dec. 2, 2004), art.2(1)(b)(iii) [“**UNCJISP**”].

a. NEXCA’s governmental structure proves its status as an organ of the State.

Preliminarily, state immunity extends to entities as long as they are performing a function on behalf of the State.¹⁷¹ The Draft Articles also recognize that state agencies exercising their sovereign-granted authority are entitled to immunity.¹⁷²

State practice such as the US Foreign Sovereign Immunities Act explicitly includes “agencies or instrumentalities of a foreign State” within the definition of a ‘foreign State’ itself, and the legislative report explicitly provides that ‘mining enterprises,’ could qualify for this status.¹⁷³ Furthermore, courts have historically considered ‘mining companies’ as multifarious entities assimilated to the State.¹⁷⁴

Here, NEXCA is completely owned by the State and was created through a Parliamentary Act.¹⁷⁵ It is governed by the Minister of Mining *ex officio* and appointees of the Prime Minister.¹⁷⁶ Moreover, NEXCA’s key projects require Parliamentary authorization and Ministerial confirmation. This governmental structure clearly indicates that NEXCA is legally entrusted to operate as a state organ and thus enjoys immunity.¹⁷⁷

¹⁷¹ Jurisdictional Immunities, ¶¶100-101.

¹⁷² ILC, *Draft Articles on Jurisdictional Immunities of States and Their Property with Commentaries*, Commentary to art.2, ¶22, A/46/10 (1991), [“**Draft Articles**”].

¹⁷³ House of Representatives, House Report No. 94-1487, *Jurisdiction of United States Courts in Suits Against Foreign States*, (Sept. 9, 1976).

¹⁷⁴ *Raccoon v. Navoi*, US, 244 F.Supp.2d 1130 (D. Colo. 2002); *Jones v. Ministry of Interior of Kingdom of Saudi Arabia* (Appl. No. 39766/03), [2006] UKHL 26.

¹⁷⁵ Compromis, ¶24.

¹⁷⁶ Compromis, ¶25.

¹⁷⁷ *Bacchus S.R.L. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438 (U.K.).

b. Separate legal personality does not negate status as an organ.

Immunity will extend even in the presence of a separate legal character if the entity is empowered by law of the State to exercise functions on its behalf.¹⁷⁸ In any event, state models which exclude a separate entity from the definition of the States, such as the UK State Immunities Act, establish only a ‘presumption of non-immunity.’¹⁷⁹ Thus, immunity can still attach if the entity proves it acted in a sovereign capacity.

Here, NEXCA requires parliamentary approval for certain projects and ministerial confirmation consistent with foreign policy.¹⁸⁰ Parliamentary orders directed NEXCA’s Gordian Gorge bid,¹⁸¹ mandated ARPA compliance,¹⁸² and a Ministry of Foreign Affairs certified national security clearance.¹⁸³

This broad state control demonstrates that NEXCA’s acts are attributed to Alekostria, confirming its status as an instrumentality of the State. The functional reality of state control outweighs formal legal separation.¹⁸⁴ Therefore, NEXCA retains immunity despite its separate legal personality.

c. Strategic resource exploitation is a uniquely sovereign prerogative.

Permanent Sovereignty over Natural Resources is an established principle of Custom.¹⁸⁵ Courts, when faced with claims related to a State’s exploitation of its resources, have deemed

¹⁷⁸ Bainbridge v. Postmaster General 1 KB 178 (U.K.); Henon v. Egyptian Government and British Admiralty (1947) 14 Annual Digest 78; Triandafilou v. Ministère public (1942) 39 AJIL 34 (France).

¹⁷⁹ XIADONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 277 (2012).

¹⁸⁰ Compromis, ¶24.

¹⁸¹ Compromis, ¶25.

¹⁸² Compromis, ¶20.

¹⁸³ Compromis, ¶27.

¹⁸⁴ Krajina v. Tass Agency, [1949] 2 ALL E.R. 274.

¹⁸⁵ Armed Activities on the Territory of the Congo (Democratic Republic of Congo v.

these activities to be ‘uniquely governmental in nature’¹⁸⁶ and an exercise of ‘sovereign prerogative’.¹⁸⁷ Since NEXCA was engaged in implementing a national security objective, its conduct was an exercise of Alekostria’s sovereign authority, regardless of the commercial form employed.

