JESSUP COMPETITION 2010

BENCH MEMORANDUM FOR JUDGES

THE CASE CONCERNING THE WINDSCALE ISLANDS

Version 4.2

CONFIDENTIAL
Only for use by Appointed Judges of the
2010 Philip C. Jessup Competition

Important Information regarding the Bench Memorandum

- This Bench Memorandum is a **confidential document** only by judges and administrators of the Jessup Competition. Every possible measure must be taken to maintain the confidentiality of the Bench Memorandum.
    - Do not leave copies of the Bench Memorandum lying in public places.
    - Do not discuss the Bench Memorandum or its contents with anyone else besides other Judges.
    - Do not distribute the Bench Memorandum to team members or team advisors, not even after the regional or national competition you have judged is over.
- If you have received this Bench Memo, you are no longer eligible to assist a team as a judge for practice oral rounds. Doing so will disqualify the team from the competition. See Official Rule 2.5.
- The contents of the Bench Memorandum will remain confidential until the conclusion of the International Rounds on March 27, 2010.
-
- The Bench Memorandum is an evolving document. As the competition season progresses, new versions of the Bench Memorandum will become available. ILSA encourages judges and competition staff to make sure they possess the most recent version of the Bench Memorandum.
- ILSA welcomes comments and recommendations on the Bench Memo. Please send all suggestions to jessup@ilsa.org.

Table of Contents

PART 1: INTRODUCTION

I. Purpose of the Bench Memorandum

This Bench Memorandum provides judges in the Jessup Competition with basic factual and legal information to enable evaluation of the written and oral performances of participating teams. This Bench Memorandum should be read in conjunction with the 2010 Jessup Problem (the "Compromis") and the Corrections and Clarifications to the Compromis.

The Compromis was designed to present a balanced problem such that each side has both strengths and weaknesses. Jessup teams should be able to construct good arguments as both applicant and respondent. As a judge, your task is to evaluate the quality of each team's analysis, their knowledge of international law, and their advocacy skills. Please make sure not to confuse this task with your own personal evaluation of the merits of the case.

This memorandum is not an exhaustive treatise on the legal issues raised in the Compromis. The state practice and legal authorities cited are illustrative and not intended to be a comprehensive review of all relevant sources of law. As such, judges should not be surprised when participants present arguments or authorities which are not discussed in this memorandum. This does not suggest that such arguments are not relevant or credible.

Please also keep in mind that the Compromis raises legal issues that are relevant to more than one claim for relief (e.g., definition of "investment" under bilateral investment treaties). Participants will often need to argue in favor of a rule of law in support of one claim and distinguish the same rule with respect to another claim. Judges should note and question any internal inconsistencies that may arise in a competitor's or team's argument.

II. Synopsis

This year's Jessup Compromis focuses on a dispute between two states over a group of islands where oil was recently discovered. The issues of international law raised are both classic and modern. On the classical side, we have a standard sovereignty fight over historical title to the islands, coupled with the companion issue of self-determination regarding the islanders. On the modern side, we have two investment treaty claims aimed at redressing controversial state actions taken to protect interests in the oil of the islands.

The territory at issue is the Windscale Islands, an archipelago located in the Eden Ocean. The Applicant is the Republic of Aspatria, which is located closer to the Islands than any other country. (Applicant = Aspatria) The Respondent is the Kingdom of Rydal, which is a former colonial empire located far from the Islands. (Respondent = Rydal) Both countries claim historical sovereignty over the Islands.

A timeline of all of the facts is in Appendix B.

A. Discovery of the Islands

The Islands were discovered in 1777 by Captain Parish, a Rydalian, who took short leave with his crew on one of the larger islands, and left behind the Rydalian flag and a stone carved with a written declaration asserting Rydal's sovereignty over the Islands. ¶5

In early 1778, a naval ship from Plumbland discovered the archipelago. Shortly afterward, the Viceroyalty of Aspatria, a colony of Plumbland located near the Islands, sent Lieutenant Ricoy to settle and claim the Islands. Ricoy established a settlement on one of the islands and lived there for 20 years until he and his men were called away to deal with internal disturbances within the Viceroyalty. Before leaving, Ricoy put the flag of Plumbland over the fort and posted a notice claiming the Islands as property of Plumbland. Historians agree that the Islands were regularly used by pirates, slave-ships, and other seafarers during this period. ¶¶6-9

In 1813, a Rydalian naval ship wrecked on one of the smaller Islands, forcing its captain, Admiral Aikton, and his crew to settle on the Islands. Two years later, a damaged slave ship landed at the Rydalian settlement, called St. Bees. Aikton offered refuge and declared the slaves free in accordance with Rydal's abolition policy. The former slaves and crew swore loyalty to Rydal. By 1816, the Rydalians had explored most of the other islands, and had found the abandoned settlement of Salkeld. ¶¶10, 12-13

In 1817, Plumbland attempted to establish a penal colony on the Islands, but was prevented by the ship-wrecked Rydalians. In 1818, Plumbland sent a letter to Aspatria protesting Rydal's occupation of the Islands. In 1819, Rydal sent a ship and crew to establish a governorship over the Islands, which has administered the Islands until present day. Many of the shipwecked members and the 1819 mission who stayed on the Islands intermarried and produced offspring. The population was also supplemented through the years by various other immigrants, mostly from Rydal. ¶¶14-16, 28

B. Aspatria's Independence and Development

In 1814, war broke out between Rydal and Plumbland for reasons unrelated to the Islands. ¶11

In 1819, a group of Aspatrians launched a successful independence movement against Plumbland. Aspatria declared independence and adopted a Constitution that declared the Islands part of its territory. ¶¶17-19

By 1821, Plumbland was losing the war with Rydal and sued for peace. The countries signed a peace treaty in which Plumbland transferred to Rydal any sovereignty it possessed over the Islands. ¶¶20-21, 26

Since its independence (except from 1880 to 1910, when Aspatria experienced an economic and political crisis), Aspatria has protested Rydal's "continued occupation" of the Islands, and asserted that the Islands have always belonged to Plumbland and were inherited by Aspatria when it gained independence. ¶¶22-25, 27, 30, 33, 36

C. Administration of the Islands

In 1903, Rydal ordered its Governor of the Islands to establish a consultative Assembly to give the Islanders a voice in day-to-day administration. In 1945, Rydal designated the Islands a non-self-governing territory under the United Nations charter. In 1947, Rydal gave the Islands a constitution, which gives control over day-to-day governance to the Assembly of the Islands subject to the approval of the Governor. ¶¶29, 34-35

The U.N. Special Committee on Decolonization has regularly taken up the matter of the Islands, allowing statements from Rydal, a delegation of Islanders, and Aspatrian supporters. ¶¶37-38

