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THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2010 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

**THE CASE CONCERNING THE DIFFERENCES BETWEEN THE STATES
REGARDING THE WINDSCALE ISLANDS**

**THE REPUBLIC OF ASPATRIA
(APPLICANT)**

v.

**THE KINGDOM OF RYDAL
(RESPONDENT)**

MEMORIAL FOR THE RESPONDENT

2010

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STATEMENT OF JURISDICTION

The Republic of Aspatria, Applicant, and the Kingdom of Rydal, Respondent, have submitted their differences concerning the Windscale Islands by Special Agreement dated 16 September 2009, without reservation, to the International Court of Justice in accordance with Article 40(1) of the *Statute of the International Court of Justice*. The parties have agreed to the contents of the *Compromis*, subject to the *Corrections and Clarifications* issued November 2009. In accordance with Article 36(1) of the *Statute of the International Court of Justice*, each party will accept the judgment of this Court as final and binding and shall execute it in its entirety and in good faith.

QUESTIONS PRESENTED

1. Whether sovereignty over the Windscale Islands lawfully belongs to Rydal;
2. Whether the Islanders are entitled to independence as an exercise of their right to self-determination;
3. Whether Rydal violated the Aspatia-Rydal Bilateral Investment Treaty (*ARBIT*);
4. Whether Rydal has standing to espouse ROCO's claim and whether Aspatia violated the *ARBIT*.

STATEMENT OF FACTS

The Parties to this dispute are Rydal and Aspatria, a former colony of Plumbland.

The archipelago called the Windscale Islands (the “Islands”) was first discovered by a Rydalian ship in 1777. The ship’s captain landed and left behind a flag and stone declaring Rydal’s sovereignty. In 1778, a Plumblandian ship noticed the Islands. An Aspatrian party subsequently claimed the Islands for Plumbland and built a fort on one island. Other seafarers contemporaneously used the remaining islands. In 1799, Aspatria ordered the party’s return. They abandoned the fort but left a notice asserting Plumbland’s claim to the Islands.

In 1813, a Rydalian ship commanded by Admiral Aikton wrecked on a third island. The survivors established a settlement called St. Bees, and later explored the remaining islands.

In 1814, war broke out between Plumbland and Rydal.

In 1815, a slave ship drifted into St. Bees’ harbour. Admiral Aikton announced that the Islands were Rydalian territory and declared the slaves free, as Rydal had abolished slavery.

In 1817, Aspatria tried to establish an Island penal colony, but was repelled by armed forces from St. Bees. King Piero of Plumbland then told Queen Constance of Rydal that the Islands were Plumbland’s. Queen Constance disagreed, stating that the Islands belonged to Rydal and that she adopted Admiral Aikton’s actions. She appointed a Governor of the Islands in 1819.

Later that year, Aspatria signed a declaration of independence, which King Piero rejected. In 1820, Aspatria passed a constitution declaring that the Republic of Aspatria included the Islands.

In 1821, Plumblaud sued Rydal for peace. The resulting Treaty of Great Corby recognized Rydalian sovereignty over the Islands and ceded any sovereignty possessed by Plumblaud to Rydal.

In 1826, Aspatria tried to seize the Islands, but failed.

The next year, Rydal recognized Aspatria's independence and received its Ambassador. The Ambassador claimed that the Islands belonged to Aspatria, but the Rydalian Foreign Minister rejected these assertions.

In 1839, King Piero recognized Aspatria's independence and ceded Plumblaudian sovereignty over Aspatrian territory, excluding the Islands. At Aspatria's insistence, however, he acknowledged its claim to the Islands.

From 1845 until 1880, the Aspatrian Ambassador in Rydal reiterated Aspatria's claim to the Islands, which Rydal dismissed. Aspatria's claims ceased until 1911.

In 1945, Rydal joined the U.N. It designated the Islands a Non-Self-Governing territory and fulfills its obligations under Article 73 of the Charter. When Aspatria joined the U.N. in 1949, it noted its claims to the Islands with the Secretary-General.

Rydal gave the Islands a constitution in 1947, which created an Islander-elected Assembly of the Islands ("the Assembly"). The Constitution confirmed Rydalian sovereignty, but left everyday governance, including exploitation of natural resources, to the Assembly, subject to the Governor's approval. Rydal maintains authority over the Islands' foreign relations.

A U.N. Special Committee regularly considers the competing claims to the Islands. It allows a delegation of Islanders to make presentations, despite Aspatria's protests. The delegation expresses its desire that the Islands remain part of Rydal. Currently, the Island

population comprises the descendants of Rydalian ships; freed slaves; and immigrants, mostly from Rydal.

In 1985, Aspatria and Rydal ratified a bilateral investment treaty ("ARBIT").

The Rydalian Oil Company ("ROCO"), incorporated in Rydal, owns 80% of the shares of A&L Exploration Corporation ("ALEC"). ALEC is incorporated in Aspatria and holds a license to exploit local oil deposits. This consistently produces revenue for ALEC's shareholders.

The Aspatrian Natural Resources Act ("NRA") establishes a criminal offence for a company to "take any action inconsistent with an exclusive government license ... concerning natural resources", punishable by a fine of up to 5% of the company's revenues.

In 1997, oil was discovered around the Islands. The discovery energised an Island independence movement.

Felix Monte de Rosa owns MDR Limited ("MDR"), an Aspatrian corporation. In 2003, MDR successfully petitioned Aspatria for a license to extract oil from the Islands.

In 2006, First Minister Nigel Craven, leader of the Assembly, announced that the right to exploit the Islands' oil would be awarded in an "open, transparent and competitive" process. An Assembly committee would evaluate bids and make recommendations to the full Assembly. An Assembly majority would make a final decision, subject to the assent of Governor Black.

Only ROCO and MDR submitted bids. ROCO's bid promised 45% of the proceeds to the Islands, and listed equipment, personnel, and assets of ALEC in Aspatria as resources that would be used. MDR's bid included an up-front payment of US\$500 million and a promise to pay 50% of the proceeds to the Islands. MDR's plan included a customer list, projected sales, proposed transportation routes, the construction of a facility on the Islands, and the employment of

Islanders. MDR's bid referenced its license from the Aspatrian government, and said it would be able to use ports and infrastructure in Aspatria. In the bid's cover letter, Monte de Rosa stated:

I do not know the outcome of the negotiations that Aspatria and Rydal plan to conduct concerning the long-term future of the Windscale Islands. Nor is this of any significance to me. As a practical matter, it is clear that I will need the acquiescence of both governments if I am to get oil from the Islands, and if I am to be able, in turn, to provide them with infrastructure, employment, and prosperity.

In 2007, the Assembly committee recommended approval of MDR's bid. The Assembly endorsed the recommendation and forwarded it to Governor Black. First Minister Craven described the MDR bid as "more economically attractive."

On 1 November 2007, after a week's consultation with Rydalian Prime Minister Abbott, Governor Black decided to withhold her signature, citing her responsibility to "safeguard the long-term viability of the territory and its people." She invited the Assembly to reconsider its recommendation. On 14 November 2007, the Assembly voted to approve ROCO's bid and Governor Black assented.

Two days later, Aspatria filed criminal charges against ALEC under the NRA for "materially participating in the ROCO bid" and interfering with MDR's license. The Prosecutor also filed a petition under the criminal code for seizure of all ALEC's Aspatrian assets. The court granted the petition and seized all ALEC bank accounts, vessels, and cash within Aspatria.

ALEC filed a petition with the Supreme Administrative Court asking that the order be cancelled. In March 2008, the court denied ALEC's petition in *ALEC v. Langdale Administrative Court*. No appeal from the order is possible.