2. THE COMMERCIAL ACTIVITY EXCEPTION DOES NOT APPLY TO NEXCA’S STRATEGIC MINING OPERATIONS.

The Restovian district court erred by characterizing NEXCA’s participation in the mining bid as “*activities typical of private businesses*,” thereby applying the commercial transaction exception (or *jure gestionis* exception). The strategic mining project is not a ‘commercial transaction’ under Custom [a]. Rather, NEXCA’s conduct constitutes *acta jure imperii*, as shown by its sovereign purpose and context [b], notwithstanding any incidental profit element [c].

a. Strategic mining is not a ‘commercial transaction’ under Article 2(2) of UNCJISP.

Commercial transactions refer to agreements involving goods or services¹⁸⁸ that have a commercial nature and purpose as specified in Article 2(2) of the UNCJISP.¹⁸⁹ However, the sole use of the nature test for determining the applicability of the exception is unreliable.¹⁹⁰

Sucharitkul has cautioned against relying on the nature test which determines whether a State is exercising its sovereign powers,¹⁹¹ by indicating that the tests created by this approach

Uganda), Judgment, 2005 I.C.J. 168, ¶244 (Dec. 19).

¹⁸⁶ In re Sedco, 543 F. Supp. 561 (1982).

¹⁸⁷ MOL, Inc. v. People’s Republic of Bangladesh, 572 F. Supp. 79 (D. Or. 1983).

¹⁸⁸ UNCJISP, art.2(2).

¹⁸⁹ Draft Articles, Commentary to art.2, ¶22.

¹⁹⁰ Justin Donoho, *Minimalist Interpretation of the Jurisdictional Immunities Convention*, 9 CHICAGO JOURNAL OF INTERNATIONAL LAW 2 (2009).

¹⁹¹ Sompong Sucharitkul, (Special Rapporteur), *Report on the Topic of Jurisdictional Immunities of States and their Property*, ¶43, A/CN.4/323 (Jun. 18, 1979).

are insufficiently accurate and do not provide reliable guidance for delineating between sovereign conduct and commercial conduct.¹⁹²

In any case, the multiple layers of Government approvals establish that the transaction was of an intergovernmental nature rather than a commercial one.¹⁹³ Therefore, NEXCA's strategic and purposeful mining activity does not amount to a 'commercial transaction.'

b. NEXCA's activities are a performance of sovereign function.

The purpose test [i] and the surrounding context and circumstances [ii] demonstrate that NEXCA's conduct constitutes *acta jure imperii*.

(i) The purpose test demonstrates sovereign objectives.

This Court in *Jurisdictional Immunities* confirmed that the distinction between *acta jure imperii* and *acta jure gestionis* is central to immunity decisions.¹⁹⁴ To determine *acta jure imperii*, the purpose test examines sovereign objectives underlying conduct.¹⁹⁵

Here, NEXCA's mining activity supported Alekostria's strategic national security interests.¹⁹⁶ Importantly, Restovia's Ministry described rare earth deposits as "of urgent and paramount importance to national security."¹⁹⁷ It has been explicitly found that agreements involving exploitation of mineral resources are not routine commercial contracts, but cooperative sovereign ventures linked to public infrastructure and resource governance.¹⁹⁸

¹⁹² Motoo Ogiso (Special Rapporteur), *Second Report on Jurisdictional Immunities of States and their Property*, ¶12, A/CN.4/422 (Apr. 11 & 24, 1989).

¹⁹³ Compromis, ¶20.

¹⁹⁴ *Jurisdictional Immunities*, ¶60.

¹⁹⁵ Draft Articles, Commentary to art.2, ¶22; UNCJISP, art.2(2).

¹⁹⁶ Compromis, ¶26.

¹⁹⁷ Compromis, ¶20.

¹⁹⁸ *Democratic Republic of Congo v. FG Hemisphere Associates*, [2009] 1 HKLRD 410, ¶91.

Moreover, when two States agree that a resource is of sovereign importance, NEXCA's engagement cannot be deemed an ordinary commercial activity. As the House of Lords observed in *I Congreso del Partido*, transactions that serve a government purpose benefit from immunity, no matter the form of the transaction.¹⁹⁹ The purpose test thus establishes that NEXCA is performing sovereign acts.

(ii) Context and circumstance establish sovereign character.