D. Trade and Oil

By the late 1930's, trading links were established between the Islands and Aspatria, although the Islands remained poor and depended on Rydal for substantial investment in business and infrastructure. Trade increased between Aspatria and Rydal during the 1970s and 1980s, despite continuing disagreement over the Islands. In 1985, Aspatria and Rydal negotiated a bilateral investment treaty to encourage and protect investments between the countries. ¶¶31-32, 39

In 1991, Aspatria passed the Natural Resources Act (NRA), which made it illegal for Aspatrian companies to interfere with exclusive government licenses to exploit natural resources. In 1993, Aspatria granted an oil exploitation license to ALEC, a company incorporated in Aspatria. ALEC's shares are 80% owned by ROCO, a multi-national energy company incorporated in Rydal. ¶40-41

In 1997, a substantial amount of oil was discovered within 200 nautical miles of the Islands' baselines. Rydal contracted with ROCO to explore the reserves. The discovery of the oil energized an independence movement in the Islands. News of the oil also reinvigorated Aspatria's assertions of sovereignty over the Islands. ¶¶42-44

E. Oil Exploitation and Independence

In 2003, Aspatria granted an exclusive license to MDR Limited, an Aspatrian company, to extract oil from the basin around the Islands. The Prime Minister of Rydal protested Aspatria's action as nonsensical, since, it claimed, Aspatria had no sovereignty over the Islands, including its oil reserves. ¶¶45-48

In 2006, the Assembly of the Islands announced a plan, approved by Rydal, to invite bids to exploit the Islands' oil. Only ROCO and MDR Limited submitted bids. The First Minister of the Islands concluded that MDR's bid was more economically attractive, and the Assembly voted in favor of it. Final approval was subject to the assent of the Governor of the Islands, who announced she was withholding her signature because MDR's proposal was only appealing in the short-term. She invited the Assembly to reconsider its decision, which led to a new vote in favor of ROCO's bid. Islanders in favor of independence denounced the outcome as a defeat against self-determination. MDR claimed it was discriminatory in

violation of the Aspatria-Rydal BIT. A suit by MDR in Rydal was dismissed, its appeal was denied, and discretionary review was withheld. ¶¶40-55, 61

In 2007, Aspatria filed criminal charges against ALEC under the NRA. The prosecutor claimed that ALEC had materially participated in the bid of its parent company, ROCO, thereby circumventing the Aspatrian license that had been granted to MDR. In connection with the criminal case, an administrative petition was filed to seize ALEC's assets. The court granted the petition, and federal police immediately seized all assets of ALEC in Aspatria. ALEC filed a petition to cancel the seizure, but the petition was denied and no appeal is possible under Aspatrian law. ¶¶56-58

To date, the criminal case has not reached final decision, and counsel for ALEC has complained that the 'temporary' seizure of assets is for all practical purposes permanent. The Prime Minister of Rydal protested to the President of Aspatria, asserting that the seizure violated international law and the Aspatria-Rydal BIT. ¶¶59-60

The controversy surrounding the claims over the oil sparked protests in the Islands and a call for a referendum on independence. A plebiscite on the question of independence was held, with 76% of Islanders voting in favor of full independence. Rydal endorsed this outcome and pledged its assistance to the Islands in a transition to independence. Aspatria condemned the plebiscite as illegal, reasserting its claim to the Islands and demanding they be returned to Aspatria's rightful control. ¶¶62-65

Rydal responded by suggesting the two countries negotiate a Special Agreement for submission to the ICJ to resolve their various disputes. Aspatria accepted the offer and the two nations concluded the Special Agreement on 10 September 2009. ¶¶66-68

III. The Legal Issues

A. Aspatria asks the Court to adjudge and declare that:

(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 belongs to Aspatria; and

  (b) the Islanders are not entitled to independence based on the principle of self-determination.

(2) Rydal's rejection of MDR's bid constituted a violation of the Aspatria-Rydal BIT.

(3) 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.

B. Rydal asks the Court to adjudge and declare that:

(1) Rydal is permitted under international law to take steps giving effect to independence for the Windscale Islands because:

(a) sovereignty over the Islands belongs to Rydal; and/or

(b) the Islanders are entitled to independence as an exercise of their right to self-determination.

(2) The rejection of MDR's bid did not constitute a breach of Rydal's obligations under the Aspatria-Rydal BIT.

(3) Rydal has standing to invoke the Aspatria-Rydal BIT to protect the assets of a Rydalian enterprise in Aspatria and the seizure of such assets was a violation of the Aspatria-Rydal BIT.

PART 2: LEGAL ANALYSIS

I. Preliminary Matters

A. Burden of Proof

Article 2 of the Compromis makes it clear that the demarcation of Aspatria as Applicant and Rydal as Respondent is without prejudice to the burden of proof, so in this case the burden is really on the party who asserts.

Both parties assert sovereignty over the Islands; therefore, the burden is equally shared on this claim. The other claims are not similarly parallel: Rydal carries the burden to prove that the Islanders are entitled to independence; Aspatria carries a burden to prove Rydal violated the Aspatria-Rydal BIT; and Rydal carries the burden to prove that Aspatria violated the Aspatria-Rydal BIT.

With respects to facts, each party bears the burden of proving any particular fact upon which their argument depends.

Important Formatting Note: This Bench Memo sets out in column form the different arguments that we expect each party to make. The party with the burden will be on the left and the responding party will be on the right. Note that this means Aspatria is not always on the left nor Rydal always on the right.

B. Standing

States has standing to bring a claim before the ICJ in one of two ways: (1) by claiming direct harm to the State; (2) by exercising diplomatic protection on behalf of a harmed national.

Direct Harm to the State
A State has standing to bring a claim to redress an internationally wrongful act that has caused harm to the State's interests.

Doctrine of Diplomatic Protection
A State may have standing to espouse a claim on behalf of someone connected to the State who has been injured by an internationally wrongful act. This doctrine, called the doctrine of diplomatic protection, is based upon a centuries-old legal fiction that an injury to an individual is an injury to the State of his nationality. In addition to natural persons, the doctrine extends to the protection of juridical persons such as corporations.

There are two important prerequisites to the exercise of diplomatic protection:

1. the injured party must have a genuine link with the protecting party, usually nationality;

2. the injured party must have exhausted all local remedies in the judicial system of the State alleged to have committed the harm.[1]

Teams should be prepared to explain their theory of standing on each claim. The authors have written the Compromis so that demonstrating standing for claims 1(a) and 2 is a simple and straightforward task. The authors have intentionally created a complex and difficult standing problem for the Respondent on claim 3. There is also a potential standing challenge on claim 1(b), which a few teams representing Aspatria may raise. Please see the respective sections below for a discussion of standing on each of the claims.

