

THE 2010 PHILLIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

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

THE CASE CONCERNING THE WINDSCALE ISLANDS – BETWEEN:

The Republic of Aspatia

Applicant

v.

The Kingdom of Rydal

Respondent

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

Pursuant to the Joint Notification and Compromis concluded on 16 September 2009, including the Corrections and Clarifications agreed to therein, at Chicago, Illinois, United States of America between the Republic of Aspatria and the Kingdom of Rydal (hereinafter “the Parties”), and in accordance with Article 40(1) of the Statute of the International Court of Justice, the Parties hereby submit to this Court their dispute concerning the Windscale Islands. The Republic of Aspatria (“the Applicant”) and the Kingdom of Rydal (“the Respondent”) submit to the jurisdiction of this Court pursuant to Article 36(1) of the Statute of the International Court of Justice and agree to be bound by the Court’s decision.

STATEMENT OF FACTS

The Republic of Aspatria (“Aspatria”) is a former colony of the Kingdom of Plumbland (“Plumbland”). It is the closest country to the Windscale Islands (“the Islands”), an archipelago in the Southern Hemisphere. An independence movement defeated Plumbland’s military forces in 1819 and declared Aspatrian independence. The Kingdom of Rydal (“Rydal”) is a Northern Hemisphere developed country with a history of worldwide colonialism.

The Islands

Rydal discovered the Islands in 1777 and left behind the flag of Rydal and a stone carving declaring Rydalian sovereignty. Less than a year later Plumbland too discovered the Islands. After discovery, the Viceroy of Aspatria sent forces to settle and claim the Islands by building a settlement and fort. Twenty-one years later (in 1799) these forces were ordered back to Aspatria to quell internal disturbances. They left behind Plumbland’s flag and a notice declaring Plumbland’s title over the Islands.

A Rydalian ship, the *HMS Applethwaite*, shipwrecked on the Islands in 1813. The survivors of the wreck built a temporary settlement while in Rydal they were thought lost at sea. Another unintentional visitor, the Sodorian slave ship *The Unthank*, drifted into the temporary settlement’s harbour in 1815. All aboard were starving and after receiving assistance swore loyalty to Rydal.

The Viceroy of Aspatria attempted to establish a penal colony on the Islands in 1817 but was stopped by the shipwrecked Rydalian. After learning of Rydal's presence from his Aspatrian Viceroy, Plumbland's King protested the occupation of Plumbland's territory to Rydal. Rydal's Queen, in turn, asserted her dominion, embraced the actions of the survivors and dispatched the *HMS Braithwaite* with the first Governor of the Islands.

Aspatria emerges

Following Aspatrian independence, the Constitutional Convention of 1820 established a federal government which expressly included the Islands. In 1821, after losing an unrelated war, Plumbland signed the Treaty of Great Corby which transferred to Rydal "any sovereignty" that Plumbland had in the Islands. In 1841, however, Plumbland also signed the Treaty of Woodside which acknowledged Aspatria's continued claim to the Islands.

Aspatria failed to retake the Islands by force in 1826 and since then has routinely reiterated its claim and protested acts inconsistent with its sovereignty over the Islands. A thirty year period saw Aspatria, suffering a series of coups d'état, become diplomatically silent but protests resumed after the restoration of political-economic stability in 1911. Today the small population of the Islands is comprised of descendants of the *HMS Applethwaite*, *HMS Braithwaite*, *The Unthank*, and primarily Rydalian immigrants

Aspatrian Relations with the Islands

By the late 1930s, Aspatria and the Islands had begun trading. While Rydal imposed duties on trade from Aspatria to the Islands, Aspatria did not impose duties on goods from the Islands.

Aspatria has always treated all people born on the Islands as Aspatrian citizens who can freely enter Aspatria. Rydal however requires that Aspatrians present a passport to enter the Islands.

Political Development of the Islands

In 1947 the Islanders were given a constitution which provided for an Assembly of the Islands (“Assembly”) having control, subject to approval of the Rydalian-appointed Governor, over day-to-day governance including the exploitation of natural resources.

Rydal designated the Islands a non-self-governing territory in 1945 when it joined the United Nations (“UN”). Upon joining the UN in 1949, the Aspatrian Ambassador sent a diplomatic note to the Secretary-General calling for the international community to recognise Aspatria’s sovereignty over the Islands and to call upon Rydal to cede the Islands’ administration to Aspatria. The UN Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (“Committee”) has regularly considered the dispute over the Islands, and has expressed concern for the interests of the Islanders. Throughout the 1980s a delegation from the Islands presented to the Committee its desire to remain Rydalian. The 1997 discovery of oil around the Islands energized an independence movement called Islanders Longing for Sovereignty and Autonomy (“ILSA”). ILSA sees the oil as a way to become an independently viable state.

Bilateral investment treaty

The Rydalian Oil Company (“ROCO”) is a multi-national energy corporation. Its related corporation, A & L Exploration Corporation (“ALEC”) is incorporated in Aspatria. ROCO

conducts business in Aspatria through ALEC, which includes providing machinery and capital. ROCO owns 80% of the shares in ALEC. ALEC's remaining shares are owned by 5,000 shareholders of different nationalities. MDR Limited ("MDR") is an Aspatrian company which extracts oil. MDR is a private company wholly owned by Felix Monte de Rosa.

Rydal and Aspatria agreed to set aside their sovereignty dispute in an effort to increase bilateral trade. In 1985, the Treaty Concerning the Encouragement and Reciprocal Protection of Investment (the "Aspatria-Rydal BIT") entered into force between Aspatria and Rydal.

The 1991 Aspatrian Natural Resources Act ("NRA") prohibits Aspatrian companies from taking actions inconsistent with an exclusive government license concerning natural resources. Licenses may only be granted to companies incorporated in Aspatria. Contravention of the NRA warrants criminal sanctions and a fine of up to 5% of a company's revenues. In 2003, Aspatria granted MDR an exclusive license to extract the oil around the Islands. MDR did not extract the oil over the next few years.

The bidding process

In 2006, the Assembly of the Islands invited bids for the rights to exploit these same oil reserves subject to assent from Governor Black. The bidding process was to be "open, transparent and competitive." Only ROCO and MDR submitted bids. Both bids met the Assembly's requirements. ROCO's bid offered 45% of the net proceeds to the Islands and the use of ALEC's assets in the oil extraction process. MDR's bid offered 50% of the net proceeds, US \$500 million upon signing the final agreement, a strategic plan to build a facility on the Islands

and employ Islanders. Monte de Rosa stated that he did not care about the outcome of the negotiations concerning title to the Islands. He sought the acquiescence of both governments and to benefit the Islands economically.

The Assembly approved MDR's bid saying it was more economically attractive to the Islanders. After consulting with the Rydalian Prime Minister, Governor Black rejected MDR's bid citing her responsibility to safeguard the future viability of the territory as part of the community of States led by Rydal. The Assembly then approved ROCO's "less generous" bid. Governor Black assented to ROCO's bid. Monte de Rosa denounced the rejection of MDR's bid as discriminatory on the basis of nationality. MDR's judicial appeals in Rydal were denied. The rejection of MDR's bid led to protests in the Islands and caused ILSA to call for a plebiscite on independence. A plebiscite was held in 2008 where a majority opted for independence. Rydal endorsed the outcome, but Aspatria condemned the plebiscite as illegal.

On 16 November 2007, Aspatria laid criminal charges against ALEC under the NRA.

Aspatria alleged that ALEC's participation in ROCO's bid interfered with MDR's exclusive license. Pursuant to a court order, Aspatrian police seized all of ALEC's assets, including bank accounts and an oil tanker valued at US \$80 million. ALEC's judicial attempts to cancel the order were denied. No further appeal was possible under Aspatrian law. The underlying criminal case has yet to be concluded.

QUESTIONS PRESENTED

The Republic of Aspatria respectfully requests this Court to determine:

1. Whether sovereign title over the Islands belongs to Aspatria;
2. Whether the Islanders are entitled to independence based on the principle of self-determination;
3. Whether MDR is a protected investor with a protected investment under the Aspatria-Rydal BIT, and whether the rejection of MDR Limited's bid violated the principles codified in the Aspatria-Rydal BIT. If a violation is found, whether such a violation is without justification;
4. Whether Rydal has standing to bring a claim before the International Court of Justice to protect the assets of ALEC. If standing is granted, whether Aspatria's seizure of ALEC's assets violated Article V and/or Article VI of the Aspatria-Rydal BIT.