The criminal case, *Prosecutor v. ALEC*, continues. Most criminal cases in Aspatria take 4-6 years to conclude, with another 2-3 years for appeals.

In December 2007, Monte de Rosa challenged the bidding process in Rydalian court. The case was dismissed for lack of standing; his appeals failed; and the Supreme Court declined discretionary review.

Meanwhile, the Islanders held a plebiscite in December 2008 to determine their future. With 93% voter turnout, 76% of the Islanders voted for independence, 18% for remaining with Rydal, and 6% for prospective unification with Aspatria.

Rydal endorsed the outcome of the plebiscite and pledged to support the Islanders' transition to independence. Aspatria's President however, condemned the plebiscite and stated that she would do all in her power to return the Islands "to Aspatria's rightful control."

SUMMARY OF PLEADINGS

I. Rydal has sovereignty over the Windscale Islands by virtue of its *effectivités*. Rydal meets the requirements for the acquisition of territory by occupation. In the alternative, if the Islands were not *terra nullius* at the time Rydal began exercising sovereignty over them, Rydal meets the requirements for acquisition of territory by prescription. Both these modes of territorial acquisition require that the state claiming sovereignty have demonstrated *effectivités*. Rydal has done so. In any event, Rydal acquired sovereignty over the Islands from Plumbland in the cessionary Treaty of Great Corby

II. Independence is a corollary of the Islanders' right to self-determination. The right to self-determination falls within the ambit of Article 38(1) of the *Statute of the International Court of Justice* and is a positive rule of international law. The people of the Islands have both the subjective and objective characteristics of a "people" for the purpose of exercising this right. For the Islanders, independence is the preferred outcome since this situation is akin to one of decolonization and is the desired result of a supermajority of the Islanders

III. The Rydalian bidding process complied with the ARBIT and customary international law. MDR's bid was treated fairly and equitably, in accordance with its principal's reasonable expectations. Rydal has extended full protection and security to the investment, including unfettered access to the Rydalian justice system. Any differential treatment received by MDR was justified on public policy grounds, and therefore was not a breach of national treatment.

IV. Aspatria violated the ARBIT by effectively expropriating the investment of ROCO, a Rydalian investor. ROCO is both a Rydalian national and an "investor" in Aspatria, per the requirements of the ARBIT. ROCO has exhausted all effective local remedies. Aspatria's

treatment of ROCO's investment is tantamount to expropriation and/or a violation of the customary international law prohibition on denial of justice. Aspatria's conduct cannot be saved by the ARBIT's exception clause.

PLEADINGS

I. RYDAL HAS SOVEREIGNTY OVER THE ISLANDS

The right to exercise sovereignty over territory originates in a legal justification - territorial title.¹ Title to territory may be complete, inchoate or defective. Competing claims to sovereignty are therefore assessed on a relative basis.² Rydal has a superior claim to sovereignty over the Islands based on occupation or prescription. Both these modes of territorial acquisition require that the claiming state has displayed *effectivités*, also known as “effective occupation.”³ Rydal has met this requirement. In the alternative, Rydal acquired sovereignty over the Islands from Plumbland in the cessionary Treaty of Great Corby.

(A) RYDAL HAS SOVEREIGNTY OVER THE ISLANDS BY OCCUPATION

Occupation is a recognized mode of territorial acquisition.⁴ It is the “the appropriation by a State of a territory which is not at the time subject to the sovereignty of any State.”⁵ In

¹ Giovanni Distefano, “The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law” (2006) *Leiden J. Int’l L.* 1041 at 1049.

² *Island of Palmas (or Miangas) (United States v. Netherlands)*, 2 R.I.A.A. 829; [*Palmas*]; *Minquiers and Ecrehos Case (France v. United Kingdom)*, [1953] I.C.J. Rep. 47 at 67; Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law*, 4th Ed. (Toronto: Oxford University Press, 2003) at 247 [Dixon and McCorquodale, *Cases and Materials*].

³ Randall Lesaffer, “Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription” (2005) 16: 1 E.J.I.L 25 at 54 [Lesaffer, “Occupation and Acquisitive Prescription”].

⁴ Martin Dixon, *Textbook on International Law*, 6th ed. (Toronto: Oxford University Press, 2007) [Dixon, *International Law*] at 155; Ian Brownlie, *Principles of Public International Law*, 6th ed (Oxford: Oxford University Press, 2003) at 127 [Brownlie, *Principles of Public International Law*]; [Dixon and McCorquodale, *Cases and Materials*, *supra* note 2 at 256.

other words, the territory must be *terra nullius*. Further, the state must display *effectivités*.⁶ When both these criteria are met, a state acquires perfect title. Rydal acquired perfect title.

(1) The Islands were *terra nullius* when discovered by Rydal

The Windscale Islands were first discovered in late 1777 by the *The Wansfell*, a ship under a Commission from the King of Rydal.⁷ At that time, the Islands were unclaimed and not subject to the sovereignty of any other state. Before the ship departed from the Islands, the Captain of *The Wansfell* took share and left behind a Rydalian flag and a carved stone declaring Rydal's sovereignty over the Islands.⁸ As per the *Islands of Palmas Case*, first discovery paired with symbolic actions creates only an inchoate title to the territory.⁹ Imperfect title can mature into full title when followed, within a reasonable period of time, by "the effective occupation of the region claimed."¹⁰ In other words, a state must display *effectivités* in order to perfect its inchoate title.

(2) Rydal's actions on the Islands evidence *effectivités*

Criteria of *effectivités* are that (i) the state has actually exercised sovereignty in the territory; (ii) the state intended to act as sovereign; and (iii) the state's exercise of sovereignty

⁵ Robert Jennings, *The Acquisition of Territory in International Law* (New York: Manchester University Press, 1963) at 20 [Jennings, *The Acquisition of Territory*].

⁶ Dixon, *International Law*, supra note 4 at 155.

⁷ *Compromis* at ¶5.

⁸ *Ibid.*

⁹ *Palmas*, supra note 2 at 846.

¹⁰ *Ibid.*

has been continuous.¹¹ Rydal’s initial settlement of St. Bees and eventual conquest and administration of the entire archipelago fulfils these three criteria.

(a) Rydal actually displayed sovereignty over the Islands

The extent by which a state must display sovereignty “may vary according to the type of territory in question.”¹² Rydal established effective local administration; demonstrated that it could control and protect the population; and established a system of national law, all of which display of high degree of sovereignty¹³ – higher than the displays found by the ICJ in two other cases concerning islands: the *Clipperton Island Arbitration Case*¹⁴ and the *Eastern Greenland Case*.¹⁵

First, the settlement of St. Bees in 1813¹⁶ evidences the establishment of effective local administration. The Rydalian crew of the *HMS Applethwaite* who settled at St. Bees decided who to admit onto the Islands¹⁷ and who to turn away¹⁸; and cultivated the land and

¹¹ Dixon, *International Law*, *supra* note 4 at 156; Lesaffer, “Occupation and Acquisitive Prescription”, *supra* note 3 at 55; *Eastern Greenland Case (Denmark v. Norway)*, (1933) P.C.I.J. (Ser. A/B) No. 53 [*Eastern Greenland*] at 45-46; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, [2002] I.C.J. Rep. 625 at ¶136, 140 [*Palau Ligitan*]; *Palmas*, *supra* note 2 at 839; *Clipperton Island Arbitration Case*, 26 A.J.I.L 390 at 393 [*Clipperton*].

¹² Dixon, *International Law*, *supra* note 4 at 156.