II. Taking Steps towards Independence

A. Claim 1(a): Sovereignty over the Windscale Islands

1. Standing

Rydal and Aspatria can easily demonstrate standing because each is directly asserting its rights/obligations against the other. Aspatria is claiming that Rydal has an obligation to cede administration of the territory to Aspatria. Rydal is claiming that it is the rightful sovereign and has a right/obligation to take steps towards independence for the islanders. Since this is a direct claim, there is no need to exhaust local remedies.

2. Significant Events

In this case, there are number of significant events relating to the early attempts to stake a claim to the Islands:

- In 1777, Captain Parrish of Rydal discovered the Islands;
- In 1778, Lieutenant Ricoy of Plumbland established a settlement on one of the islands that lasted for approximately 20 years;
- In 1813, Admiral Aikton, of Rydal, and his crew became wrecked on one of the islands and thereafter exercising jurisdiction over the whole of the ;
- In 1819, Rydal appointed a Governor over the Islands, who took control of the Islands;
- In 1819, Colonel Diaz and his supporters declared Independence from Plumbland and in 1920 established the state of Aspatria; and
- In 1826, Aspatria attempted and failed to take the Islands by force.

[1] International Law Commission's Draft Articles on Diplomatic Protection, art. 3 and 14 (2006).

3. Critical Date

The critical date is the point at which a dispute crystallizes – when the parties know that they are in dispute and therefore their actions may well have become actions in pursuance of litigation. Under this principle, whoever has title at the critical date shall retain it. In theory, evidence of state action that occurs after this critical date should be ignored for purposes of analyzing sovereignty disputes. In practice, though, tribunals have adopted varying approaches – some have treated the concept of critical date as integral to their analysis and others have ignored it.[2]

4. The Inter-Temporal Doctrine

The Inter-Temporal Doctrine holds that a legal question should be evaluated not in light of current rules of international law, but rather in light of the rules of international law that existed at the relevant point in time.[3] Respondent teams, in particular, will attempt to exploit this doctrine by arguing at that discovery had more legal effect at the time Captain Parris came upon and claimed the Islands. Applicant teams may respond that international law had evolved by that time to require something more than discovery.

5. Modes of Acquisition

The analysis of this case will require the teams to understand the various methods under which title to territory can be obtained: (1) Cession, (2) Occupation, (3) Accretion, (4) Conquest, and (5) Prescription.

(1) Cession of state territory is the transfer of sovereignty over state territory by the owner-state to another state.

(2) Occupation is the act of appropriation by a state by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another state.

(3) Accretion is the name for the increase of land through new formations. Such new formations may be only a modification of the existing state territory.

(4) Conquest, or subjugation, is the acquisition of territory by a forceful taking, followed by annexation. No longer a valid means of acquiring sovereignty, this

---

[2] *The Island of Palmas/Miangas Case* (United States of America v. The Netherlands), Permanent Court of Arbitration Award, 4 April 1928, p.14 [hereinafter *Islas Palmas*] (finding that the critical date was the date of signing of a treaty of cession); Argentina-Chile Boundary Dispute, 61 AJIL 1071 (1967) (finding the "notion of the critical date to be of little value in the present litigation" and "examin[ing] all the evidence submitted to it, irrespective of the date of the acts to which such evidence relates"); *Minquiers & Ecréhos Case* (UK v. France), ICJ Judgment (1953) [hereinafter *Minquiers & Ecrehos*] (finding that the critical date should not, given the special circumstances in that case, exclude consideration of subsequent events, unless they were taken with a view to improving the legal position of the party).

[3] *Islas Palmas*, p.14 [hereinafter *Islas Palmas*] ("The effect of discovery by Spain is therefore to be determined by the rule of international law in force in the first half of the 16th century…").

was an accepted mode of acquisition in the past, during the period when the making of war was recognised as a sovereign right.

(5) Prescription, described more fully below, is the acquisition of title to property from another sovereign as a result of undisturbed continuous possession for an extended duration.

The Compromis primarily raises arguments concerning occupation and prescription, but also touches upon cession and conquest; accretion is not relevant.

6. Rydal's Claim of Sovereignty

Rydal will argue that it has historic title over the Islands based on its first discovery. Alternatively and more effectively, Rydal will argue that its first discovery conveyed inchoate title, which was perfected when Rydal effectively occupied the Islands.

Aspatria will counter that Rydal never perfected its title and that Plumbland was actually the first to effectively occupy the Islands and acquire title, which was inherited by Aspatria when it gained independence from Plumbland.

Rydal will respond that even if Aspatria acquired title as a result of its occupation, Aspatria abandoned that title or lost it through acquisitive prescription to Rydal.

(a). First Discovery and Symbolic Annexation

Rydal	Aspatria
Rydal has historical title because it first discovered the Islands when Captain Parish landed and soon thereafter manifested its sovereignty in various symbolic acts of annexation by leaving a flag and a stone carved with a declaration claiming sovereignty over the Islands.[4]	Discovery alone is not sufficient. Title on the basis of first discovery is a controversial theory without support under international law. Rydal did not take any overt action to implement its intention to obtain title.[5] Mere declaration through symbolic acts is not an overt act. Rydal's discovery at most conferred only an inchoate title which was not perfected (see below).[6]

[4] *Clipperton Island Case* (Mexico v. France), Arbitral Award on the Subject of the Difference Relative to the Sovereignty Over Clipperton Island, 26 Am. J. Int'l L. 394, 28 January 1931 [hereinafter *Clipperton Island*] (finding that France acquired title over terra nullius when a lieutenant in the French navy, acting pursuant to orders, proclaimed and declared French sovereignty over the Islands and notified another government of the symbolic act of annexation).

[5] Acquiring sovereignty over *terra nullius* "requires an intention to acquire sovereignty, a permanent intention to do so and overt action to implement the intention to make the intention to acquire manifest to other States." *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), ICJ Judgment, 23 May 2008 [hereinafter *Pedra Branca*].

[6] *Islas Palmas*, p.15 ("[A]ccording to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.").