SUMMARY OF THE PLEADINGS

Plumbland had full and undivided sovereignty over the Windscale Islands as a result of effective occupation. At no time did Rydal effectively occupy the Islands and thereby gain title; more was required in this period than discovery and symbolic declarations. Furthermore, only events which occurred before the dispute arose are relevant to determining sovereignty; the length of Rydal's illegal occupation is inconsequential. Aspatria inherited title to the Islands as successor state to Plumbland under the doctrine of *uti possidetis juris*.

Aspatria, as the successor state to Plumbland, gained title to the Islands upon achieving independence through the doctrine of *uti possidetis juris*. This doctrine freezes title to territory as it was at the moment of a former colony's achievement of independence. Independence is a question of fact, not recognition. Attempts to change title subsequent to independence are irrelevant. Aspatria's title to the Islands is unaffected even if regard is paid to post-independence acts. Aspatria has never acquiesced to Rydal's illegal occupation and regional and international opinion supports Aspatria's claim.

The Windscale Islands are not entitled to independence on the basis of self-determination. Since Aspatria has title to the Windscale Islands, the people of the Islands are entitled to internal self-determination, that is, self-determination within Aspatria. By treating people born on the Islands as full citizens of Aspatria despite Rydal's administration of the Islands, Aspatria has shown itself capable of providing the Islanders with the political, economic and social rights which

comprise internal self-determination. Moreover, internal self-determination best accords with the fundamental international law principle of territorial integrity.

The Islands do not fulfill the requirements for external self-determination, which would include independence. External self-determination arises only in three very narrow circumstances: for colonial peoples, for peoples under forceful occupation, and for peoples whose right to internal self-determination is utterly denied. The Islanders are not a colonial people because they are not inherently distinct from the imperial power of Rydal. The Islanders are not under forceful occupation. Finally, it would be premature to argue that the Islanders would be denied their right to internal self-determination, because Aspatria has not been given an opportunity to administer the Islands.

Rydal's rejection of MDR's bid violated the Aspatria-Rydal BIT. MDR was a protected investor with a protected investment under the terms of the BIT. Rydal's rejection of MDR's bid contravened the national treatment protections guaranteed to MDR under terms of the BIT. Rydal's actions discriminated against MDR on the basis of nationality. MDR's bid met the requirements of the bidding process and was more attractive economically, yet ROCO's lesser bid was chosen because Rydal wished to award the license to a non-Aspatrian company. Rydal's interference in the bidding process undermined MDR's rights as an equal competitor in the oil market. This interference amounted to protectionism and unfair and inequitable treatment.

Rydal lacks standing under the Aspatria-Rydal BIT and under customary law to protect ALEC's assets. ALEC is an Aspatrian national and the seizure was a matter internal to Aspatria. Even if

Rydal is granted standing, Aspatria's seizure of ALEC's assets was lawful and did not violate Article VI of the Aspatria-Rydal BIT. The seizure did not constitute direct expropriation as Aspatria did not transfer title of ALEC's assets to itself. Nor did the seizure constitute indirect expropriation. The seizure was consistent with Article VI(b) of the BIT. Furthermore, the seizure was by its nature a temporary injunction and does not amount to a permanent taking under customary law.

PLEADINGS

I a. RYDAL MUST CEDE ADMINISTRATION OVER THE ISLANDS TO ASPATRIA

A. Plumbland had full and undivided sovereignty over the Windscale Islands as a result of occupation.

1. The Source of Title to the Islands is Occupation.

Out of three peaceful ways of acquiring territory identified by the International Court of Justice (ICJ) occupation is the only means which is relevant to this dispute.¹ It has three requirements: the territory must be *terra nullius*, the claimant needs had the intention to occupy the territory, and the claimant must exercise sovereign rights therein.² *Terra nullius* was defined by the ICJ as “a territory belonging to no-one” before occupation.³ Both Rydal’s and Plumbland’s claims to the Islands rested upon occupation because there were “no signs of human habitation” at the time of discovery by either Party.⁴

2. Rydal Failed to Gain Title through Occupation in 1777

¹ *Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12 at para. 79 [*Western Sahara*].

² *Legal Status of Eastern Greenland (Denmark v. Norway)* (1933), P.C.I.J. (Ser. A/B) No. 53 at 48 [*Eastern Greenland*].

³ *Western Sahara*, *supra* note 1.

⁴ *Compromis*, at para. 5.

The law which governs any analysis of facts is the law in effect at the time the facts took place, not the law in effect at the time a dispute arises.⁵ Under the law of occupation in the 1700s more was required than the intention to occupy the territory and the making of symbolic declarations.⁶ At that time the crux of the exercise of sovereign rights was the settlement or use of territory.⁷ In the absence of “the actual, not the nominal” exercise of sovereign rights⁸, claims to sovereignty were simply “pretension” which could be defeated by a competing claim.⁹

Rydal’s symbolic declaration in 1777 was insufficient as an exercise of sovereign rights. From the time of discovery until the founding of Plumblund’s settlement at Salkeld in 1778, Rydal failed to exercise *any* sovereign rights in regard to the Windscale Islands.¹⁰ In fact, no intentional acts were undertaken by Rydal until 42 years after the Island’s discovery and even then only because the dispute had arisen.¹¹ Consequently, Rydal never gained title over the Islands which remained *terra nullius* and available for occupation by another state.

⁵ *Island of Palmas Case (Netherlands v. USA)* (1928), R.I.A.A. 829 (Permanent Court of Arbitration) at 845 [*Palmas*].

⁶ Yehuda Z. Blum, *Historic Titles in International Law* (The Hague: Martinus Nijhoff, 1965) at 101; Lassa Oppenheim, *International Law Vol. 1* (London: Longmans, Green and Co, 1955) at 558.

⁷ Surya Prakash Sharma, *Territorial acquisition, disputes, and international law* (The Hague: Martinus Nijhoff, 1997) at 63-64. *Palmas*, *supra* note 5 at 839.

⁸ *Arbital Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico)* (1931), 26 Am. J. Int’l L. 390 at 393 [*Clipperton*].

⁹ *Eastern Greenland*, *supra* note 2 at 48.

¹⁰ *Compromis*, at paras. 5-6.

¹¹ *Compromis*, at para. 10.

3. Plumbland Occupied the Islands and Gained Title Thereto in 1778

i. Plumbland met the requirement of intention

Intention to occupy a territory can be expressly stated, or it can be inferred, from conduct occurring over a long period.¹² The intention to occupy an entire territory, moreover, is sufficient to gain title even where the settlements are much smaller than the territory covered by the intent.¹³ Plumbland's stated intention is visible in its express declaration in 1799 intending to "forever" retain all of the Islands.¹⁴ As well, Plumbland's intention to occupy is further supported by the founding of Salkeld and Plumbland's attempt to establish a penal colony on the Islands in 1817.¹⁵

ii. Plumbland exercised sovereign rights

The actual continuous and peaceful display of state functions is central to determining title to territory.¹⁶ Plumbland, through the establishment of its fort and settlement, continuously, and peacefully exercised its sovereign rights for more than 20 years. Plumbland consequently gained title to the Islands through occupation. Throughout this period no other state protested or

¹² *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, 23 May 2008, General List No. 130, online: International Court of Justice <<http://www.icj-cij.org/docket/files/130/14492.pdf>> at 45 [*Pedra Branca*].

¹³ *Eastern Greenland*, *supra* note 2 at 48.

¹⁴ *Compromis*, at para. 7.

¹⁵ *Compromis*, at paras. 14, 20.

¹⁶ *Palmas*, *supra* note 5 at 839-840.

attempted to settle the islands nor was Plumbland under any duty to inform other states of its occupation.¹⁷

iii. Plumbland never abandoned the Islands

Once effective occupation is established it is extremely difficult to overturn. In order for a state to lose title to territory through dereliction it must have the *animus* of abandonment which cannot be presumed even if a state is not actively exercising authority.¹⁸ When Plumbland's subjects were ordered back to Aspatria, the notice left at Salkeld conclusively shows that there was no *animus* of abandonment.¹⁹

4. Rydal's Actions Subsequent to the Bilateral Dispute Arising Are Irrelevant

i. The critical date for the dispute is in the middle of 1818

The time at which a dispute is brought before a tribunal is not the same as the "critical date" at which a dispute first arises between the parties.²⁰ A "dispute" is simply a disagreement, conflict of legal views or interests on a point of law or fact.²¹ The critical date is thus when the dispute

¹⁷ *Palmas*, *supra* note 5 at 868.