¹³ *Ibid.*

¹⁴ *Clipperton*, *supra* note 11 at 394.

¹⁵ *Eastern Greenland Case*, *supra* note 11 at 54.

¹⁶ *Compromis* at ¶10.

¹⁷ *Ibid.* at ¶12.

¹⁸ *Ibid.* at ¶14.

domesticated a species native to the Islands¹⁹, which required organization. Further, in time, Rydal established a succession of Rydalian Governors on the Islands who exercised control over the whole archipelago.²⁰ Rydal also authorized the establishment of a consultative Assembly to allow the Islanders to express their views²¹, enabling better administration of local matters.

Second, Rydal has demonstrated that it could control and protect the population. The Islands are poor by international standards²² and depend on Rydal to provide international protection. Rydal has retained exclusive authority to defend the Islands, evidence that it would come to the aid of the Islanders if necessary.²³

Third, Rydal gave the Islands a constitution based in Rydalian law²⁴ and thereby established a system of national laws in the Islands. For each of these reasons, Rydal actually exercised state sovereignty over the Islands.

(b) Rydal intended to act as sovereign over the Islands

In the *Eastern Greenland Case* and *Clipperton Island Arbitration Case*, and reiterated recently in the *Palau Ligitan Case*, the ICJ emphasized that actual display of sovereignty must be

¹⁹ *Compromis*. at ¶13.

¹⁹ *Ibid* at ¶28.

²⁰ *Ibid*.

²¹ *Ibid*. at ¶29.

²² *Ibid*. at ¶32.

²³ *Ibid*. at ¶35

²⁴ *Ibid*.

accompanied by an *animus occupandi*, or intention and will to act as sovereign.²⁵ The intention to act as sovereign has the force of law and is “a necessary condition of occupation.”²⁶

Intention can “usually be presumed from the simple fact that the state is exercising such authority in the island.”²⁷ By effectively exercising state power, Rydal meets this presumption. Further, Rydal definitively asserted its intention to act as sovereign when Queen Constance of Rydal declared that she “embraces and adopts all of the actions of her loyal and noble subjects [from the *HMS Braithwaite*].”²⁸ Rydal therefore authorized Admiral Aikton’s actions. Rydal’s designation of the Islands as a Non-Self-Governing territory under Article 73 of the United Nations Charter²⁹ and its fulfillment of all the requirements to report and transmit information regarding the Islands is also conclusive evidence pointing to Rydal’s intention to act as sovereign over the Islands.³⁰

(c) Rydal’s exercise of sovereignty over the Islands has been continuous

From 1816 to present day, Rydal has exercised the powers of a state on the Islands. It introduced and maintained local governance; controlled and protected the populations on the Islands, and established a system of law. Rydal did not abandon or relinquish its sovereignty over the Islands for any period of time since settling St. Bees.

²⁵ *Eastern Greenland Case*, *supra* note 11 at 45-46; ; *Clipperton*, *supra* note 11 at 394; *Palau Ligitan*, *supra* note 11 at ¶134.

²⁶ *Clipperton*, *ibid.*

²⁷ Dixon, *International Law*, *supra* note 4 at 156.

²⁸ *Compromis* at ¶15.

²⁹ *Ibid.* at ¶34.

³⁰ *Ibid.*

(B) RYDAL HAS SOVEREIGNTY OVER THE ISLANDS BY PRESCRIPTION

In the alternative, Rydal acquired sovereignty over the Islands by acquisitive prescription. Acquiring sovereignty by prescription is just like acquiring sovereignty by occupation – the state must prove *effectivités*.³¹ The only difference is that that prescription applies *terra nullius*.³² It is the result of *de facto* sovereignty for a long period of time over territory that is subject to the sovereignty of another.³³ It serves to validate a title which is, in its origins, defective.³⁴ In that case, *per the Palmas Case*, “the display of territorial sovereignty... is as good as title.”³⁵ Because an assertion to the right of sovereignty by prescription is not grounded in formal title however, it is subject to acquiescence by the *de jure* sovereign and to proof of another state’s perfect territorial title.³⁶ Neither of these facts applies in this case.

(1) Aspatria’s diplomatic protests are not sufficient to deny Rydal’s sovereignty

Even if Aspatria is the *de jure* sovereign over the Islands, its objections do not prevent Rydal from acquiring sovereignty over the Islands by prescription. Only in 1827, when Aspatria unsuccessfully attempted to seize the Islands, did Aspatria’s protests amount to anything beyond

³¹ Dixon, *International Law*, *supra* note 1 at 155.

³² Dixon, *ibid*; Brownlie, *Principles of Public International Law*, *supra* note 4.

³³ Randall Lesaffer, citing Shearer in “Occupation and Acquisitive Prescription” *supra* note 3 at 46.

³⁴ Jennings, *The Acquisition of Territory*, *supra* note 5 at 21.

³⁵ *Palmas*, *supra* note 2 at 839.

³⁶ *Case Concerning the Frontier Dispute (Burkina-Faso v. Republic of Mali)*, [1986] I.C.J. Rep. 554 at ¶23 [*Burkina-Faso*]; *Frontier Dispute (Benin v. Niger)* 2005, online: www.icj-cij.org at ¶141; Dixon, *International Law*, *supra* note 1 at 155.

diplomatic notes.³⁷ Further, the diplomatic notes to Rydal were not continuous. For nearly thirty years, Aspatria withdrew all its ambassadors from Rydal and stopped officially protesting Rydalian sovereignty over the Islands.³⁸ Finally, while Aspatria claims to have protested Rydal's sovereignty since the 19th century, Aspatria did not refer the matter to an international body until 1962³⁹, and did not submit the question of sovereignty to a competent tribunal until now. Aspatria's protests are insufficient to deny Rydal's sovereignty by prescription.

(2) Plumbland does not have title that can displace Rydal's sovereignty

In the *Burkina- Faso Case*, the ICJ accorded pre-eminence to legal title over effective occupation as a basis of sovereignty.⁴⁰ This is not at issue here because Plumbland does not have a better title to the Islands than Rydal.

(a) Plumbland does not have title by occupation

Plumbland does not have title to the Islands by occupation of a fort at Salkeld. Requirements needed to acquire title by occupation are that the territory in question was *terra nullius* at the time of occupation, and that there is evidence of *effectivités*. Given that Rydal had already acquired an inchoate title to the Islands, the Islands were not *terra nullius* when Plumbland stumbled upon them and this argument fails at the first criterion.

³⁷ *Compromis* at ¶14.

³⁸ *Ibid.* at ¶30.

³⁹ *Ibid.* at ¶14.

⁴⁰ *Burkina-Faso*, *supra* note 36 at ¶23.

(b) Plumbland does not have title by prescription

Plumbland does not have title to the Islands by prescription. Like occupation, prescription also requires *effectivités*, which Plumbland has not demonstrated. The requirements of *effectivités* are that the state exercised continuous sovereignty with intention. Plumbland does not meet any of these three criteria. First, Plumbland did not display state sovereignty during its brief settlement at Salkeld: there was no evidence of the establishment of any effective local administrative. Moreover, pirates and other sea farers continued to use the islands⁴¹; there is no evidence that Plumbland could have protected the Islands; and no system of national law established. Second, Lieutenant Ricoy's 20 year authority at Salkeld does not signify sufficient intention to act as sovereign on Plumbland behalf. Finally, the requirement of continuous exercise of sovereignty has not been met: Lieutenant Ricoy's brief time at Salkeld does not compare to Rydal's almost two hundred year exercise of sovereignty.