(b). First Effective Occupation

Rydal	Aspatria
Rydal's first discovery conferred inchoate title, which was later perfected by Rydal's effective occupation on the Islands within a reasonable amount of time.	Rydal did not effectively occupy within a reasonable amount of time. By the time Aikton arrived, the Islands were already the territory of Plumbland, and Aikton's actions were not sufficient to displace Plumbland's sovereignty.[7]
Admiral Aikton is a senior officer in the Rydalian navy, not just any private person, and therefore an agent of Rydal. Through the following actions, Aikton and his men effectively occupied the Islands on behalf of Rydal: • Building a settlement • Informing crew of slave ship Sodor they had landed on territory of Rydal • Declaring slaves free based on abolition in Rydal • Exploring and cultivating the other islands • Informing landing party of The Grizedale, a ship from Plumbland, that they cannot stay on the Islands Moreover, Aikton thought prior to his landing the Islands were already the territory of Rydal, so no intention to acquire sovereignty was necessary, only an intention to occupy in a manner consistent with the already existing sovereignty, which he did.	Rydal did not effectively occupy the Islands because Aikton did not have actual authority or intention to claim sovereignty over the Islands on behalf of Aspatria. Aikton shipwrecked on the Islands; allowing a fair inference that he did intend to settle and occupy. Moreover, nothing in the Compromis indicates that he was vested with the authority to claim territory on behalf of Rydal. Therefore, there was no intentional act by Rydal acting as, and on behalf of, the sovereign. The person asserting sovereignty must have been authorized by the sovereign in whose name he is purporting to act. Although an admiral of the navy, there is no evidence that he was specifically authorized or vested with the power to claim territory on behalf of the Rydalian crown.[8]
Even if Aikton did not have the authority to act on behalf Rydal when he settled and occupied the Islands, Queen Constance subsequently ratified his acts and adopted them as her own. The dispute is between Rydal and Aspatria (not Plumbland) therefore the earliest critical date is 1826 when Aspatrian President Diaz sent forces to take the Islands but failed. Moreover, the principle of critical date is neither universally accepted or appropriate for this case.	Queen Constance's subsequent ratification of Aikton's acts did not retroactively establish intent to act as sovereign. September 1818 is the critical date for this dispute, since that is when Plumbland learned of Rydal's presence on the islands. Queen Constance's subsequent ratification was thus a self-serving and irrelevant event with regard to the sovereignty dispute. Rydal did not act with the intent to occupy the Islands until Queen Constance sent the HMS Braithwaite and a governor to the Islands.

[7] *Islas Palmas*, p. 15 ("[I]nchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State[.]").

[8] *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (Malaysia/Indonesia), ICJ Judgment, 17 December 2002, p. 140 [hereinafter *Pulau Ligitan*] ("The Court observes, however, that activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority."); *Fisheries Case* (United Kingdom v. Norway), ICJ Dissenting Opinion of Judge Arnold McNair, 18 December 1951, p.72 ("Another rule of law that appears to be relevant to the question of historic title is that some proof is usually required of the exercise of State jurisdiction, and that the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them.").

Rydal	Aspatria
	However, by this time, it was too late, because Rydal was aware of the competing claim to the Islands by Plumbland. From this point on, despite Rydal's long and continuing occupation, the consistent protests of Plumbland and Aspatria have prohibited Rydal's inchoate title from being perfected.
Thirty-six years passed between Parish's landing and Aikton's occupation, which is a reasonable amount of time within which to perfect title, especially since the Islands were uninhabited and relatively inaccessible during the intervening period.[9]	Rydal did not occupy the Islands within a reasonable period of time. Plumbland's competing claim to the Islands shortened the reasonable time period for Rydal to perfect its title. The nature of the territory is such that Rydal should and could have perfected sooner.[10]

(c). Conquest

In 1826, Aspatria sent a force to the Islands to attempt to take them by force. It is clear that conquest was a classic means of acquiring sovereignty. In 1826 the prohibition of waging war as an instrument was still a century away.[11]

Rydal	Aspatria
Aspatria's attempt to seize the Islands in 1826 was a use of force against Rydal which was defeated. Thus, even if Plumbland had a valid claim to the Islands, it was lost through conquest.	A use of force to repel an attempt to take possession of territory by another is different in character from a use of force to take territory by conquest. There is a different intention, and the intention is significant.
A state of war does not necessarily have to have been declared.	Subjugation concerns the seizure by the use of force and requires a state of war to exist.

(d). Prescription

Prescription is a legal term referring to the acquisition of title to property as a result of undisturbed continuous possession for an extended duration. The ICJ has acknowledged that in certain circumstances, sovereignty over territory might pass as a result of failure to respond to concrete displays of territorial sovereignty by another State.[12] The ICJ, however,

---

[9] *Clipperton Island*, p. 392-393. In this case, Mexico claimed that Spain discovered Clipperton Island and Mexico succeeded to Spain's title in 1836. The arbitral award found that since Mexico did not exercise any manifestation of her sovereignty over the island until 1897, "the mere conviction that this was territory belonging to Mexico, although general and of long standing, could not be retained." Consequently, the island was *terra nullius* and susceptible of occupation in 1958, the year France proclaimed her sovereignty over the island.

[10] Teams may distinguish the facts of the *Case Concerning the Windscale Islands* from *Pedra Branca* and *Legal Status of Eastern Greenland* (Norway v. Denmark), PCIJ Judgment, (ser. AB) No. 53, 5 April 1933, pp. 45-52 [hereinafter *Eastern Greenland*]. In *Eastern Greenland,* pp. 50-51, the Court held that limited displays of authority were sufficient to establish sovereignty beyond the colonized area of Eastern Greenland there was no competing claim and because of "the Arctic and inaccessible character of the uncolonized parts of the country"; in *Pedra Branca* ¶66, the Court held that this same conclusion extended to the "tiny uninhabited and uninhabitable island [of Pedra Branca/Pulau Batu Puteh], to which no claim of sovereignty had been made by any other Power."

[11] Kellogg-Briand Pact of 1928.

[12] *Pedra Branca*, ¶121, p.37.

has stopped short of concretely affirming the status of acquisitive prescription in international law or identifying the conditions for acquiring title to territory by prescription.[13]

In order for acquisitive prescription to occur, the possession of the acquiring state must be:

- *á titre de souverain* (consistent with sovereignty)
- open and notorious (public)
- peaceful (acquiescence by any state that has any title)
- continuous (uninterrupted)
- enduring (for a certain substantial length of time)

Rydal	Aspatria
Even if the Viceroyalty of Aspatria is found to have title, Rydal subsequently acquired that title through acquisitive prescription.	Rydal did not acquire title by prescription, which requires undisturbed exercise of sovereignty and acquiescence.
Plumbland and Aspatria's protests were not sufficient: • The protests amounted to nothing more than diplomatic acts. • Neither requested or referred the matter for settlement by an international tribunal.[14]	There has been no acquiescence. Ever since Plumbland first learned of Rydal's display of sovereignty on the Islands (as a result of Captain Crook's attempt to set up a penal colony on the Island), there have been consistent protests: • Plumbland's immediate diplomatic protest in 1818 after learning of Rydal's presence on the Islands • Aspatrian President Diaz's attempt to seize the Islands in 1826 • Aspatria's continuous diplomatic protests (except for 1880-1910) • Aspatria's protest when it joined the U.N. in 1949. Plumbland could not be expected to engage in anything more than diplomatic protests since it was at war. Moreover, Aspatria was a new republic and had limited resources. Protests are sufficient to avoid prescription and there is no requirement to refer a dispute to international tribunals or other settlement mechanism.[15]
Moreover, Rydal satisfied the undisturbed sovereignty element when Aspatria ceased protesting between 1880 and 1910.	Aspatria did not acquiesce to Rydal between1880-1910 because it was not reasonable to expect Aspatria to protest during a time of political and economic

[13] *Kasikili/Sedudu Island* (Botswana/Namibia), ICJ Judgment (1999) [hereinafter *Kasikili*] (acknowledging that both parties accepted the principle of acquisitive prescription under international law and the conditions required for satisfying it, but rejecting Namibia's claim of acquisitive prescription for failing to satisfy the condition that possession be exercised *á titre de souverain*, consistent with sovereignty).