¹⁸ *Clipperton Island*, *supra* note 8 at 394.

¹⁹ *Compromis*, at para. 7.

²⁰ *Palmas*, *supra* note 5 at 845.

²¹ *Mavrommatis Palestine Concessions (Greece v. United Kingdom)* (1924), P.C.I.J. (Ser. A) No. 2 at 11.

over title is first expressly raised between the parties.²² This is referred to as “crystallization”.²³ The dispute crystallized in the middle of 1818 when King Piero of Plumland protested to Queen Constance of Rydal about the accidental and illegal occupation of the Islands by the shipwrecked crew of the *HMS Applethwaite*, a Rydalian ship.²⁴

ii. Rydal’s actions after crystallization are irrelevant

The impact of crystallization is to render subsequent acts irrelevant to the resolution of a territorial sovereignty dispute.²⁵ Such acts are “in general meaningless” when territorial sovereignty disputes arise because they may have been done to buttress a claim.²⁶ Consequently, Rydal’s 1818 ratification of its illegal occupation is a post-crystallization act which, in light of its previous ignorance of Admiral Aikton’s survival, could only have been taken with a view to strengthening Rydal’s claim.²⁷ This ratification and all other subsequent acts of Rydal concerning the Islands, including its long occupation, are therefore of no legal force or effect.

²² *The Minquiers and Ecrehos Case (France v. United Kingdom)*, [1953] I.C.J. Rep. 47 at 59 [Minquiers & Ecrehos].

²³ *Pedra Branca*, *supra* note 12 at 16.

²⁴ *Compromis*, at para. 15.

²⁵ *Palmas*, *supra* note 5 at 866.

²⁶ *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, 8 October 2007, General List No. 120, online: International Court of Justice <<http://www.icj-cij.org/docket/files/120/14075.pdf>> at para. 117 [Caribbean Sea].

²⁷ *Compromis*, at para. 15.

B. Aspatria inherited from Plumbland full and undivided title as a result of *uti possidetis juris*

1. Under the Doctrine Aspatria Inherits Title to the Islands as Successor to Plumbland

The doctrine of *uti possidetis juris* determines the borders that newly independent states inherit.²⁸ It freezes, at the moment of independence, the pre-existing administrative boundaries determined by the former colonial power. Acts subsequent to this moment are legally irrelevant.

i. Uti possidetis juris governs the dispute

The doctrine is aimed at “securing respect for territorial boundaries at the moment when independence is achieved”.²⁹ The doctrine accords pre-eminence to legal title over effective possession, and halts colonial powers or states from taking uninhabited or unexplored regions from newly independent states.³⁰ Rydal’s actions in illegally occupying the sovereign territory of Aspatria fall squarely within the corrective bounds of *uti possidetis juris*.

ii. Aspatria has title to the Islands as the former administrative division

The borders gained by a newly independent state under *uti possidetis juris* are the same as the pre-independence boundaries it held as a colonial administrative division.³¹ Acts of state

²⁸ *Case concerning the Frontier Dispute (Burkina Faso v. Mali)*, [1986] I.C.J. Rep. 554 at 565 [Burkina Faso/Mali].

²⁹ *Ibid.*

³⁰ *Ibid.* at 566.

³¹ Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008) at 130.

administration are therefore evidence of the administrative division. Relevant acts taken by Plumbland with regard to the Islands were consistently directed through the Viceroy of Aspatria and include: ordering military forces to establish a fort and settlement³², the dispatch of *The Grizedale* to establish a penal colony³³, and the transmission of information concerning the Islands back to Plumbland.³⁴ Aspatria, through the Viceroyalty of Aspatria, therefore inherits title to the islands as the former administrator.

iii. Aspatria was an independent state by 1819-1820

The broadly recognized international law criteria for statehood are: population, territory, and government.³⁵ In addition, under international law the existence of a state is independent of recognition by other states³⁶ and is a question of fact.³⁷ Recognition, moreover, applies retroactively to the moment statehood is achieved and not from the date recognition is conferred.³⁸ By 1820 Aspatria had a population, territory, and a federal system of government.³⁹

³² *Compromis*, at para. 6.

³³ *Compromis*, at para. 14.

³⁴ *Compromis*, at para. 15.

³⁵ See also *Convention on the Rights and Duties of States*, 26 December 1933, O.A.S.T.S. No. 37, art. 1 [*Montevideo Convention*].

³⁶ *Ibid.* art. 3.

³⁷ *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia* (1991), 31 I.L.M. 1488 at 1495.

³⁸ Ti-Chiang Chen, *The International Law of Recognition* (London: Stevens & Sons Ltd., 1951) at 172-185.

³⁹ *Compromis*, at para. 19.

Furthermore, the King of Plumbland's refusal to recognize the newly independent Aspatrian state is inconsequential. In 1819 Plumbland had ceased to exercise power in Aspatria and by 1820 the independent state of Aspatria had emerged.⁴⁰

iv. Treaty of Great Corby's cession article is a nullity

It is an established principle of international law that treaties cannot dispose of the territorial rights of independent third states nor transfer more rights than the transferor possesses.⁴¹ The Respondent accordingly cannot rely on the Treaty of Great Corby's cession article⁴² because at the time of the treaty's creation Plumbland did not have title to the Islands. Moreover, by that time Aspatria had, consistently with the principle of *uti possidetis juris*, manifested its title over the Islands through legislation at its Constitutional Convention.⁴³

2. Rydal's Acts Subsequent to Aspatrian Independence are Irrelevant

Because *uti possidetis juris* applies from the moment of independence onwards⁴⁴ the only facts relevant to determining title are those visible in a snapshot of the territory at the moment of independence.⁴⁵ Since the doctrine freezes title to territory as it is at the moment of

⁴⁰ *Compromis*, at paras. 18-19.

⁴¹ *Palmas*, *supra* note 5 at 842; *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art. 34 [VCLT].

⁴² *Compromis*, at para. 20.

⁴³ *Compromis*, at para. 19.

⁴⁴ *Burkina Faso/Mali*, *supra* note 28 at 568.

⁴⁵ *Case concerning the Frontier Dispute (Benin v. Niger)*, [2005] I.C.J. Rep. 90 at para. 26.

independence, Aspatria's title as successor state to Plumbland continues to be definitively protected. Only a clear contrary expression by the state with title is capable of changing this.⁴⁶ At no time has Aspatria undertaken any actions which clearly express any desire to abandon title to the Islands.

3. Even if Post-Independence Actions are Examined, they Re-Affirm Aspatria's Rights

i. Aspatria has never acquiesced to Rydal's illegal occupation

At international law, state silence on a matter is usually understood as acquiescence thereto. In case of dispute, acquiescence supports a claim made by the unopposed state.⁴⁷ As well, the concept of acquiescence "presupposes freedom of will" such that there is no acquiescence without the freedom to protest.⁴⁸ Protesting acts inconsistent with one's title, however, preserves a state's rights.⁴⁹

Aspatria has consistently opposed Rydal's illegal occupation of the Islands by force of arms⁵⁰, legislative acts⁵¹, diplomatic protests⁵², and through treaties.⁵³ The single period of Aspatrian

⁴⁶ *Ibid.*

⁴⁷ *Pedra Branca*, *supra* note 12 at 64.

⁴⁸ *Burkina Faso/Mali*, *supra* note 28 at 597.

⁴⁹ See e.g. *The Chamizal Case (Mexico v. United States)* (1911), XI R.I.A.A. 309 at 328.

⁵⁰ *Compromis*, at para. 22.

⁵¹ *Compromis*, at para. 44.