(c) Even if Plumbland has acquired title, it abandoned its title

In the event that Plumbland's settlement at Salkeld was sufficient to grant it title, Plumbland abandoned this title in 1799 when Lieutenant Ricoy and his men returned to Aspatria.⁴² Given the close proximity between the Islands and Aspatria, Plumbland could have been more vigilant in sending representatives to the Islands to maintain control and reassert its claim. The presumption that the absence of state activity does not constitute abandonment⁴³ is rebutted. When Fort Salkeld was abandoned, so too was Plumbland's claim to title.

⁴¹ *Compromis* at ¶14.

⁴² *Ibid.* at ¶7.

⁴³ Brownlie, *Principles of Public International Law*, *supra* note 4 at 138.

(C) **IN THE ALTERNATIVE, RYDAL ACQUIRED SOVEREIGNTY FROM PLUMBLAND IN THE CESSIONARY TREATY OF GREAT CORBY**

In the alternative, if Plumbland had sovereignty over the Islands before 1821, then it lawfully transferred sovereignty to Rydal under the Treaty of Great Corby. In the Treaty, Plumbland “irrevocably transfers any sovereignty that [it] possesses in the [Windscale] Islands to [Rydal].”⁴⁴

(1) Aspatria did not acquire sovereignty over the Islands before the Treaty was signed

Plumbland had sovereignty to cede to Rydal. Aspatria did not inherit any rights to the Islands because it was not independent when the Treaty was signed, and *uti posseditis juris* was not a principle of law at the time.

(a) Aspatria was not independent when the Treaty was signed

Aspatria did not inherit title to the Islands before Plumbland ceded the Islands to Rydal because Aspatria was not independent at the time. The doctrine of inter-temporal law requires that facts be interpreted in light of the rules of international law as they existed at the time, and not as they exist now.⁴⁵ The *Montevideo Convention*, though ratified in the 20th century, reflects the “classical conditions under customary international law that a prospective state must satisfy.”⁴⁶ These criteria existed as customary law when Aspatria declared independence. The four criteria for statehood are: consistent population, defined territory, effective government and

⁴⁴ *Compromis* at ¶20.

⁴⁵ Brownlie, *Principles of Public International Law*, *supra* note 4 at 124-5.

⁴⁶ Hugh Kindred and Philip Saunders, eds. *International Law: Chiefly as Interpreted and Applied in Canada*, 7th edition (Toronto: Emond Montgomery Publications Ltd, 2006) at 14 [Kindred, *International Law*].

a capacity to enter into relations with other states.⁴⁷ The fourth requirement, “capacity to enter into relations with other states”, is dependent upon *recognition* by other states.⁴⁸ Without recognition, a state that otherwise meets the criteria outlined in the *Montevideo Convention* will be denied state status. At the earliest, recognition occurred when Plumbland recognized Aspatria in 1839. Because Aspatria could not have acquired any benefits from Plumbland before its independence, it could not have received title to the Islands before the Treaty of Great Corby was signed by Rydal and Plumbland.

(b) Uti possedetis juris was not a principle of international law at the time Aspatria became independent

Even if Aspatria was recognized as an independent state in 1819, *uti possidetis* – the concept that international boundaries follow colonial administrative boundaries – does not apply. *Uti possedetis* originated as a customary rule in South America⁴⁹ during decolonization, and had not reached the status of law at the time that Aspatria declared independence. The *Burkina-Faso* decision recognizing *uti possidetis* as a general principle was not decided until 1986⁵⁰ – long after Aspatria’s independence. Plumbland therefore lawfully transferred title to the Islands to Rydal in 1821.

⁴⁷ *Montevideo Convention On the Rights and Duties of States* (1936) 165 L.N.T.S. 19.

⁴⁸ Kindred, *International Law*, *supra* note 45 at 18.

⁴⁹ *Ibid.*

⁵⁰ *Burkina-Faso*, *supra* note 36.

(D) RYDAL’S SOVEREIGNTY OVER THE ISLANDS ENABLES IT TO GIVE EFFECT TO THE ISLANDERS’ DECLARATION OF INDEPENDENCE

Territorial sovereignty is the most extensive form of jurisdiction. It denotes full and unchallengeable power over territory and persons in that territory.⁵¹ When Rydal established the Islands as a “Non-Self-Governing” territory under *Article 73*⁵² of the United Nations Charter, this did not affect Rydal’s territorial rights to the Islands or sovereignty over the Islands.⁵³ What it does mean is that Non-Self-Governing status ceases automatically upon the achievement of full self-government; “whether full self-government has in fact been achieved is something that is to be decided by the Administering State and General Assembly together.”⁵⁴ Until that decision is made however, the Islanders have explicitly chosen to pursue full-self-government via independence, and by virtue of Rydal’s sovereignty over the Islands, Rydal may allow the Islanders to secede in their quest for independence.

II. RYDAL MAY GIVE EFFECT TO INDEPENDENCE FOR THE ISLANDS BECAUSE THE ISLANDERS ARE ENTITLED TO INDEPENDENCE AS AN EXERCISE OF THEIR RIGHT TO SELF-DETERMINATION

The right to self-determination is a positive rule of international law. The Islands are a Non-Self-Governing territory, and such territories are expressly recognized as having the right to self-determine. Moreover, the people of the Islands have both the subjective and objective

⁵¹ Dixon, *International Law*, *supra* note 1 at 154.

⁵² *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, Article 73. [*Charter of the United Nations*].

⁵³ James Crawford, *The Creation of States in International Law*, (Toronto: Oxford University Press, 2006) at 364 [Crawford, *The Creation of States*]; *Western Sahara Case*, Advisory Opinion [1975] I.C.J Rep 12 at ¶42 [*Western Sahara*].

⁵⁴ Crawford, *The Creation of States*, *ibid* at 369.

characteristics of a “people” for the purpose of exercising this right. For the Islanders, independence is the optimal outcome since this situation is similar to one of decolonization and is the desired result of a supermajority of the Islanders.

(A) THE RIGHT TO SELF-DETERMINATION IS A POSITIVE RULE OF INTERNATIONAL LAW

The right to self-determined has evolved from a “principle” to a right. It is a rule of law under Article 38 of the *Statute of the International Court of Justice*. The right to self-determination is recognized by both Aspatria and Rydal in Conventions and is customary international law.

(1) The right to self-determination is recognized by the contesting states in a Convention

Although Articles 1(2) and 55 of the Charter of the United Nations identify the concept of self-determination of peoples as a *principle*⁵⁵, the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) explicitly state that “All peoples have the right of self-determination.”⁵⁶ Both Rydal and Aspatria have ratified these two Conventions.⁵⁷ As such, the right to self-determination is recognized by both Rydal and Aspatria and is thus an enforceable rule of positive international law, *per* Article 38(1)(a) of the *Statute of the International Court of Justice*.⁵⁸

⁵⁵ *Charter of the United Nations*, *supra* note 52, Articles 1(2), 55.

⁵⁶ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, 16 December 16 1966, 993 U.N.T.S. 3.

⁵⁷ *Compromis at ¶69*.

⁵⁸ *Statute of the International Court of Justice*, 26 June 1945, 33 U.N.T.S. 993, Article 38.

(2) The right to self-determination is customary international law

The right to self-determination is also customary international law, *per* Article 38(1)(b) of the Statute of the ICJ.⁵⁹ Customary international law requires two elements: (i) consistent and general international practise among states, and (ii) practise that is accepted as law by the international community (in other words, *opinion juris*).⁶⁰ The right to self-determination has met both these requirements.