[14] *Minquiers & Ecrehos*, Individual Opinion of Judge Levi Carneiro, 17 November 1953, ¶21 (opining that France, which was claiming sovereignty, ought to have proposed arbitration; and that decisive and immediate intervention is much preferable to allowing a dispute to be prolonged on the basis of "mere periodical and ineffectual paper protests").

[15] *Chamizal Arbitration* (1911), 5 AJIL 782, RIAA, xi. 316 (US claim failed on the ground that the possession had not been without challenge).

Rydal	Aspatria
	crisis. Further, there is no authority that 30 years is a sufficient amount of time to give effect to the prescriptive title.

(e). Abandonment

Abandonment of territory requires not only failure to exercise authority over the territory, but also an intention to abandon the territory. The *Clipperton Island* arbitral award famously held that France had not lost her right by "dereliction," to Clipperton Island, since she never had the animus of abandoning the Island.[16] The fact that she had not exercised her authority there in a positive manner did not imply the forfeiture of an acquisition that had already definitively been perfected.

Rydal	Aspatria
Plumbland abandoned the Islands, after which the Islands returned to the status of *terra nullius*, and Rydal acquired title by effective occupation thereafter through Aikton's acts, which Queen Constance validly adopted retroactively. (see above)	Loss of sovereignty via abandonment requires actual abandonment and the intention of giving up sovereignty. There was no express intent by Plumbland to abandon the Islands. To the contrary, the notice left by Lieutenant Ricoy shows that there was no intention to abandon.
Abandonment can be presumed from the actual abandonment by Ricoy plus the inactivity of the Viceroyalty of Plumbland towards the Islands for 17 years thereafter.[17]	

7. Aspatria's Claim of Sovereignty

(a). First Effective Occupation by Plumbland

Aspatria	Rydal
States may intervene to effectively occupy a territory while another State possesses only inchoate title over that territory.	States may only acquire title via effective occupation on *terra nullius*.[18] At the time Lieutentant Ricoy of Plumbland arrived, the Islands were not terra nullius because Rydal had already obtained either absolute or inchoate title to the Islands.

[16] *Clipperton Island*, p. 394.

[17] "Abandonment may be presumed from inactivity if there was a competing claim or if inactivity was so long and continuous as to constitute abandonment or to lead to an irresistible inference of intention to abandon, even if only tacit." Sir Gerald Fitzmaurice, *The Law and the Procedure of the International Court of Justice*, 32 B.Y.I.L. 20, 20 (1955-56).

[18] *Western Sahara*, ICJ Advisory Opinion, 16 October 1975, p. 39 [hereinafter *Western Sahara*] ("The expression 'terra nullius' was a legal term of art employed in connection with "occupation" as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be terra nullius – a territory belonging to no-one – at the time of the act alleged to constitute the "occupation". . . In the view of the Court, therefore, a determination that Western Sahara was a 'terra nullius' at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'); *Clipperton Island*, p.393-394 ("that island was in the legal situation of *territorium nullius*, and, therefore, susceptible to of occupation").

Aspatria	Rydal
Plumbland interrupted Rydal's inchoate title when it landed and settled Salkeld. Pumbland's effective occupation of Salkeld established title over all islands in the archipelago.[19]	Plumbland's intervening settlement at Salkeld did not compromise Rydal's inchoate title because it did not amount to effective occupation, which requires possession and administration. Plumbland did not possess or display actual authority over the Islands.[20] Plumbland settled only Salkeld, and allowed pirates and other sea-farers to use the other Islands, acts which are inconsistent with sovereignty. Plumbland, therefore, did not obtain title over the whole archipelago.
It is not necessary for a State to exercise authority over all of the territory all of the time in order to gain or retain sovereignty.[21] The intention was to claim the entire archipelago. Ricoy was sent by the Viceroyalty of Aspatria to "settle and claim" the Islands; and the notice that he posted states that "*these Islands* were first settled."	

(b). Uti Possidetis Juris

The principle of *uti possidetis juris* (UPJ) serves to preserve the boundaries of colonies emerging as States.[22] Originally applied to establish the boundaries of decolonized territories in Latin America, UPJ has become a rule of wider application, notably in Africa.[23] The principle has undeniably been accepted as a customary norm in the colonial context, especially when there is explicit or implied consent of the states concerned. However, there is still considerable debate over whether the principle of UPJ applies in other contexts and to the full extent of its scope.

---

[19] *Eastern Greenland*, pp. 45-52 (finding that the King of Denmark's pretensions to be sovereign over the whole of Greenland could not be limited to only the colonized portions of Greenland because various pieces of legislation showed the King was exercising authority over the whole of Greenland).

[20] *Clipperton Island*, p. 393-94 (requiring an act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there).

[21] *Islas Palmas*, p. 9 ("Although continuous in principle, sovereignty cannot be exercised in fact act every moment on every point of a territory...[I]n exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a state cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent.")

[22] *Frontier Dispute* (Burkina Faso/Republic of Mali), ICJ Judgment, 22 December 1968, ¶20 [hereinafter *Burkina Faso/Mali*] (UPJ is a "general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. It's obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power…Its purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored.").

[23] *Burkina Faso/Mali*, ¶20, p.15 ("Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.").

The ICJ has noted that it is difficult to ascertain precisely where the administrative borders lay.[24] The ICJ also observed that the principle of UPJ is not absolute, but rather a "retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes."[25] It is further said that the date of independence is not the only date which is of importance and that other critical dates can arise for example by adjudication or from a boundary treaty.[26]

Uti possidetis juris (or *uti possidetis de jure*) is to be distinguished from *uti possidetis de facto* (sometimes just referred to as *uti possidetis*), a principle which determines ownership on the basis of effective possession rather than colonial title.