⁵² *Compromis*, at paras. 24, 27.

silence is attributable to a political-economic crisis in the country that led to a series of coups d'état. Aspatria, as a state, lacked freedom of will at this time. Furthermore, Aspatria again asserted its claims to the Islands within a year of reestablishing civilian government.⁵⁴ In sum, Aspatria has never, by choice, remained silent in the face of Rydalian actions concerning the Islands.

ii. International and regional opinion supports Aspatria's title

In numerous cases the ICJ has taken into account the impact of recognition by third states on territorial disputes.⁵⁵ Recognition and acquiescence by states and “by the neighbours concerned...are the most general origin of existing international boundaries”.⁵⁶ Evidence of international opinion supports Aspatria's title to the Islands. Ten states located near Aspatria as well as a number of other states have regularly supported the Applicant's title claim in both the General Assembly and the Special Committee on decolonization.⁵⁷

⁵³ *Compromis*, at paras. 26, 36.

⁵⁴ *Compromis*, at para. 30.

⁵⁵ See e.g. *Caribbean Sea*, *supra* note 26 at para. 227; *Palmas*, *supra* note 5 at 838; *Western Sahara*, *supra* note 1 at para. 111.

⁵⁶ *The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India v. Pakistan)* (1968), XVII R.I.A.A. 1 at 498.

⁵⁷ *Compromis*, at para. 38.

I b. THE ISLANDERS ARE NOT ENTITLED TO INDEPENDENCE ON THE BASIS OF SELF-DETERMINATION AT INTERNATIONAL LAW.

Self-determination has two manifestations: internal self-determination and external self-determination. Internal self-determination, defined as “a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state[,]” usually satisfies the right to self-determination at international law.⁵⁸ Independence is a form of external self-determination. A peoples’ right to external self-determination arises only in three very narrow circumstances: (1) for colonial peoples; (2) for peoples under “alien subjugation, domination or exploitation” outside a colonial context; or (3) (though not necessarily settled international law) where a people’s right to internal self-determination is “totally frustrated”.⁵⁹ The Islanders do not come within these exceptions.

A. The Islanders are entitled to internal self-determination within Aspatria.

1. Aspatria can readily satisfy the Islanders’ right to internal self-determination.

Internal self-determination is the “primary focus”⁶⁰ of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,⁶¹

⁵⁸ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 122, 126, 130 [*Secession of Quebec*].

⁵⁹ *Ibid.* at paras. 131-135.

⁶⁰ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 146 [*Self-Determination*].

⁶¹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, [ICESCR].

to which Aspatria and Rydal are both parties.⁶² Moreover, a state's territorial integrity shall be respected where it is "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."⁶³ (The Vienna Declaration and Programme of Action calls for no "distinction of any kind").⁶⁴

Aspatria has treated people born on the Islands as Aspatrian citizens since independence, and some Islanders have taken advantage of this for business and education purposes. Aspatria has also refused to impose duties on imports coming from the Islands. When added to the fact that Aspatrian law applies to all its territory, including the islands, it is clear that Aspatria represents the whole people including the Islanders and can easily and readily afford the Islanders the political, economic, social and cultural guarantees associated with internal self-determination. The Islanders would not only be bound by, but able to benefit from, Aspatrian law.⁶⁵

2. Internal self-determination is compatible with territorial integrity, which is at the core of the international system.

⁶² *Compromis*, at para. 69.

⁶³ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625(XXV), UN GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082 (1970) 121 at 124 [*Friendly Relations*].

⁶⁴ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, art. 2, UN Doc. A/CONF.157/23.

⁶⁵ *Compromis*, at paras. 33, 31, 19.

The centrality of territorial integrity is visible in every manifestation of international law, including state practice,⁶⁶ and even where claims to self-determination are arguably strongest. Article 46(1) of the Declaration on the Rights of Indigenous Peoples, for example, reiterates that nothing in the Declaration should be interpreted so as to “dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”⁶⁷ Dismemberment of Aspatian territory through granting the Islanders independence would consequently stand in opposition to the overwhelming tide of international law and practice. Internal self-determination, however, is compatible with territorial integrity.⁶⁸

3. The 2008 plebiscite is not determinative.

In many cases, the United Nations has taken account of the “freely expressed will of peoples” by organizing or supervising plebiscites.⁶⁹ However, in certain cases where there is a dispute as to sovereignty over the territory in question, the UNGA has directed the parties to take account of the interests, but not the wishes, of the population.⁷⁰ Specifically, this has occurred in the

⁶⁶ *Charter of the United Nations*, art. 2(4); *Covenant of the League of Nations*, 28 April 1919, art. 10, online: UNHCHR < <http://www.unhcr.org/refworld/docid/3dd8b9854.html>>; *Declaration on the granting of independence to colonial countries and peoples*, GA Res. 1514(XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. No. A/4684 (1960) 66 [*Resolution 1514*] at 67; *Friendly Relations*, *supra* note 63 at 123-124; *Burkina Faso/Mali*, *supra* note 28 at para 25; Cassese, *Self-Determination*, *supra* note 60 at 122.

⁶⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., UN Doc. A/RES/61/295, 1 at 11.

⁶⁸ *Secession of Quebec*, *supra* note 58 at para. 130.

⁶⁹ Cassese, *Self-Determination*, *supra* note 60 at 76-79.

factually similar cases of the Falkland Islands and Gibraltar (both non-self-governing territories).⁷¹ As to the dispute over Falkland Islands, Argentina has claimed title to them based on the principle of *uti possidetis*, (the territory having been inherited from Spain), while Britain has claimed title on the basis of subsequent settlement and the principle of self-determination for the people of the Islands.⁷² Regarding Gibraltar, Spain has consistently protested Britain's submission of information on the territory pursuant to Article 73e of the UN Charter because it considers Gibraltar to be part of Spain.⁷³ In fact, the UNGA has explicitly declared one referendum expressing the wishes of those in Gibraltar invalid,⁷⁴ and ignored another.⁷⁵ In the 2008 plebiscite, the Windscale Islands voted 76% in favour of independence (with 93% turnout).⁷⁶ However, the dispute over the Windscale Islands also involves competing sovereignty claims. Notably, the U.N. Special Committee has expressed concern only for the *interests* of the

⁷⁰ Miguel Antonio Sánchez, "Self-Determination and the Falkland Islands Dispute" (1982-1983) 21 Colum. J. Transnat'l L. 557 at 571; Lowell S. Gustafson, *The Sovereignty Dispute over the Falkland (Malvinas) Islands* (Oxford: Oxford University Press, 1988) at 39. See e.g. *Question of the Falkland Islands (Malvinas)*, GA Res. 39/6, UN GAOR, 39th Sess., Supp. No. 51, UN Doc. A/39/51 (1984) 17 at 17; *The Question of Gibraltar*, UNGA Res. 2353(XXII), UN GAOR, 22nd Sess., Supp. No. 16, UN Doc. A/6716 (1967) 53 at 53 [*Question of Gibraltar*].

⁷¹ *Non-Self-Governing Territories Listed by General Assembly in 2002*, online: <<http://www.un.org/Depts/dpi/decolonization/trust3.htm>>.

⁷² Gustafson, *supra* note 70 at 21-22, 28, 37.

⁷³ Howard S. Levie, *The Status of Gibraltar* (Boulder, CO: Westview Press, 1983) at 103.

⁷⁴ *Question of Gibraltar*, *supra* note 70 at 53.

⁷⁵ James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Martinus Nijhoff Publishers: Leiden, Netherlands, 2007) n. 37 at 326.

⁷⁶ *Compromis*, at para. 63.

population of the Windscale Islands.⁷⁷ It has also not commented on the 2008 plebiscite. Therefore, given the decisions of the world community in highly similar situations, the ICJ need not see the 2008 plebiscite in favour of independence as determinative of the issue of self-determination.

B. The Islanders are not entitled to independence based on external self-determination.

1. The Islanders are not entitled to independence on the basis of decolonization.

i. The Islanders are not colonial peoples.

The right to independence has been given to all non-self-governing territories.⁷⁸ The logic underlying this right is that people under colonial rule are an entity “inherently distinct from the colonialist Power”, whose territorial integrity should be “restored”.⁷⁹ While the Islands have been designated as a non-self-governing territory,⁸⁰ the Islanders are not subject to the relevant indicia of “alien subjugation, domination and exploitation” as described in UNGA Resolution 1514, the *Declaration on the granting of independence to colonial countries and peoples* [“Resolution 1514”].⁸¹ The Rydalian government is not ‘alien’ to the settlers on the Islands. The population on the Islands has come mostly from Rydal, and while the original population of the

⁷⁷ *Compromis*, at para. 37.