Consistent state practise supporting the right to self-determination is evidenced in the historical decolonization of dependent territories.⁶¹ The practise may not have been uniform among all states, but as the ICJ indicated in the *Military and Paramilitary Activities In and Against Nicaragua Case*, the Court “does not consider that, for a rule to be established as customary, the corresponding practise must be in the absolutely rigorous conformity with the rule.”⁶²

The right to self-determination is accepted as law in the international community. In the *Western Sahara Case*, the ICJ and concluded that:

the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of customary international law... This is the precise situation manifested by the long list of resolutions which, following in the wake of Resolution 1514, have proclaimed the principle of self-determination to be an operative right.⁶³

⁵⁹ *Ibid.*

⁶⁰ Kindred, *International Law*, *supra* note 50 at 148.

⁶¹ Rupert Emerson, “Self- Determination” (1971) 65 A.J.I.L. 459 at 463.

⁶² *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* [1986] I.C. J. Rep. 14 at ¶186.

⁶³ *Western Sahara*, (Sep. Op. Dillard) *supra* note 53 at 121.

In addition, the right to self-determination has been recognized and affirmed by the United Nations General Assembly⁶⁴ and by the Security Council.⁶⁵ The right to self-determination is therefore customary international law.

(B) THE ISLANDERS ARE A UNIT WHO MAY EXERCISE THE RIGHT OF SELF-DETERMINATION

The right to self-determination applies “to entities whose right to self-determination is established under or pursuant to international agreements, in particular... Non-Self-Governing territories.”⁶⁶ Customary international law confirms that the right to self-determination is specifically contemplated for Non-Self-Governing territories.⁶⁷ Since the Windscale Islands are designated by Rydal as a Non-Self-Governing territory, the Islanders have an established right to self-determination.

Moreover, the Islanders are a “people” for whom the right to self-determination exists. A “people” must, at a minimum, share subjective and objective characteristics.⁶⁸ The peoples of the Island meet both these requirements.

⁶⁴ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514(XV), UN GAOR, 1952, Supp. No. 16, 66 at 67. [*Resolution 1514*]; *Declaration of 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, 1970, Supp. No. 28, UN Dec. A/5217, 121 at 122 [*Resolution 2625*].

⁶⁵ SC Res. 183, UN SCOR, 1963; SC Res. 301, UN SCOR, 1971.

⁶⁶ Crawford, *Creation of States*, *supra* note 53 at 9.

⁶⁷ *Resolution 1514*, *supra* note 64 at 67; *Western Sahara*, *supra* note 53 at ¶56; *The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples* GA Res. 1654(XVI), 16 UN GAOR, 1961, Supp. No. 17, UN Doc. A/4684, 65 at 65 [*Resolution 1654*].

⁶⁸ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) at 30-31 [Hannum, *Autonomy, Sovereignty and Self-Determination*].

First, of the Islands' population mostly comprises descendents from Rydal settlers or immigrants, freed slaves, or are the offspring of both. These people have lived in a remote archipelago, isolated at sea for a long period of time, and share objective characteristics of a "people."

Second, in assessing subjective characteristics, the Court must look at whether or not the proposed "people" believes themselves to be part of a group.⁶⁹ To this end, it is illustrative that the Islanders completely reject any association with Aspatria, and voted overwhelmingly in favour of independence. They share a common political goal, and imagine themselves to be a coherent political unit. The Islanders are therefore a unit entitled to exercise the right of self-determination.

(C) INDEPENDENCE IS THE BEST FORM OF SELF-GOVERNMENT FOR THE ISLANDERS

(1) Customary international law recognizes Independence as the best form of self-government for Non-Self-Governing territories

Customary international law affirms that independence is the best form of self-government for Non-Self-Governing territories.⁷⁰ The Windscale Islands are Non-Self-Governing territory "whose peoples have not yet attained a full measure of self-government."⁷¹ Self-government is the goal for Non-Self-Governing territories, and to this end, General

⁶⁹ Hannum, *Autonomy, Sovereignty and Self-Determination*, *supra* note 68 at 31.

⁷⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 1970*, Advisory Opinion [1971] I.C.J Rep. 16 at ¶52; *Western Sahara Case*, *supra* note 53 at ¶55; *Resolution 1514*, *supra* note 64 at 67; *Resolution 1654*, *supra* note 67 at 65.

⁷¹ *Charter of the United Nations*, *supra* note 52, Article 73.

Assembly Resolution 1541 identifies three forms of self-government, including independence.⁷²

Resolution 1514 highlights "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations"⁷³ and urges signatories to take "Immediate steps... in non-self-governing territories... to transfer all powers to the peoples of those territories... in order to enable them to enjoy complete independence and freedom."⁷⁴

In practise, for Non-Self-Governing territories then, independence is recognized as the "central and most usual form of self-government."⁷⁵ To this, the majority of the "General Assembly has also asserted that while material and political progress is a correlative of political independence, the former is not a pre-condition of the later, and the two should be promoted together."⁷⁶ The Windscale Islands cannot therefore be denied independence because it has not yet achieved the material or political progress of other developed countries. As a designated Non-Self-Governing territory, independence from the administering sovereign is the preferred form of self-government.

(2) The plebiscite constitutes the will of the people

The form of self-government chosen must be the will of the people who are self-determining. Resolution 1514 declares that all peoples "have a right to self-determination, and by virtue of that right they *freely determine their political status* and freely pursue their...

⁷² *Principles Which Should Guide Members in Determining Whether or Not an Obligation to Transmit Information Under Article 73e of the Charter*, GA Res. 1541(XV), Annex, UN GAOR, Supp. No. 16, UN Doc A/4684 (1960) 29 at 29.

⁷³ *Resolution 1514*, *supra* note 64 at 67.

⁷⁴ *Ibid.* [emphasis added].

⁷⁵ Crawford, *Creation of States*, *supra* note 53 at 369.

⁷⁶ *Ibid.* at 368.

development.”⁷⁷ Resolution 2625 further provides that States must promote self-determination in order to bring about the end to colonialism, “having due regard to the *freely expressed will* of the peoples concerned.”⁷⁸ In the *Western Sahara* opinion, the Court concluded that the Resolutions “confirm and emphasize that the application of the right of self-determination requires a *free and genuine* expression of the will of the peoples concerned.”⁷⁹

Since the Islanders held a plebiscite in which 93% of the voting population on the Island participated, the genuine will of the people was expressed in a democratic process, with 76% of those voting elected to declare Independence.

III. RYDAL COMPLIED WITH THE ARBIT AND CUSTOMARY INTERNATIONAL LAW

Aspatria cannot meet its burden of proving a Rydalian breach of customary international law or the ARBIT. Articles IV and V of the ARBIT specify customary international law standards of protection that each party must follow in its treatment of foreign investors. Rydal met these standards.

(A) RYDAL COMPLIED WITH ITS CUSTOMARY INTERNATIONAL LAW OBLIGATIONS

Rydal’s treatment of MDR Limited did not violate the ARBIT. Article IV provides that each party must extend national treatment Article V of the ARBIT requires that each party “shall accord to investments treatment in accordance with customary international law, including fair

⁷⁷ *Resolution 1514, supra* note 64 at 67.

⁷⁸ *Resolution 2625, supra* note 64 at 124.

⁷⁹ *Western Sahara, supra* note 54 at ¶55.

and equitable treatment, full protection and security, and non-discrimination.”⁸⁰ Rydal complied with these standards.