Aspatria	Rydal
Aspatria inherited title to the Islands from Plumbland, based on the principle of *uti possidetis juris*, because the Islands were part of the Viceroyalty of Aspatria. When Aspatria became independent, the Islands became independent along with it and have remained a part of Aspatria ever since.	Even if Plumbland had sovereignty over the Islands, Aspatria did not inherit title under the principle of *uti posseditis juris*. The principle of UPJ is not universal and does not apply to this case.
The relevant date on which to examine the colonial borders is Aspatria's declaration of independence on 2 November 1819.	Diaz' declaration of independence, an illegal act, is not the relevant date for determining colonial borders. The territory of the Islands could not be conveyed away from Plumbland by a unilateral act of revolutionaries no more than the rest of Aspatria could. Until Aspatria attained recognition as a state, it could not acquire sovereignty over the Islands. Rydal recognized Aspatria's independence in 1827; Plumbland did so in 1839 in the Treaty of Woodside. By then, the Islands had already been ceded to Rydal, by Plumbland in 1823 through the Treaty of Great Corby, and thus the colonial boundaries had been redrawn.
The exercise of administrative authority may be used as evidence of juridical boundaries inherited under	Aspatria cannot positively show that the Islands were administered by the Viceroyalty of Aspatria or that

[24] *Land, Island, and Maritime Frontier Dispute* (El Salvador/Honduras), ICJ Judgment, 11 September 1992, ¶28, p.33 [hereinafter *El Salvador/Honduras Frontier Dispute*].

[25] *El Salvador/Honduras Frontier Dispute* , ¶43, p.41.

[26] *El Salvador/Honduras Frontier Dispute* , ¶67, p.54.

[27] *Honduras Borders* (Guatemala v. Honduras), 23 January 1933, 2 R.I.A.A. 1309, 1324 (For the purpose of drawing the line of "uti possidetis of 1821," the Tribunal held that "where administrative control was exercised by the colonial entity with the will of the Spanish monarch, there can be no doubt that it was a juridical control, and the line drawn according to the limits of that control would be a juridical line."); *Burkina Faso/ Mali*, ¶63, p.37 (While treaties and maps are most authoritative, the conduct of administrative authorities, "colonial effectivités," may be considered as proof of the effective exercise of territorial jurisdiction in a region during a colonial period. The force of such colonial effectivités is relative. The Court said that where they conflict with actual legal title, preference should be given to the holder of the title. However, if there is no co-existent legal title, colonial effectivités "must invariably be taken into consideration.").

Aspatria	Rydal
UPJ.[27] Facts that indicate the Viceroyalty of Aspatria administered the Islands: • Lieutenant Ricoy was sent by the Viceroy of Aspatria to settle and claim the Islands • The Viceroy of Aspatria tried to establish a penal colony on the Islands. • Aspatria's Constitution provides that the Islands are included in the new republic; it did not state that it was a separate administered territory Moreover, Plumbland acknowledged in the treaty of Woodside that the Islands were part of the territory of the Viceroyalty of Aspatria.	they were within the territorial boundary of the Viceroyalty of Aspatria.[28]
The principle of UPJ should be upheld, even today, as redress for Rydal's illegal occupation of the Islands.	The principle of UPJ does not apply to disputes such as this, where the dispute is not between former states of a single colonial sovereign.

8. Evaluating Competing Claims of Effective Occupation

Aspatria	Rydal
Given its history as a former colony which has struggled throughout recent history to establish itself as a stable and viable state, Aspatria could not be expected to militarily or diplomatically challenge Rydal's occupation. Despite this limitation, Aspatria has taken every available action within its means to protest Rydal's occupation.	When there are two competing claims of effective occupation, the ICJ will assess the competing acts of state authority to determine which claim is stronger. Rydal's claim is stronger because it has manifested effective control over and governed the entire archipelago for much longer than Aspatria.
The dispute crystallized[29] in 1818[30] when both States formally opposed each other's claims to the Islands. Rydal's endorsement of Admiral Aikton's acts and subsequent occupation of the Islands should not be considered by the Court because these were undertaken to improve its legal position.[31]	The dispute did not crystallize between these two states until 1826 at the earliest, but even if the dispute with Plumbland, which crystallized in 1818 is relevant, Rydal's subsequent occupation of the Islands and Queen Constance's adoption of Admiral Aikton's acts may be considered by the Court as a normal continuation of prior acts of occupation.
State practice supports uniting non-self-governing territories with contiguous territories that share a	"The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in

---

[28] *Territorial and Maritime Dispute* (Nicaragua v. Honduras), ICJ Judgment, 8 October 2007, ¶158, p.45 ("[I]n order to apply the principle of *uti possidetis juris* to the islands in dispute, it must be shown that the [sovereign] had allocated them to one or the other of its colonial provinces.")

[29] *Pedra Branca*, ¶32 ("[I]n the context of a dispute related to sovereignty over land…the date upon which the dispute crystallized is of significance. Its significance lies in distinguishing between those acts which should be taken into consideration for the purpose of establishing or ascertaining sovereignty and those acts occurring after such date.").

[30] *Compromis*, ¶15

[31] *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (Malaysia/Indonesia), ICJ Judgment, 17 December 2002 [hereinafter *Pulau Ligitan*]. ("The Court … cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them.").

Aspatria	Rydal
common heritage, rather than allowing those territories to become independent States.[32]	international law."[33]

B. Claim 1(b): Self Determination Rights of the Islanders

1. Preliminary Matters

(a). Relation of Claim 1(a) to Claim 1(b)

Teams should be prepared to explain the relationship between claims 1(a) and 1(b). Some teams may argue that sovereignty must be determined before the issue of self-determination can be addressed. Others will portray the questions of sovereignty and self-determination as inextricably intertwined, dealing with them as a single legal question.[34]

Judges should also note that if Rydal wins on claim 1(a), then Rydal, as sovereign, can cede the territory of the Islands to its inhabitants and "grant" independence. In this situation, Aspatria would have very little reason or justification to argue claim 1(b) that the Islanders are not entitled to independence.

For the sake of exploring both claims fully, we recommend that judges avoid ruling from the bench on claim 1(a) or in any other way drawing conclusions that would foreclose argument on claim 1(b) by Aspatria. Instead, we suggest that judges use hypothetical questions such as "If this Court finds in favor of the other party on claim 1(a), where does that leave your case?" This question will invite an Aspatrian team to make a concession about the relationship between the claims without admitting defeat on claim 1(a), and thus permitting them to move on to the merits of claim 1(b).