In *Dole Food Co. v. Patrickson*, the US Supreme Court analyzed the instrumentality's relationship with the State at the time of the alleged conduct.²⁰⁰ Here, NEXCA undertook the project after a Parliamentary resolution,²⁰¹ ministerial approval,²⁰² and Restovian national security clearance.²⁰³ The ILC Commentary demonstrates that activities undertaken to fulfil international obligations are sovereign acts.²⁰⁴

NEXCA was mandated to fulfil the ARPA conditions,²⁰⁵ which meant that its activities were linked to advancing Alekostria's treaty obligations rather than a profit-maximization motive. Each stage of the project included significant government authorization and oversight.²⁰⁶ The totality of the government's involvement indicates the sovereign nature of NEXCA's conduct.

¹⁹⁹ I Congreso del Partido, [1983] 1 AC 244, 267 [**"I Congreso"**].

²⁰⁰ Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003) [**"Dole Food"**].

²⁰¹ Compromis, ¶26.

²⁰² *Id.*

²⁰³ Compromis, ¶27.

²⁰⁴ Draft Articles, Commentary to art.2, ¶18.

²⁰⁵ Compromis, ¶27.

²⁰⁶ Compromis, ¶¶28-29.

c. Profit motive does not negate immunity where strategic objectives predominate.

The ILC Commentary notes that “*economic considerations...do not in and of themselves deprive the transaction of its sovereign character.*”²⁰⁷ Here, NEXCA’s Parliamentary authorization requirement²⁰⁸ demonstrates the subordination of profit to strategic goals. Immunity arises from the government’s objective, not the form of the transaction.²⁰⁹

Each transaction should be considered on its own basis.²¹⁰ In this instance, private company involvement in the bidding process²¹¹ does not convert sovereign procurement to commercial acts.

3. THE TERRITORIAL TORT EXCEPTION DOES NOT APPLY TO NEXCA’S SOVEREIGN ACTIVITIES.

Restovia’s invocation of the territorial tort exception to deny immunity violates Custom since the exception does not extend to core areas of state sovereignty [a]. Moreover, the territorial nexus requirement for this exception was not satisfied [b], and a third party broke the causal chain [c].

a. Custom excludes tortious acts committed by sovereign organs.

The territorial tort exception is confined to routine, insurable risks such as traffic accidents, and not acts undertaken in the exercise of sovereign authority. The ILC noted that it aims to ensure insurance companies cannot evade liability through state immunity.²¹²

²⁰⁷ Draft Articles, Commentary to art.2, ¶19.

²⁰⁸ Compromis, ¶24.

²⁰⁹ I Congreso, 267.

²¹⁰ Dole Food, 474-75.

²¹¹ Compromis, ¶¶29,48.

²¹² Draft Articles, Commentary to art.12, ¶4.

Moreover, States have expressed disagreements to including all tortious acts within the scope of the territorial tort exception to immunity.²¹³ Where such divergence persists, *opinio juris* cannot be established.²¹⁴ NEXCA's preparatory surveys for the strategic mining bid, approved by Restovia, concerned the exercise of sovereign authority to develop strategic national resources. Since these activities relate to the exercise of sovereign authority, the exception does not apply.

b. Custom dictates that the exception only applies to direct, localized acts or omissions.

Both consistent state practice [i] and *opinio juris* [ii] confirm that the territorial tort exception is narrowly confined to acts occurring within the forum State.

(i) State Practice

Several national legislations, including the non-commercial tort provision of the US²¹⁵ and UK²¹⁶ statutes along with other similar Australian²¹⁷ and Canadian²¹⁸ statutes, provide that the act or omission must have taken place within the forum State. This excludes any claims based on extraterritorial acts that caused an effect within domestic borders.²¹⁹

Courts that have interpreted these statutes have primarily restricted their application to simple local torts, and have not treated remote, preparatory, or policy-type actions taken abroad as a basis for allowing claims.²²⁰

²¹³ McElhinney v. Ireland, Appl. No. 31253/96, ¶38 (ECtHR, Nov. 21, 2001); Propend Finance Pty Ltd. v. Sing, [1997] 111 ILR 611.

²¹⁴ CIL Draft Conclusions, conclusion 9(5).

²¹⁵ Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(5).

²¹⁶ State Immunities Act 1978 c. 33, pt. I, §5.

²¹⁷ Foreign States Immunities Act 1985 (Cth), §11.

²¹⁸ State Immunity Act, R.S.C. 1985, c.S-18, §6.

²¹⁹ David Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AJIL 194, 202 (2005).