(1) Rydal’s actions were fair and equitable

The customary international law standard for a breach of fair and equitable treatment was first articulated in *Neer* as conduct amounting “to an outrage, to bad faith, to wilful neglect of duty, or an insufficiency of governmental action so far short of the international standard that every reasonable and impartial man would readily recognize its insufficiency.”⁸¹ Today, the most accepted formulation of the standard prohibits conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.”⁸²

On the facts of this dispute, the original announcement of the bidding process was clear: bids were to be reviewed by a committee of the Assembly, the Assembly would make a recommendation, and that recommendation was “subject to the assent of the Governor of the Islands.”⁸³ Governor Black retained discretion over the approval of bids, and her exercise of that discretion cannot reasonably be characterized as arbitrary or lacking in due process.

⁸⁰ *Compromis* at Annex 1, Article V [emphasis added].

⁸¹ *Neer v. Mexico*, Opinion, US-Mexico General Claims Commission, 15 October 1926, [1927] 21 A.J.I.L. 555 at 556.

⁸² *Waste Management v. Mexico*, Final Award, 30 April 2004, 43 I.L.M. 967 at ¶99 (International Centre for Settlement of Investment Disputes); *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, [1989] I.C.J. Rep. 15 [ELSI].

⁸³ *Compromis* at ¶49.

(a) MDR Limited's reasonable expectations were met

The investor's reasonable expectations are a relevant consideration in analyzing an alleged violation of fair and equitable treatment.⁸⁴ Those expectations can be based on both the legal framework of the process, as well as the statements of State officials.⁸⁵ MDR Limited's reasonable expectations were met.

For example, Monte de Rosa understood that the bidding process would be subject to the approval of both Aspatria and Rydal. Since 1947, Rydal's Governor of the Islands has been empowered to make final determinations on Assembly proposals regarding the natural resources of the Islands. Moreover, there is no evidence to suggest that the Governor's approval is merely perfunctory. Monte de Rosa recognized this reality after submitting the MDR bid, saying, "As a practical matter, it is clear that I will need the acquiescence of both governments if I am to get oil from the Islands."⁸⁶ In other words, Monte de Rosa and MDR Limited were not under the misapprehension that the bidding process would result in the mechanical approval of Governor Black; they fully understood that the final decision regarding the outcome of the process was at the discretion of the Rydalian government.

Moreover, the statements of Rydalian officials did not mislead the Aspatrian investor. The leading investment law decision on fair and equitable treatment and reliance on official statements comes from the ICSID tribunal in *Metalclad v. Mexico*.⁸⁷ From 1990 to 1995, Metalclad received periodic approval for its proposed waste-management facility in the form of

⁸⁴ Rudolf Dolzer, "New Foundations of the Law of Expropriation of Alien Property" (1981) 75 A.J.I.L. 553.

⁸⁵ *Metalclad Corp. v. Mexico*, Award, 30 August 2000, 5 I.C.S.I.D. Rep. 209 at ¶89 [*Metalclad*].

⁸⁶ *Compromis* at ¶53.

⁸⁷ *Metalclad*, *supra* note 85.

licenses, gratuitous statements from Mexican federal officials, and the acquiescence of local authorities to its public construction efforts. Metalclad received explicit, repeated assurances about the viability of its project at crucial points in its development. However, after spending five years and millions of dollars on the investment, Metalclad was forced to stop work because the local government refused to grant a municipal building permit. However, there was no procedure for obtaining such a permit, and the company's attempts to ascertain a method of procurement were met with silence. In other words, the investor's level of reliance was significant and demonstrable, while the official statements were clearly misleading. The statements of Rydalian officials fall far short of that standard.

(2) Rydal provided full protection and security to MDR

The concept of full protection and security typically deals with the host State's obligations to undertake all reasonable measures to protect an investment from physical harm, and to extend to that investor full access to legal remedies. In the case at bar, no physical harm has been alleged and MDR has availed itself of the Rydalian judicial process. No allegations of judicial inadequacy have been pleaded.

(3) Rydal's actions were not discriminatory

Tribunals are divided on whether discriminatory intent is necessary, or if discriminatory effect will suffice.⁸⁸ In the instant case, only two bids were submitted. To focus on a discriminatory effect would therefore be absurd, since any outcome that does not favour the Aspatrian bid would automatically produce a discriminatory effect. Instead, Aspatria must provide evidence of discriminatory intent. No such evidence is present here.

⁸⁸ *LG & E v. Argentina* (2007), 46 I.L.M. 36 at ¶246 (International Centre for Settlement of Investment Disputes).

(4) Rydal extended national treatment to MDR

The ARBIT includes requires that each country to treat investors of the other country “no less favourably than it accords, in like circumstances, to its own investors and to investors of a non-party.”⁸⁹ “National treatment” clauses are common in international investment instruments, and the language of the ARBIT corresponds to the language of the North American Free Trade Agreement (NAFTA).⁹⁰ The decisions of NAFTA tribunals have outlined three requirements for a violation of national treatment: the presence of “like circumstances,” the presence of differential treatment, and the absence of a rational basis for the distinction.

Rydal does not dispute that MDR and ROCO are in “like circumstances,” or that there has been differential treatment. However, when Governor Black withheld her signature from the MDR bid, she articulated a reasonable justification for her action: that is, to “safeguard the long-term viability of the territory and its people.”⁹¹ In *S.D. Myers v. Canada*, the NAFTA tribunal reasoned that “assessment of ‘like circumstances’ must take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.”⁹²

It is widely accepted that differential treatment can be justified where rational ground for the distinction can be shown. For example, in *GAMI v. Mexico*, the Mexican government enacted a policy of expropriating sugar mills that were in a State-defined zone of insolvency. The

⁸⁹ *Compromis* at Annex I, Article IV.

⁹⁰ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA].

⁹¹ *Compromis* at ¶53.

⁹² *S.D. Myers Inc. v. Canada* (2001), 40 I.L.M. 1408 at ¶250 (North American Free Trade Agreement, Chapter 11).

tribunal found that the existence of a rational purpose behind the policy—even one that was ineptly implemented—was enough to defeat the plaintiff’s claim of discriminatory treatment:

*The Government may have been misguided. That is a matter of policy and politics. The Government may have been clumsy in its analysis of the relevant criteria for the cutoff line between candidates and non-candidates for expropriation. Its understanding of finance may have been deficient. But ineffectiveness is not discrimination. The arbitrators are satisfied that a reason exists for the measure which was not itself discriminatory.*⁹³

In this case, Governor Black acted appropriately. Her concerns were in line with the will of the Islanders, who have unequivocally rejected Aspatrian rule. The Islanders had already identified their newfound natural resources as a springboard from which they might reach independence.⁹⁴ In light of Monte de Rosa’s belief that his “patriotic responsibility [is] to make sure that Aspatrian oil is extracted by the Aspatrian people for the Aspatrian people,”⁹⁵ Governor Black’s role as a sober second thought for the Assembly was even more necessary and legitimate.

(5) Rydal has complied with its national treatment obligations.

The World Trade Organization’s General Procurement Agreement (“WTO-GPA”), effective since 1996, established heightened standards of conduct for countries bound by national treatment clauses in bidding processes.⁹⁶ The WTO-GPA is a plurilateral agreement to which neither Rydal nor Aspatria have acceded. However, even this instrument recognizes a State’s

⁹³ *GAMI v. Mexico* (2005), 44 I.L.M. 545 at ¶114 (North American Free Trade Agreement, UNCITRAL).

⁹⁴ *Compromis* at ¶43.

⁹⁵ *Ibid.* at ¶46.