(b). Standing

When claims 1(a) and 1(b) are considered together, Rydal and Aspatria can easily demonstrate standing because each is asserting its rights/obligations against the. However, if the Court were to rule on claim 1(a) as a separate legal question, then standing under claim 1(b) is less certain. Some Aspatrian teams may argue that Rydal would not have standing to argue claim 1(b) if Aspatria prevailed on 1(a) because Rydal cannot espouse a claim of self-determination on behalf of the islanders, who have been determined not to be subjects of Rydal. As a counterargument, Rydal might appeal to the *erga omnes* or universal

---

[32] Britain agreed to transfer sovereignty over Hong Kong to the People's Republic of China in the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong; In 1961, India invaded and annexed Goa, then a Portuguese territory.

[33] *Islas Palmas,* p. 35

[34] Rosalyn Higgins says that determining where territorial sovereignty lies must be done before addressing whether there is a right to self determination. Rosalyn Higgins, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 127 [hereinafter *HIGGINS: PROBLEMS AND PROCESS*]. Other publicists believe that the question of sovereignty may be tied up in matters relating to the self-determination rights of the peoples who inhabit the disputed territory.

character of the right to self-determination and the fact that Rydal has committed to assisting the Islanders transition to independence, thus creating an international obligation to invoke as a basis for direct standing.

2. The Principle of Self-Determination

Self-determination is an historic legal concept that has evolved and devolved significantly over the past century. In the early 1900's, international support grew for the right of all people to self-determination. This led to successful secessionist movements during and after WWI, and laid the groundwork for decolonization. The U.N. Charter and the International Covenant on Civil and Political Rights both enshrine self-determination as a right of "all peoples." The questions remain: what does this right entail, and what constitutes a "people"?

3. The Islands Status as a listed Non-Self Governing Territory

The Islands were listed by Rydal as a Non-Self Governing Territory, which is a term used by the United Nations to refer to territories under the administrative control of a foreign power. Almost all of the countries that have ever been listed as a non-self governing territory are former colonies. The list was created as part of a U.N. campaign to decolonize the world and grant independence to peoples who have been historically subjugated. Depending on which party is represented, teams will argue that this status means different things.

Aspatria	Rydal
The Islands should have never been listed as a non-self governing territory in light of the sovereignty dispute (similar to the Falkland Islands/Malvinas dispute); and even if the Islands properly carry such status, there is no obligation to bring the Islands towards independence	The international community has an obligation to move non-self governing territories towards independence. U.N. General Assembly Resolution 1514.

4. Definition of "a people"

Very little consensus exists regarding the definition of "a people." Widely espoused definitions include: the entire population of a territorial unit; a group bound by common ethnicity and language; a group "native" to the land; and a disenfranchised portion of a greater population. Judges should question students about the definition they choose, how it relates to the scope and purpose of the right of self-determination; and whether the Islanders fit the definition.

Aspatria	Rydal
The Islanders are not a people entitled to external self-determination.	The Islanders are a people that have the right to external self-determination.
The inhabitants are not native to the Islands or ethnically distinct. Moreover, these are not stateless individuals. They are citizens of Aspatria.	The inhabitants are "first settlers" in a previously uninhabited territory. Although they come, historically, mainly from Rydal, the population was augmented by the former slaves, who are likely to have been significantly different in terms of ethnicity. After 200 years of intermarrying and producing offspring, the inhabitants have emerged as an ethnically distinct group.

5. Independence/Secession

Students may also refer to "internal" and "external" self-determination, which demonstrate the idea that self-determination exists on a spectrum, with the internal form being achieved through the realization of various political and social rights, and external self-determination being the achievement of full independence/secession. This development acknowledged that a certain measure of internal self-government may be sufficient to guarantee self-determination for a people. One modern viewpoint asserts that people are not entitled to external self-determination, or full independence/secession, unless their government has violated or failed to guarantee their fundamental human rights.

Aspatria	Rydal
An automatic right to independence does not flow from the right of self-determination. The ICCPR states that a people, by virtue of the right of self-determination, only has the right to freely determine their political status and development. Independence is not a guaranteed right of peoples.	The people of the Islands are entitled to independence. As recognized in UN General Assembly Resolution 1541, the peoples of non-self governing territories should be moved towards independence if they so choose.
External self-determination is warranted only when a people are repressed by their and the only way to grant internal rights of self-determination (e.g., political participation) is by independence/ secession. There is no reason to believe that Aspatria would not guarantee the Islanders' their right to internal self-determination; and thus no reason why the last resort of independence/secession is warranted.[35]	Independence/secession is appropriate when that is the choice of the people.[36]
The people of the Islands are not entitled to external self-determination because they have not proven they can form a viable independent state.	

6. Referendum/Plebiscite

Aspatria	Rydal
If the Court finds that Aspatria is the rightful sovereign, as it should, then Rydal has no standing to raise a claim of self-determination on behalf of a people whose nationality is not Rydalian.	Rydal is obligated to assist the Islands in transitioning to full independence because it is the administering authority.[37] In the alternative, Rydal is permitted to assist the

[35] Aaland Islands, *The Aaland Island Question: Report of the Committee of Jurists*, League of Nations, Official Journal, Special Supp. No. 3 (October 1920). Rosalyn Higgins argues that self-determination is not a right to independence, but that "what is important is that a proper range of options is laid before a dependent people and that they are given the opportunity to express their choice." *HIGGINS: PROBLEMS AND PROCESS*, p. 111.

[36] Professor Christian Tomuschat takes the view that a people "are entitled to decide what way to go. In each and every case all the possible options are open to them. They cannot be prevented from choosing independent statehood." *Self Determination in a Post-Colonial Word*, in MODERN LAW OF SELF-DETERMINATION (Tomuschat ed. 1993) at 12.

[37] United Nations Charter, art. 73(b); International Covenant on Civil and Political Rights, art. 1(3); International Convenant on Civil, Economic, and Political Rights, art. 1(3); United Nations General Assembly Resolution 1514 (XV), Declaration on the granting of independence to colonial countries and people, principle IV (4 December 1960).

Aspatria	Rydal
	Islands in transitioning to full independence because respecting the self-determination of peoples is an erga omnes obligation, and all States have a legal interest in protecting this right.
The holding of the referendum was in contravention of international law and therefore illegitimate. There is no evidence to show that it comported with international standards, which include internal monitoring mechanisms, international observation, and clear ballots that list all options.[38]	The referendum was legitimate because it was initiated and organized by the islanders themselves. The ballot offered three clearly stated options and 93% of the people voted. The plebiscite resulted in 76% voting in favor of full independence, a clear expression of the people's will to form their own independent state.