⁷⁸ *Resolution 1514*, *supra* note 66 at 67; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, [1970] I.C.J. Rep. 16 at para. 52.

⁷⁹ Cassese, *Self-Determination*, *supra* note 60 at 334.

⁸⁰ *Compromis*, at paras. 34-35.

⁸¹ *Resolution 1514*, *supra* note 66 at 67.

Islands intermarried and reproduced with individuals from *The Unthank*, those individuals were not indigenous to the Islands, and swore loyalty to Rydal almost immediately upon arrival.⁸² Therefore, the people of the Islands are not “inherently distinct” from Rydalians. The only territorial integrity that needs to be restored is that of Aspatria, which is the formerly colonized state⁸³ that the decolonization process is designed to benefit.

ii. Non-self-governing territory status has not always resulted in self-determination where territorial sovereignty disputes are a factor.

In the situations of the Falkland Islands and Gibraltar, discussed above, the UNGA “has not considered non-self-governing territory status to translate into a right of self-determination[.]”⁸⁴ Moreover, in the case of *Western Sahara*, sovereignty claims conflicted with the right to self-determination for the people in the contested territory.⁸⁵ The ICJ determined that Morocco and Mauritania had not established “legal ties of such a nature” over the disputed territory which “might affect the application of resolution 1514 (XV) [...] and, in particular, of the principle of self-determination” (emphasis added).⁸⁶ Therefore, the possibility remains that previous ties of sovereignty can “affect the relevant decolonization principles.”⁸⁷ Moreover, *Western Sahara*,

⁸² *Compromis*, at paras. 10, 12, 16, 28.

⁸³ *Compromis*, at para. 3.

⁸⁴ Summers, *supra* note 75 at 326; See e.g. *Question of the Falkland Islands (Malvinas)*, GA Res. 2065, UN GAOR, 20th Sess., Supp. No. 14, UN Doc. A/6014 (1984) 57 at 57; *Question of Gibraltar*, *supra* note 70 at 53.

⁸⁵ *Western Sahara*, *supra* note 1 at para. 162.

⁸⁶ *Ibid.*

unlike this case, dealt not with settlers, but with people who had been in the territory since before the time of colonization.⁸⁸

This supports the contention that the ICJ is not bound, simply because the Islands have been designated as non-self-governing territories,⁸⁹ to accord them independence when Aspatria's sovereignty and territorial integrity are at stake. Given the strength of Aspatria's claim to sovereignty over the Islands, this is an appropriate case in which to respect Aspatria's territorial integrity. Similar arguments have been made by Argentina in the context of the Falkland Islands dispute.⁹⁰

2. The Islanders are not peoples subject to “alien subjugation, domination or exploitation” outside the colonial context.

“[S]ubjection of peoples to alien subjugation, domination and exploitation”⁹¹ also gives rise to a right of external self-determination outside the context of colonialism.⁹² However, state practice⁹³ and the deliberate use of the “more restrictive” term ‘alien occupation’ in Article 1 of

⁸⁷ Malcolm Shaw, “The Western Sahara Case” (1978) 49 Brit. Y.B. Int'l. L. 119 at 148.

⁸⁸ *Western Sahara*, *supra* note 1 at para. 71.

⁸⁹ *Compromis*, at para. 34.

⁹⁰ Sánchez, *supra* note 70 at 563.

⁹¹ *Friendly Relations*, *supra* note 63 at 124.

⁹² Cassese, *Self-Determination*, *supra* note 60 at 90.

⁹³ *Ibid.*, at 90-99.

the First 1977 Geneva Protocol⁹⁴ in reference to self-determination, show that “‘alien subjugation, domination and exploitation’ covers those situations in which any one Power *dominates* the people of a *foreign territory* by recourse to *force*” (emphasis in original).⁹⁵ The Islanders are not subject to domination by the use of force by either Rydal or Aspatria; Rydal’s use of the Islands as a harbour for its navy⁹⁶ is not enough to constitute domination by force. Accordingly, Rydal cannot support independence for the Islands on this basis.

3. A minority or sub-national group’s right to external self-determination can only exist where it is excluded from internal self-determination.

A positive legal right to secession does not exist at international law.⁹⁷ Generally, minorities and sub-national groups do not have a right of external self-determination.⁹⁸ While it is not necessarily settled at international law, a people may be able to secede “as a last resort” when its right to internal self-determination is “totally frustrated” and access to government is denied.⁹⁹ It would be inequitable to simply assume that Aspatria could not or would not respect the

⁹⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, art. 1(4); Cassese, *Self-Determination*, *supra* note 60 at 92.

⁹⁵ Cassese, *Self-Determination*, *supra* note 60 at 99.

⁹⁶ *Compromis*, at para. 28.

⁹⁷ *Secession of Quebec*, *supra* note 58 at para. 111; Hurst Hannum, “Re-Thinking Self-Determination” (1993) 34 Va. J. Int’l L. 1. at 42.

⁹⁸ Emilio J. Cárdenas & Maria Fernanda Cañas, “The Limits of Self-Determination”, in Wolfgang Danspeckgruber, ed., *The Self-Determination of Peoples: Community, Nation, and State in an Interdependent World* (Boulder, CO.: Lynne Rienner Publishers, 2002) at 103.

⁹⁹ *Secession of Quebec*, *supra* note 58 at paras. 134-136.

Islanders' right to internal self-determination to the Islanders. Having been continually prevented from administering the Islands, they have never before been given the opportunity to give the Islanders internal self-determination.

Restricting the circumstances under which minorities may secede can serve a worthwhile goal: that of coexistence within a state. It has been said that “[a] world of segments should not be allowed to replace a world of tolerance.”¹⁰⁰ Overall, granting the Islanders internal self-determination within Aspatría provides a just and workable solution to this difficult issue.

¹⁰⁰ Cárdenas & Cañas, *supra* note 98 at 111.

II. THE REJECTION OF MDR LIMITED'S BID CONSTITUTES A VIOLATION OF THE ASPATRIA-RYDAL BIT.

A. The Aspatria-Rydal BIT accorded pre-entry rights to MDR.

1. MDR is a protected investor under the BIT.

According to Article 31(1) of the Vienna Convention on the Law of Treaties, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁰¹ Contemporary BITs contain language that extends the scope of treaty protection to the pre-investment stage.¹⁰² The Aspatria-Rydal BIT and US Model BIT 2004 contain identical definitions of ‘investor of a Party.’ The US Model BIT encompasses an investor who “attempts to make” an investment, and broadens the scope of investment protection to persons who are merely seeking to invest.¹⁰³

The definition of ‘investor’ in the Aspatria-Rydal BIT establishes pre-investment rights for MDR.

The express inclusion of the term ‘attempts to make’ includes a foreign investor in Rydal or

¹⁰¹ *VCLT*, *supra* note 41, art. 31.

¹⁰² *Japan-Mexico Economic Partnership Agreement*, Japan and Mexico, 17 September 2004 (entered into force April 2005) online: Ministry of Foreign Affairs Japan <<http://www.mofa.go.jp/region/latin/mexico/agreement/index.html>>; *New Zealand-China Free Trade Agreement*, New Zealand and China, April 2008 (entered into force 1 October 2008) online: New Zealand Ministry of Foreign Affairs & Trade <<http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/China/index.php>>; *Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership*, Japan and Singapore, 13 January 2002 (entered into force 20 November 2002) online: Ministry of Foreign Affairs Japan <<http://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html>>.

¹⁰³ Engela C. Schlemmer, “Investment, Investor, Nationality, and Shareholders” in Peter Muchlinski, Federico Ortino and Christoph Schreuer eds., *The Oxford Handbook of International Law* (New York: Oxford University Press) at 67.

Aspatria that is merely seeking to invest. In addition, the protection of pre-investment rights is consistent with the intentions of the Parties. Since the BIT's Preamble states that the Parties desire to create conditions for greater economic co-operation based on principles of equality and mutual benefit,¹⁰⁴ the Parties could not have intended to agree to allow the discriminatory or unfair treatment of bids. Excluding a foreign company's bids from the BIT's non-discriminatory and fair and equitable treatment provisions would mean unfairly treated non-nationals would be at risk of not ever being able to proceed to the investment stage. Thus, the definition of 'investor' encompasses MDR Limited in its bid for oil rights and the company merits pre-entry protection.