⁹⁶ *Agreement on Government Procurement*, 1 January 2006, [WTO], online: <http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm> [*Government Procurement*].

right to reject a bid on “public interest” grounds.⁹⁷ Moreover, not even the WTO-GPA requires the provision of reasons unless and until a member country espouses the claim of a national in the instrument’s formal challenge procedures.⁹⁸

IV. RYDAL HAS STANDING TO PROTECT ROCO’S INVESTMENT AGAINST ASPATRIA’S ILLEGAL CONDUCT

Aspatria’s seizure of ALEC’s assets (“the Aspatrian Seizure”) is either an expropriation of ROCO’s investment in violation of the ARBIT, a denial of justice contrary to customary international law, or both. Rydal has standing to seek protection for ROCO from this honourable Court.

(A) RYDAL HAS STANDING TO ESPOUSE ROCO’S CLAIM

Rydal meets all of the standing requirements to espouse ROCO’s claim. Customary international law provides that a State may extend its protection to a national injured by the internationally wrongful act or omission of another State.⁹⁹ The injured party’s State of nationality initiates the procedure of “diplomatic protection” to secure cessation of, or obtain reparations for, the internationally wrongful act.¹⁰⁰ The State espousing the claim must ensure that 1) the claim is brought in accordance with any applicable rule relating to the nationality of

⁹⁷ *Government Procurement*, *supra* note 96 at Article XIII 4(b).

⁹⁸ *Ibid.* at Article XVIII 2.

¹⁰⁰ International Law Commission, *Draft Articles on Diplomatic Protection*, UN GAOR, 62nd Sess., UN Doc. A/61/10 (2006) [*Draft Articles on Diplomatic Protection*].

claims;¹⁰¹ and 2) any available and effective local remedy has been exhausted.¹⁰² Rydal meets both of these requirements.

(1) ROCO is a Rydalian national

ROCO is incorporated in Rydal and is therefore presumed to be a Rydalian national.¹⁰³ This presumption can be rebutted when a company is controlled by foreign nationals in another State and has no significant business dealings in the State of incorporation.¹⁰⁴ However, there is no evidence to suggest that nationals in another jurisdiction control ROCO, or that it lacks significant business ties to Rydal. ROCO therefore meets the nationality requirement for the diplomatic protection of Rydal.

(a) ALEC is a ROCO investment under the ARBIT

ALEC is a ROCO investment in Aspatria. The ARBIT's definition of "investment" includes every "asset of an investor that has the characteristics of an investment, including [...] the expectation of gain or profit."¹⁰⁵ ALEC has provided ROCO with a "consistent stream of revenue" since at least 1993.¹⁰⁶ ALEC therefore exhibits the "characteristics of an investment."

¹⁰¹ International Law Commission, *Report of the International Law Commission on the work of its fifty-third session*, GAOR, 56th Sess., UN Doc. A/56/10 (2001) 43 at Article 44(a) [*Draft Articles on State Responsibility*].

¹⁰² *Ibid.* at Article 44(b).

¹⁰³ *Draft Articles on Diplomatic Protection*, *supra* note 100 Article 9.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Compromis* at Annex I.

¹⁰⁶ *Ibid.* at ¶41.

The ARBIT further provides that an investment may include “shares, stock, and other forms of equity participation in an enterprise.”¹⁰⁷ ROCO holds 80% of ALEC’s shares.¹⁰⁸ This is consistent with Professor Dolzer’s account of the current state of nationality and shareholding in international law:

*It is now generally accepted, on the basis of treaty provisions, that shareholding in a company is a form of investment that enjoys protection. Thus, even if the affected company does not meet the nationality requirements under the relevant treaty, there will be a remedy if the shareholder does.*¹⁰⁹

Therefore, ALEC is either a ROCO investment by virtue of the latter’s expectation of profit from the former, or because of ROCO’s shareholdings in ALEC.

(b) Barcelona Traction’s position on the claims of shareholders does not apply

In *Barcelona Traction*,¹¹⁰ this honourable Court held that the nationality of shareholders is not enough to ground a claim of diplomatic protection. However, the present case is distinguishable. First, the Court in *Barcelona Traction* acknowledged that its reasoning on this issue was based solely on customary international law, and that treaty law could replace the presumption against shareholder nationality.¹¹¹ As described above, the ARBIT explicitly provides that shareholders in a foreign investment can be “investors” under the treaty.

Moreover, the ARBIT explicitly provides that the State of an “Investor’s nationality may bring the claim before the International Court of Justice, and the other Party shall accept the

¹⁰⁷ *Compromis*. at Annex 1.

¹⁰⁸ *Ibid.* at ¶40.

¹⁰⁹ Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (New York: Oxford, 2008) at 59.

¹¹⁰ *Case Concerning Barcelona Traction, Light and Power Co., Ltd.*, [1970] I.C.J. Rep. 32.

¹¹¹ *Ibid.* at ¶¶ 89-90.

personal and subject matter jurisdiction of the Court.”¹¹² Aspatria must honour its treaty obligations—to accept the jurisdiction of this honourable Court when Rydal espouses the claim of an ARBIT investor—because of the customary international law principle of *pacta sunt servanda*.¹¹³ Aspatria is therefore precluded from relying on the reasoning in *Barcelona Traction*.

(2) All effective local remedies have been exhausted

Customary international law requires that all effective local remedies be exhausted before a claim is brought regarding the responsibility of a State.¹¹⁴ The most egregious injury to ALEC stems from the unlawful seizure of its assets, which resulted from the proceeding *ALEC v. Langdale Administrative Court*. ALEC has exhausted all appeals in that proceeding and has therefore satisfied the exhaustion requirement at international law.

While the case of *Prosecutor v. ALEC* is technically unresolved, exhaustion is not required where “there is undue delay in the remedial process which is attributable to the State alleged to be responsible.”¹¹⁵ Aspatria, like all states, is responsible for the internationally wrongful acts of its courts.¹¹⁶ Therefore, if Aspatrian justice is characterized by “undue delay,” the need to exhaust local remedies will be waived and the distinct international law delict of denial of justice, described below, may arise.

¹¹² *Compromis* at Article XIII.

¹¹³ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 at Article 26 (entered into force on 27 January 1980).

¹¹⁴ *Interhandel case (Switzerland v. United States of America) Preliminary objections*, [1959] I.C.J. Rep. 6 at 27; *ELSI*, *supra* note 82 at ¶50.

¹¹⁵ *Draft Articles on Diplomatic Protection*, *supra* note 100 at Article 15(b).

¹¹⁶ *Draft Articles on State Responsibility*, *supra* note 101 at Article 4(1).

ALEC's assets were seized by Aspatria two years ago. Based on other Aspatrian criminal proceedings, obtaining a final determination in *Prosecutor v. ALEC* will likely take a total of six to nine years. A primary consideration in evaluating the reasonableness of the delay will be the complexity of the case and the volume of work required for its thorough examination.¹¹⁷ *Prosecutor v. ALEC* is not a complicated case. The company either "materially participated" in the bid, or it did not. A delay of six to nine years for a final determination is indefensible. Moreover, delays of this length have been deemed unacceptable by other arbitral tribunals. For example, in *El Oro Mining and Railway Co.*, the Anglo-Mexican Claims Commission held that a delay of nine years before a final conclusion was proof that the country's "judicial machinery is defective."¹¹⁸

(B) THE ASPATRIAN SEIZURE IS AN ILLEGAL EXPROPRIATION AND/OR A DENIAL OF JUSTICE

Two days after Rydal approved ROCO's bid, an Aspatrian prosecutor began using the Aspatrian courts to seize all of ALEC's equipment, vessels, cash, and bank accounts within Aspatria. ALEC's alleged delict was "material participation" in the ROCO bid, contrary to the NRA. While the NRA's maximum penalty is a fine of 5% of a company's revenue, Aspatria is interfering with 100% of ALEC's local assets and its capacity to generate revenue. Without assistance from this honourable Court, Aspatria's interference may last for nearly a decade. Aspatria's treatment of ALEC, though cloaked in judicial proceedings, has the effect of expropriation and is a denial of justice.