²²⁰ *Id.*

(ii) *Opinio juris*

Custom recognizes a narrow territorial tort exception to immunity, reflected in Article 12 of the UNCJISP. It imposes two cumulative conditions: first, the act or omission must occur in whole or in part in the territory of the forum State and second, the author of the act or omission must be present in that territory at the time.²²¹

This Court recognizes the territorial tort exception limited to the cases of the forum State, and its survey of national practice puts forth that *locus delicti* is the decisive factor.²²² In this case, NEXCA's cybersecurity failures occurred at its headquarters in Alekostria²²³ not in Restovia. Furthermore, the individual responsible for the ultimate control lapses, senior manager Liz Scott, was reporting directly to NEXCA's Board in Alekostria. The fact that the relevant acts happened in Alekostria does not satisfy Article 12's territorial requirement. As such, the territorial tort exception cannot apply.

c. In any event, a third-party malware attack disrupts the causal chain.

In *Saudi Arabia v. Nelson*, injuries arising from sovereign functions remained exempt from tort liability.²²⁴ In this case, the event was the result of a 'criminal malware' device being downloaded by unknown third parties,²²⁵ and not negligence in ordinary operations.

²²¹ UNCJISP, art.12.

²²² J. Barker, 'International Court of Justice: Jurisdictional Immunities of the State (Germany v. Italy) Judgment of 3 February 2012' 62 ICLQ 3 741, 752 (2013).

²²³ Compromis, ¶38.

²²⁴ *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993).

²²⁵ Compromis, ¶38.

ILSA’s decision that “*the malware breach was facilitated by NEXCA’s failure*”,²²⁶ establishes a third-party causative proximate cause. The criminal act breaks the necessary causative chain for the application of Article 12.²²⁷ Therefore, immunity is preserved.

4. NEXCA DID NOT WAIVE ALEKOSTRIA’S IMMUNITY BY PARTICIPATING IN RESTOVIAN PROCEEDINGS.

This Court in *Djibouti v. France* made a distinction between voluntary cooperation and waiver of immunity.²²⁸ ILSA was established by an agreement²²⁹ between the two governments, and participation in joint law enforcement does not imply consent to private civil litigation.²³⁰ NEXCA’s cooperation in a governmental investigation cannot be considered to be a waiver of immunity from private civil suits.²³¹

Moreover, the VCLT stipulates that waiver authority stems from state practice or specific authorization.²³² State-owned agencies may not waive state immunity without authorization from the government.²³³ In this case, the operational managers of NEXCA do not have the authority to waive Alekostria’s immunity.²³⁴ Only authorities within the State that are competent to act in accordance with international law can authorize a waiver of state immunity.²³⁵ Therefore, if proper authorization has not been granted, there can be no effective waiver.

²²⁶ *Id.*

²²⁷ Alexander Orakhelashvili, *State Immunity and International Public Order*, 45 GYIL 227, 259-260 (2002).

²²⁸ Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v. France*), Judgment, 2008 I.C.J. 177, ¶¶190-196 (Jun. 4).

²²⁹ *Compromis*, ¶37.

²³⁰ Draft Articles, Commentary to art.7, ¶8.

²³¹ *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422, 425 (6th Cir. 1984).

²³² VCLT, art.7(1)(b).

²³³ *Duff Development Co. Ltd. v. Government of Kelantan*, [1924] AC 797 (HL).

²³⁴ *Compromis*, ¶27.

²³⁵ VCLT, art.7.

PRAYER FOR RELIEF

For the foregoing reasons, the Dominion of Alekostria (“**Alekostria**”) respectfully prays that this Court **ADJUDGE** and **DECLARE** that:

- A. Union of Sollania may intervene as a non-party in this case under Article 62 of the International Court of Justice’s Statute.
- B. The Republic of Restovia (“**Restovia**”) is in breach of ARPA and customary international law for not having obtained the free, prior, and informed consent of the Pilemon people before carrying out the development of Gordian Gorge, and that Restovia is therefore under the obligation to stop all mining activities, to provide assurances of non-repetition, and to make reparations.
- C. Alekostria did not violate the 1965 Extradition Treaty by not handing over Ms. Liz Scott, as allowing her trial in Restovia would constitute a violation of *ne bis in idem*, which is a general principle of law under Article 4 of the Extradition Treaty.
- D. Restovia has committed an international law violation by refusing state immunity to NEXCA, and it is under an obligation to discontinue the proceedings against NEXCA.

Respectfully submitted,

AGENTS FOR THE APPLICANT.