2. MDR's bid is a protected investment under the BIT.

Article IV of the BIT states that "investment" means every asset of an investor that has the characteristics of an investment, such as the commitment of capital.¹⁰⁵ Commitment of capital does not require a movement of capital.¹⁰⁶ BITs with treaty provisions applying only to established investments contain express admission clauses limiting the protection under the treaty to after the investor has been admitted into the host country.¹⁰⁷

MDR's bid falls under the definition of 'investment' in the BIT. The BIT lacks an admission clause limiting its scope to established investments. Absent a clause limiting the BIT's scope,

¹⁰⁴ *Compromis*, at Annex I.

¹⁰⁵ *Ibid.*

¹⁰⁶ Schlemmer, *supra* note 103 at 62.

¹⁰⁷ UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (New York and Geneva: United Nations), Doc. No. UNCTAD/ITE/IIA/2006/5 (2007) at 33.

and since the BIT has an open-ended definition of ‘investment,’ MDR is entitled to a liberal interpretation of what constitutes an investment. The term ‘commitment’ should be interpreted according to its plain meaning to encompass a promise to transfer resources. Thus the ‘commitment of capital’ should be understood to encompass MDR’s promise to pay 50% of the net proceeds to the Islands and the plan to build a facility on the Islands.

B. Rydal’s rejection of MDR’s favourable bid was contrary to the overall object and purpose of the Aspatia-Rydal BIT.

The intention of the parties to a treaty should be interpreted according to the express words used by them in the light of surrounding circumstances.¹⁰⁸ The context for the purpose of interpretation of a treaty includes its Preamble.¹⁰⁹

The wording of Article IV should be interpreted in the context of the mutual promotion of economic interests stated in the Aspatia-Rydal BIT’s Preamble. The Preamble describes the intentions of both Parties to create favourable economic conditions and recognizes the desire to stimulate entrepreneurship in both States. The act of entering into the BIT sought to encourage investment apart from the political dispute over the Islands. As noted by one Prime Minister of Rydal, “the issue [over the Islands] may in some future time be resolved, but for now, it is more productive for these two great nations to focus upon matters of more significant mutual benefit.”¹¹⁰ Rydal’s actions were directly contrary to these stated objectives. MDR’s bid was in

¹⁰⁸ Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (United Kingdom: Cambridge University Press, 2007) at 235.

¹⁰⁹ *Ibid.*

all respects more economically attractive to the Islands, yet ROCO's lesser bid was chosen because Rydal wished to award the license to a non-Aspatrian company. Rydal treated MDR's bid unfavourably in a manner that was inconsistent with the economic goals of the Treaty.

C. The rejection of MDR's bid violated the national treatment guarantee in Article IV.

The national treatment standard obliges a State to make no negative differentiation between foreign and national investors when applying its rules.¹¹¹ In the context of bilateral investment treaties, a State must treat nationals and non-nationals equally with respect to their domestic markets.¹¹² National treatment is subject to the exception that differential treatment is acceptable where a State has a legitimate public purpose for that differential treatment.¹¹³ Article IV of the Aspatria-Rydal BIT codifies the national treatment standard stating that, "each Party shall accord investments and investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors and to the investors of any non-Party."¹¹⁴ Rydal's treatment of MDR's bid violated Article IV.

1. Rydal's rejection amounted to discrimination on the basis of nationality.

i. Rydal's actions amounted to differential treatment in 'like circumstances.'

¹¹⁰ *Compromis*, at para. 39.

¹¹¹ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (New York: Oxford University Press, 2008) at 178.

¹¹² Surya P. Subedi, *International Investment Law* (United States: Hart Publishing, 2008) at 71.

¹¹³ *S.D. Myers v. Canada, First Partial Award* (2001), 40 I.L.M. 1408 at 250, (North American Free Trade Agreement).

¹¹⁴ *Compromis*, at Annex I.

The national treatment standard, codified in Article IV of the BIT, prohibits discriminatory conduct against foreign investors. In other words, treatment accorded to foreign investors must not be less favourable than the treatment accorded to domestic investors.¹¹⁵ For treatment to be discriminatory, the treatment must have been different in ‘like circumstances.’ A 2005 Organisation for Economic Co-operation and Development (OECD) report indicates that the appropriate basis for comparison is as between firms operating in the same economic sector.¹¹⁶ Governor Black’s decision to withhold her signature for MDR’s bid forced the Assembly of the Islands to reverse their approval of MDR’s bid requiring the Assembly to act upon ROCO’s bid instead. Thus, differential treatment has taken place. Since MDR and ROCO are both firms operating within the same economic sector seeking rights to exploit oil reserves, and indeed are competing for the same bid, the less favourable treatment towards MDR was in “like circumstances.”

ii. The aim and effect of Governor Black’s actions was to discriminate based on nationality.

The ‘aims and effects’ test for discrimination adopted by NAFTA requires: (i) disproportionate adverse effects on foreigners combined with (ii) an intent to discriminate.¹¹⁷ To find discriminatory intent on the basis of nationality, the impugned action must be motivated by the

¹¹⁵ Dolzer, *supra*, note 111.

¹¹⁶ OECD, *National Treatment of Foreign-Controlled Enterprises* (Paris: Organisation for Economic Co-operation and Development, 2005) at 106; *Marvin Feldman v. Mexico, Award* (2003), 18 ICSID Review-FILJ 488 at para. 171 (International Centre for Settlement of Investment Disputes).

¹¹⁷ *S.D. Myers, supra* note 113 at para. 252.

fact that the enterprise is under foreign control.¹¹⁸ The intent to discriminate based on nationality would constitute a breach of the national treatment standard.¹¹⁹

MDR suffered unfair disadvantage through being unable to negotiate a final contract with the Islands, despite MDR's bid receiving approval from the Assembly. In addition, Rydal intended to discriminate against MDR's bid. This discrimination was on the basis of nationality. Governor Black's refusal to allow MDR's bid was motivated by the fact that MDR was under Aspatrian control. Governor Black's statement strongly implied that MDR, as an Aspatrian company, was not part of "the future of the Windscale Islands [which] lies within that community of States, led by Rydal" and as such, was not entitled to oil rights to the Islands. The intent of the refusal was to differentiate between national and non-national investors and this amounted to discrimination.

iii. There was no legitimate public purpose.

The assessment of 'like circumstances' must take into account policy objectives that would justify government regulations to treat foreign investors differently in order to protect the public interest.¹²⁰ A State may in certain circumstances accord less than national treatment if it is closely related to a legitimate public purpose.¹²¹ Economic well-being, safety, and the

¹¹⁸ *Genin v. Estonia, Award* (2002), 17 ICSID Review-FILJ 395 at para. 369 (International Centre for Settlement of Investment Disputes).

¹¹⁹ *Ibid.*

¹²⁰ *S.D. Myers, supra* note 113 at para. 250.

¹²¹ *Oscar Chinn Case* (Belgium v. United Kingdom) (1934), PCIJ (Ser. A/B) No. 63 at 87.

environment all constitute recognized public welfare objectives.¹²² In this instance the rejection of MDR's bid was not connected to Rydal's stated public purposes.

Governor Black's decision to disallow MDR's bid was premised on the belief that MDR's offer would not safeguard the long-term continued viability of the Islands. Governor Black's concept of viability was vague and her reasons for denial were not 'transparent.'¹²³ MDR's bid would not have adversely affected the economic well-being of the Islanders. MDR's offer was described by First Minister Craven as "without question more economically attractive to the people of the Islands." Unlike ROCO's bid, MDR's bid included a promise to pay 50% of the net proceeds to the Islands as well as plan to build infrastructure on the Islands and employ Islanders as part of the enterprise. There is no evidence that extraction methods used by MDR would affect the environment more or less adversely than the extraction methods used by ALEC. Finally, there is no evidence that MDR's bid posed a political threat to the Islands. In his cover letter accompanying the bid, Monte de Rosa stated that he did not know the outcome of the negotiations that Aspatria and Rydal plan to conduct concerning the long-term future of the Islands, nor did he find the negotiations of any significance to his company's oil venture. Without a sufficient connection to its stated public objective, Rydal cannot rely on the public purpose exception to justify according MDR less than national treatment.