¹¹⁷ *El Oro Mining and Railway Company (Limited) (Great Britain v. United Mexican States)* (1931), Decision, 18 June 1931, U.N.R.I.A.A., vol. V, No. 55 at 198 [*El Oro Mining*]; *Case concerning the Administration of the Prince von Pless* (1933), Preliminary Objections, P.C.I.J. (Ser. A/B) No. 52 at 4.

¹¹⁸ Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005) at 178 (quoting *El Oro Mining*).

(1) The Aspatrian Seizure is equivalent to expropriation

The ARBIT prohibits Aspatria from expropriating an investment, “directly or indirectly through measures equivalent to expropriation.”¹¹⁹ Expropriation is clear and “direct” when a State declares, through judicial, legislative, or executive decree, that title to property will be transferred to the State for its public purposes.¹²⁰

Modern governments are rarely so frank. Instead, “indirect” expropriation has become the norm. The U.S.-Iran Claims Tribunal described indirect expropriation in the following terms:

*[I]t is recognised by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.*¹²¹

The effect of the State action is the most important factor in determining whether an expropriation has occurred. Whenever the interference with property is substantial and lasts for an extended period of time, a prima facie case exists that the State has expropriated the property.¹²²

Aspatria has not formally taken title to ALEC’s assets, but it has completely and catastrophically interfered with ALEC’s property rights. Aspatria has seized all of ALEC’s assets, including an oil tanker and bank accounts totalling \$80 million.¹²³ While the Aspatrian

¹¹⁹ *Compromis* at Annex 1, Article VI(a).

¹²⁰ Martin Domke, “Foreign Nationalizations: Some Aspects of Contemporary International Law” (1961) 55 Am. J. Int’l L. 585.

¹²¹ *Starret Housing Corp. v. Iran* (1983), 4 Iran-United States Cl. Trib. Rep. 122 at 154.

¹²² *Norwegian Shipowners Claim*, [1922] 1 R.I.A.A. 307; *Goetz v. Burundi*, Award, 10 February 1999, [2000] 15 I.C.S.I.D. Rev.-FILJ 457; *Metalclad*, *supra* note 85.

¹²³ *Compromis* at ¶57.

Seizure continues, ALEC's assets will depreciate; its employees will go unpaid and quit; its stock price will wither. As a result, ROCO is being deprived of its ability to realize profits from its investment, and ALEC's shares are likely to be inalienable for the foreseeable future. Only a formal transfer of title could be a clearer act of Aspatrian expropriation.

Even the eventual disposition of *Prosecutor v. ALEC* would not alter the expropriatory nature of Aspatria's conduct. Expropriation includes State action that results in the significant depreciation of an investment and hinders its economic potential.¹²⁴ ROCO's shareholding in—and steady stream of revenue from—ALEC are significantly undermined by Aspatria's actions.¹²⁵

(2) The Aspatrian Seizure is a denial of justice

The ARBIT contains a residual requirement that parties “accord to investments treatment in accordance with customary international law.”¹²⁶ Therefore, even if Aspatria can show that it did not expropriate ROCO's investment within the definition of the ARBIT, Aspatria has committed a separate internationally wrongful act that is forbidden by the treaty. Specifically, the sedate pace of the Aspatrian courts gives rise to a claim of “denial of justice,” an internationally wrongful act.

¹²⁴ UNCTAD, *Series on Issues in International Investment Agreements: 'Taking of Property'* (2000) at 4, online: <http://www.unctad.org/templates/Download.asp?docid=352&lang=1&intItemID=2322>

¹²⁵ *Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, [2000] 39 I.L.M. 1317 at ¶76 (International Centre for Settlement of Investment Disputes).

¹²⁶ *Compromis* at Annex 1, Article IV.

It is a principle of customary international law that States must make available a fair and effective justice system to aliens.¹²⁷ This standard will be violated not only when the investor faces an outright exclusion from the justice system, but where their access is subject to undue delay.¹²⁸ As outlined above, the Aspatrian justice system's handling of *Prosecutor v. ALEC* is characterized by undue delay, which is an internationally wrongful denial of justice and violation of the ARBIT.

(C) THE ASPATRIAN SEIZURE IS NOT SAVED BY EXCEPTIONS IN THE ARBIT

A State's right to expropriate is limited by its international law obligations, which are informed by the ARBIT in this case. Specifically, the ARBIT prohibits expropriation "except for a public purpose; in accordance with due process of law; in a non-discriminatory manner; and on prompt, adequate, and effective compensation."¹²⁹ In other words, an expropriation is not legal at international law unless each of these requirements is met. Aspatria fails this threshold test because, at a minimum, there is no evidence that Aspatria made any attempt at compensation since the original seizure in 2007.¹³⁰

(a) The Aspatrian Seizure was not a *bona fide* public welfare regulation

Aspatria's actions are not a legitimate exercise of its power to regulate. The ARBIT provides that non-discriminatory State actions "designed and applied to protect legitimate public

¹²⁷ *Loewen v. United States*, Award, 26 June 2003, I.C.S.I.D. Case No. ARB(AF)/98/3 at ¶129; *Azinian v. Mexico*, Award, 1 November 1999, 5 ICSID Reports 269 at ¶¶102-03.

¹²⁸ *Antoine Fabiani (no. 1), France v. Venezuela*, (1896), reprinted in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party: Volume V*, 4878 (Hein: 1995) at 4895.

¹²⁹ *Compromis* at Annex I, Article VI(a).

¹³⁰ *Ibid.* at ¶57.

welfare objectives do not constitute indirect expropriation,” except where they are “so severe in light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith.”¹³¹ In other words, a regulation undertaken in good faith must be necessary and proportional.¹³²

Aspatria’s actions were not proportional, so they cannot be a good-faith general welfare regulation. In *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* an ICSID tribunal ruled that Mexico’s expropriation—which was characterized as a penalty for violating a local law—was not proportional because “[a]ll the infringements committed were either remediable or remediated or subject to minor penalties.”¹³³ In the case at bar, the proscribed penalty under the NRA may, at most, equal 5% of ALEC’s revenues. Aspatria could also have ordered a less drastic remedy—i.e. an injunction preventing ALEC from participating in drilling around the Islands—but instead it suspended all of ALEC’s operations. This penalty far outstrips the “crime” of having one’s assets listed in another company’s bid for work.

In sum, Aspatria’s treatment of ALEC is an internationally wrongful expropriation. Aspatria’s taking should not be permitted to masquerade as *bona fide* regulation.

¹³¹ *Ibid.* at Annex I, Article VI(b).

¹³² See A.F.M. Maniruzzam, “Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investments: an Overview” (1998) 8 J. Transnat’l L. & Pol’y at 67-70.

¹³³ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (2004) 43 I.L.M. 133 (International Centre for Settlement of Investment Disputes) at ¶148.

PRAYER FOR RELIEF

Rydal respectfully requests that this Honourable Court adjudge and declare that:

1. Rydal has lawful sovereignty over the Windscale Islands and may take steps to effect the independence of the Islanders;
2. The Islanders are entitled to independence as an exercise of their right to self-determination;
3. Rydal did not violate the ARBIT;
4. Rydal has standing to espouse ROCO's claim, and Aspatria violated the ARBIT.

All of which is respectfully submitted,

Team 370R