2. Rydal's treatment of MDR's bid was protectionist.

¹²² OECD, Directorate for Financial and Enterprise Affairs, *Indirect Expropriation and the Right to Regulate in International Investment Law*, Working Paper No. 2004/4 (2004) at 21.

¹²³ *Compromis*, at para. 49.

Protectionism focuses on requirements that unfavourably affect the equality of competition in the market.¹²⁴ A protectionist purpose on the part of a State breaches the national treatment standard.¹²⁵ A restraint on competition works against the purpose of a national treatment clause, which seeks to protect foreign investors in domestic markets.¹²⁶ Thus the actions of a State cannot have the intent and/or the effect of protecting the market share for its own nationals.¹²⁷ *S.D. Myers* addresses the problem of protectionist intent. In *S.D. Myers*, Canada banned the export of PCB hazardous waste from Canada to the United States.¹²⁸ During a parliamentary session the Minister of the Environment stated, ‘It is still the position of the government that the handling of PCBs should be done in Canada by Canadians.’¹²⁹ The tribunal viewed this statement as protectionist, adding, “[a] statement by the lead Minister in the House of Commons with respect to government policy on an issue is ordinarily to be accepted at face value as stating official government policy and the rationale behind it.”¹³⁰

Governor Black’s statement that ‘the future of the Windscale Islands should remain with Rydal’ indicated a protectionist intent. Governor Black’s statement should be accepted at face value as

¹²⁴ *Pope & Talbot Inc. v. Canada, Award on Merits* (2002), 122 ILR 352 at para. 45 (North America Free Trade Agreement).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T. S. 1947 No. 27 (entered into force 1 January 1948), Art. III [GATT].

¹²⁸ *S.D. Myers*, *supra* note 113 at para. 15.

¹²⁹ *Ibid.* at para. 116.

¹³⁰ *Ibid.*

representing Rydal's policy for the rejection of MDR's bid. While it is acknowledged that a protectionist intent cannot be solely based on the subjective intent a single legislator,¹³¹ corroborating evidence indicated that the Governor was acting in her capacity as a state agent.¹³² Her statement was released after a week of consultation with Prime Minister Abbott, Rydal's Head of State. Since there were only two bids in contention, one from ROCO and one from MDR, the Governor knew or ought to have known that her statement would indirectly result in protecting ROCO's market share.

Furthermore, Rydal's actions had a protectionist effect. Its rejection of MDR's bid prevented MDR from accessing the same opportunities given to ROCO to exploit the oil reserves. MDR's right to equal competition under the BIT was undermined by Rydal's interference in the bidding process.

D. The rejection of MDR's bid violated the fair and equitable treatment guarantee in Article V.

Article V obliges Rydal and Aspatria to accord the fair and equitable treatment standard to investments in the territory of the other Party. The fair and equitable standard is violated where conduct of a government amounts to manifest injustice or bad faith.¹³³

¹³¹ Philippe Kahn and Thomas W. Wälde, *New Aspects of International Investment Law* (Boston: Martinus Nijhoff Publishers, 2007) at 342.

¹³² *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)*, [1994] I.C.J. Rep. 112 at 122.

¹³³ *USA (L.F. Neer) v. Mexico* (1926), 4 R.I.A.A. 60, 21 AJIL (US-Mexico General Claims Commission) at 555 [Neer].

Rydal's actions were manifestly unjust. The bidding process was not "competitive" as promised by First Minister Craven. MDR's bid satisfied all the conditions set out by First Minister Craven. As First Minister Craven admitted, MDR's bid was economically more attractive for the Islands. Yet Governor Black refused to give her assent to the Assembly's bid and gave unclear reasons for doing so. Vague reasons for denial are not 'transparent' and Rydal's external political interference violated MDR's right to a fair and competitive bidding process. Rydal's actions were inequitable contrary to Article V.

III. RYDAL DOES NOT HAVE STANDING TO INVOKE THE ASPATRIA-RYDAL BIT TO PROTECT THE ASSETS OF ALEC, AN ASPATRIAN COMPANY, AND IN ANY EVENT, ASPATRIA DID NOT VIOLATE THE ASPATRIA-RYDAL BIT.

A. Rydal does not have standing to invoke the Aspatria-Rydal BIT to protect the assets of ALEC, an Aspatrian company.

1. Rydal cannot bring a claim under Article XIII of the Aspatria-Rydal BIT because ALEC's assets are not protected under the BIT.

Article XIII of the BIT states that where a dispute arises with respect to rights conferred by the BIT, the State of said Investor's nationality may bring the claim before the Court. The BIT applies to investments in the territory of the other Party. The nationality of a corporation is

derived from the place in which it is incorporated and has its registered office.¹³⁴ ALEC was incorporated in Aspatria and is deemed an Aspatrian national. This is not a dispute arising with respect to ‘rights conferred by the BIT’ because the assets of ALEC are not protected under the BIT. ALEC is not protected under the BIT because it is a locally incorporated company with assets located solely within Aspatria. The seizure is an issue entirely internal to Aspatria and ALEC cannot bring a claim on its own behalf.

2. In the absence of the Aspatria-Rydal BIT, Rydal lacks standing in customary law.

i. Rydal cannot bring a claim on behalf of ALEC because ALEC is an Aspatria national.

The doctrine of diplomatic protection allows a State to bring a claim on behalf of one of its nationals injured by another State.¹³⁵ Since only the State whose nationality a company possesses has *jus standi* to bring a claim before the Court,¹³⁶ Rydal has no basis on which to seek protection for the assets of ALEC, a non-Rydalian entity.

ii. Rydal cannot bring a claim on behalf of ROCO as a shareholder in ALEC.

Barcelona Traction held that as a general rule a State may not pursue a claim on behalf of nationals who suffer injury as a consequence of measures taken against foreign companies in

¹³⁴ *Case Concerning The Barcelona Traction, Light and Power Company Second Phase (Belgium v. Spain)*, [1970] I.C.J. Rep. 3 at 42 [*Barcelona Traction Case*].

¹³⁵ Antonio Cassese, *International Law, 2nd ed.* (New York: Oxford University Press, 2005) at 139 [*International Law*]; *Mavrommatis Palestine Concessions (Greece v. United Kingdom)* (1927), P.C.I.J. (Ser. A/B), No. 2 at 12.

¹³⁶ Cassese, *ibid.* note 2 at 101.

which they own shares.¹³⁷ The Court refused to allow diplomatic protection for shareholders on the basis that doing so would create economic insecurity in a climate where the shares of international companies are “widely scattered and frequently change hands.”¹³⁸ The Court did not wish to open the door to competing claims on the part of different States.¹³⁹

According to the rule in *Barcelona Traction*, Rydal may not pursue a claim on behalf of ROCO, a shareholder in ALEC. ROCO was not the sole shareholder of ALEC’s shares. Its shares were also held by 5,000 other shareholders of different nationalities. ALEC was not merely an extension of Rydalian national economic resources and allowing Rydal to make a claim on behalf of ALEC would be inconsistent with the Court’s desire to avoid potential competing claims from other investors.

iii. Neither ALEC nor ROCO have exhausted local remedies.

It is an established rule of customary international law that a State may not advance the claim of a national until that national has exhausted all local remedies in the host State.¹⁴⁰ ALEC has not exhausted local remedies in Aspatria and ROCO has not attempted to seek local remedies in Aspatria. The criminal case, *Prosecutor v. ALEC*, has yet to be decided in Aspatria. Since adjudication by the Aspatrian courts is pending, Rydal’s claim before this Court is premature.

¹³⁷ *Barcelona Traction Case*, *supra* note 134 at 32.

¹³⁸ *Ibid.* at 49.

¹³⁹ *Ibid.*

¹⁴⁰ *Interhandel case (Switzerland v. United States of America) Preliminary objections*, [1959] I.C.J. Reports 1959 at 6.

B. Aspatria did not violate the Aspatria-Rydal BIT because its actions did not amount to direct or indirect expropriation.

1. The seizure of ALEC's assets did not constitute direct expropriation.

Article VI of the BIT prohibits the direct expropriation of a foreign investment. Direct expropriation is the compulsory taking of title to private property by the State.¹⁴¹ The definition of private property includes tangible and intangible property such as shares in enterprises.¹⁴² A State is entitled to enact lawful regulatory measures that may affect foreign interests without having those measures amount to expropriation.¹⁴³

There was no direct transfer of title to Aspatria. The Aspatrian government did not attempt to transfer power of management or control of ALEC to itself. Title to ALEC's assets remains with ALEC until the conclusion of the underlying criminal case. If ALEC is found not guilty, all seized assets will be returned promptly to ALEC. The seizure of ALEC's property did not constitute a direct taking under Article VI(a).

2. The seizure of ALEC's assets did not constitute indirect expropriation.

¹⁴¹ Subedi, *supra* note 112 at 75; *US-Central America Free Trade Agreement (CAFTA), Annex 10-C*, United States of America, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, 28 January 2004, online: Office of the United States Trade Representative <<http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta>>.

¹⁴² Brownlie, *supra* note 31 at 532.

¹⁴³ *Ibid.*

i. There was no indirect expropriation under the BIT because the seizure was consistent with Article VI(b).

Indirect expropriation involves a taking or deprivation of property by a State through interference with the use or enjoyment of that property, even where legal title to that property is not affected.¹⁴⁴ Article VI of the BIT expressly prohibits indirect expropriation. However, Article VI(b) draws a clear line between acceptable regulatory measures which may impact upon the profitability of an investment, and those which amount to an “indirect” expropriation of an investment. Article VI(b) states that measures which are not so severe as to constitute bad faith, which are non-discriminatory and which fulfill a public purpose do not constitute indirect expropriation.¹⁴⁵ Aspatria’s conduct fulfills these criteria and does not constitute indirect expropriation.

a. Aspatria’s measures were applied in good faith and not severe in light of their purpose.

Article VI(b) of the BIT states that “measures so severe in light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith” will constitute indirect expropriation.¹⁴⁶ This provision is not applicable because the seizure was not too severe given the purpose of criminal sanctions. ALEC knowingly violated local laws prohibiting interference with licenses granted by the Aspatrian government. ALEC was aware of the importance of

¹⁴⁴ *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2 (1984), 6 Iran-United States Cl. Trib. 219 at 225.

¹⁴⁵ *Compromis*, at Annex I.

¹⁴⁶ *Ibid.*

exclusive licensing as ALEC itself possessed an exclusive license to exploit oil deposits in the northeast province of Aspatria. In addition to Aspatria's actions being consistent with local laws known to ALEC, the seizure was conducted in good faith. According to independent NGO reports, it is not unusual for criminal proceedings in Aspatria take four to six years to conclude. ALEC willingly took the risk of participating in ROCO's bid despite the possibility of criminal sanctions, and Aspatria is entitled to seize its assets to prevent ALEC from any further criminal conduct.

b. Aspatria's measures were non-discriminatory.

A State must not unreasonably single out a particular entity without demonstrating an objective justification for doing so.¹⁴⁷ Discriminatory intent on the part of a government is required for a finding of discrimination.¹⁴⁸

The Natural Resources Act (NRA) applies to any national who contravenes an exclusive government license. Criminal proceedings in Aspatria are not unfair and apply to all locally incorporated companies. Charges were filed against ALEC because it violated local laws and interfered with government licensing. The seizure of ALEC's assets was not designed to single out ROCO based on ROCO's share ownership in ALEC. All local market participants are subject to the NRA. That ROCO's interest in ALEC was incidentally affected by the seizure is not sufficient grounds on which ROCO can claim discrimination.

¹⁴⁷ Paul E. Comeaux and N. Stephan Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risk* (New York: Oceana Publications, Inc., 1997) at 80.

¹⁴⁸ *Oscar Chinn Case*, *supra* note 121 at 87.

c. Aspatria's measures fulfilled a legitimate public purpose.

The protection of natural resources is a recognized legitimate public purpose and essential to the well-being of a State.¹⁴⁹ The tribunal in *Libyan American Oil Company v. Libya* stated that limited measures targeting foreign ownership of natural resources are not discriminatory, since the protection of natural resources is intrinsically linked to a legitimate public purpose.¹⁵⁰ A number of BITs have explicitly recognized the rights of a State to adopt measures designed to ensure investment activity is sensitive to environmental concerns.¹⁵¹ Examples include the provisions in Article 10.12 of the FTA between Chile and the US, Article 114(2) of NAFTA, Article 12 of the US Model BIT 2004, Annex B.13(1)(c) of the Canada-Peru BIT.¹⁵²

In preventing ALEC from illegally claiming access to Aspatria's oil reserves around the Islands, Aspatria sought to enforce laws designed to control and protect the use of natural resources in Aspatria. Aspatria took reasonable measures to prevent ALEC from contravening laws designed to protect and control the exploitation of Aspatria's natural resources.

ii. There was no indirect expropriation according to customary law.

¹⁴⁹ *Declaration of Permanent Sovereignty over Natural Resources*, G.A. Res. 1803 (XVII), UN GAOR, Supp. No.17, UN Doc. A/5217 (1962).

¹⁵⁰ *Libyan American Oil Company v. Libya, Award* (1981), 20 I.L.M. 1 at 59.

¹⁵¹ Subedi, *supra* note 112 at 77.

¹⁵² *Ibid.*

In the context of investments, indirect expropriation occurs where the measure substantially impairs an investor's economic rights enough to render their rights useless.¹⁵³ A 'substantial' impairment must approach total impairment.¹⁵⁴ Furthermore, a finding of indirect expropriation requires an irreversible, permanent interference.¹⁵⁵ Indirect expropriation is not found on the basis of a temporary injunction, which by its nature may disappear, or which requires further proceedings before the taking crystallizes.¹⁵⁶

Aspatria did not substantially impair ROCO's share ownership in ALEC. ROCO retained its title and ownership rights to ALEC's shares. The company and its shares remain in existence and their value depends on the market. Therefore the seizure was an acceptable regulation of ALEC's use of the property and did not amount to indirectly expropriating ROCO's shares. Moreover, the seizure was interlocutory in nature and subject to further proceedings under Aspatrian law. Should ALEC be tried under Aspatrian law and found not guilty, all its assets will be promptly returned. The seizure is temporary and does not constitute indirect expropriation.

¹⁵³ OECD, *Indirect Expropriation and the Right to Regulate in International Investment Law*, *supra* note 122 at 11.

¹⁵⁴ Todd Weiler, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May Ltd., 2005) at 621.

¹⁵⁵ *S.D. Myers*, *supra* note 113 at para. 286.

¹⁵⁶ Weiler, *supra* note 154.

C. Aspatria did not violate the Aspatria-Rydal BIT because its actions did not amount to unfair or inequitable treatment under Article V.

Article V requires Parties to the BIT to accord the fair and equitable treatment standard to investments in the territory of the other Party. The fair and equitable standard is violated where conduct of a government amounts to manifest injustice or bad faith.¹⁵⁷ The actions of Aspatria were neither unfair nor inequitable. The NRA was passed in 1991 and was in place before the oil was discovered in the basin around the Islands.¹⁵⁸ The Act applies to all market participants regardless of nationality. All companies operating in Aspatria are subject to the possibility of seizure of assets if their assets are used to contravene the Act. ROCO is not entitled to use its business affiliation with ALEC and the provisions in the BIT to circumvent local laws. Aspatria's actions were reasonable in the circumstances and did not violate the fair and equitable treatment provisions in the BIT.

¹⁵⁷ *Neer*, *supra* note 133 at 555.

¹⁵⁸ *Compromis*, at para. 42.

CONCLUSION / PRAYER FOR RELIEF

For the foregoing reasons, Aspatria respectfully requests the Honourable Court to adjudge and declare as follows:

1. Rydal may not lawfully take steps giving effect to the independence of the Windscale Islands and must cede administration over the Islands to Aspatria because:
 - a. sovereignty over the Islands belong to Aspatria; and
 - b. the Islands are not entitled to independence based on the principle of self-determination.
2. That the rejection of MDR's bid by Rydal constituted a breach of Article IV and of Article V of the Aspatria-Rydal BIT, and order the Respondent to pay compensation for injury to MDR.
3. That Rydal does not possess standing to invoke the Aspatria-Rydal BIT to protect ALEC's assets from seizure, and to declare that the seizure did not violate the provisions in the Aspatria-Rydal BIT.