7. Self Determination vs. Territorial Integrity

While the early goals of self-determination were secession and full independence, the principle soon came to a head with the competing principles of territorial integrity and *uti posseditis juris*. Later U.N. resolutions qualified the right, noting that it can be achieved without independence, and requiring its achievement to comport with the principle of territorial integrity. Although the inspiration for the principle of self-determination was those who had been subjugated by colonizers, it was former colonies who began to claim that the principle of self-determination had been taken too far and resultantly undermined their claims to territories inherited under the principle of uti posseditis juris. Around the same time, groups of ethnic peoples claiming a right to self-determination outside of the context of colonization began to emerge, causing the principle's early supporters to demure. Hence the references to "pre-decolonization" and "post-decolonization" theories of self-determination.

Aspatria	Rydal
The principles of territorial integrity and *uti possidetis juris*[39] prevail over the right of self-determination.	The right of a people to self-determination is a peremptory norm of international law[40] and therefore overrides any completing claims based on territorial integrity.
Benedetto Conforti:[41] Then there is the principle of 'territorial integrity',	Benedetto Conforti:[43] [T]here is a general limit deriving from the principle

[38] United Nations General Assembly Resolution 1541 (XV), at Principle IX ("The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic process, impartially conducated and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.").

[39] *Burkina Faso/Mali*, ¶¶25-26, pp.16-17 ("At first sight this principle [UPJ] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.")

[40] *East Timor* (Portugal v. Australia), Judgment, (1995) I.C.J. Rep. 90, ¶29 [hereinafter *East Timor*]

[41] Benedetto Conforti, *The Law and Practice of the United Nations*, p.261-62.

Aspatria	Rydal
according to which consideration must be given to the historical-geographical ties between the territory to be de-colonized and a bordering State which has previously come into being through de-colonization. The content of this principle is not entirely clear. It is, doubtlessly, a rule that is able to derogate from the principle of self-determination only when, as for example, in the case of the Falkland/Malvinas Islands or of Gibraltar under British rule, the majority of the local population is not native but 'imported' from the mother country. [42]	of self-determination of peoples, the principle that underlay the practice which overwhelmed article 73 [of the UN Charter]. This principle…obliges the Assembly to decide on the future of a non-self-governing territory by taking into account of the aspirations of the local population. According to the opinion expressed by the International Court of Justice in the Western Sahara case of October 16, 1975 (ICJ, Reports, 1975, p 33, no. 59), the Assembly may decide, if special circumstances so require, without consulting the inhabitants of the territory and as long as the aim of respecting their wishes is in some way satisfied. . . . Also in these cases, one must ask, however, in what sense, and up to what point, the claims of the bordering State are to be satisfied." Addressing the issue of self-determination in the context of a sovereignty dispute.

III. Bilateral Investment Treaties

A. History

Investors are hesitant to invest in countries where laws and other government mechanisms may be unpredictable or hostile with regard to foreign investments. Although foreign investors are protected by rules of customary international law, the imprecise nature of these protections and the lack of enforcement mechanisms have historically proven to be an unsatisfactory risk. To address these concerns and encourage foreign direct investment, States enter into treaties with their trading partners to specify the exact terms of the protections that investments of their nationals will enjoy abroad.

The first generation of these treaties were Friendship, Commerce and Navigation Treaties (FCNs), which required the host state to treat foreign investments on the same level as investments from any other state, including in some instances treatment that was as favorable as the host nation treated its own investments. FCNs also established the terms of trade and shipping between the parties, and the rights of foreigners to conduct business and own property in the host state.

The second generation of these treaties are Bilateral Investment Treaties (BITs), which set forth *actionable* standards of conduct that applied to governments in their treatment of investors from other states, including very importantly provisions on expropriation and the

---

[42] T. Franck and P. Hoffman, *The Right of Self-Determination in Very Small Places,* 8 N.Y.U.J.I.L.P 331, 383 (1976) ("[I]n modern international law the right of self-determination would have to take priority over a [territorial] claim going back almost 150 years.").

[43] Benedetto Conforti, THE LAW AND PRACTICE OF THE UNITED NATIONS 261-62.

repatriation of capital. Since the first BITs were signed fifty years ago, most countries of the world have entered into BITs. It is estimated that there are more than 2500 BITs in force today.[44]

B. Developing States and BITs

"There is a highly competitive global market for foreign direct investment. The standing of each nation state in that market depends upon a myriad of factors, among which the stability and predictability of the existing regulatory regime for investments is always important and often decisive…

[T]he protection afforded by investment treaties is tangible enough to feature in the investor's calculus of investment risks. An investment treaty can thus serve to bridge part of the gap between the perception of sovereign risk in a developing country, on the one hand, and in a highly developed country with public institutions that have acquired a firm reputation for fairness and transparency, on the other.

An investment treaty cannot, of course, be expected to bridge that gap entirely. That is not its function. Investment treaties do not create a uniform law on the establishment, acquisition, expansion, management, conduct, operation or alienation of foreign investments; their object and purpose is not to create a single regulatory regime for foreign investment. Sovereign risk will vary considerably from country to country regardless of the existence of investment treaties. For a developing country to compete successfully for foreign direct investment, however, it is sufficient if the level of sovereign risk is counterbalanced by its comparative advantages as a destination for foreign capital (cheaper labour or material costs, expanding consumer markets, higher profit margins, etc.). An investment treaty can assist a developing country to tip these scales in its favour."[45]

C. Aspatria-Rydal BIT

The bilateral investment treaty between Aspatria and Rydal is similar to other real world BITs. The full agreement is not included in the Compromis. Only the following key provisions have been provided:

- Definition of investment
- Definition of investor
- National treatment and most-favored-nation provision
- Fair and equitable treatment provision
- Expropriation provision
- Dispute resolution provision for State-State claims

---

[44] UNCTAD, WORLD INVESTMENT REPORT 2007 (2007) xvii, *available at* www.unctad.org/en/docs/wir2007p1_fn.pdf.

[45] Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 1-2 (Cambridge University Press 2009).

D. Compromissory Clause of the Aspatria-Rydal BIT

The typical investment dispute under a BIT is a cause of action brought by a corporation directly against a State before an alternative dispute resolution forum such as an arbitral tribunal. The most common venues for such cases are specialized arbitration institutions such as ICSID (International Centre for Settlement for Settlement of Investment Disputes), regional trade unions such as NAFTA (North American Free Trade Agreement), or other international *ad hoc* arbitrations such as those governed by the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules.

Less common are investment disputes directly between two states. Even less common are investment disputes brought between two states before the ICJ. Although the ICJ has decided at least one case under a friendship, commerce and navigation (FCN) treaty,[46] which is the 19th century predecessor of the bilateral investment treaty, the ICJ has never decided a dispute where one state invokes a BIT against another state. Because of this lack of precedent and because investment disputes are typically not before the ICJ, some teams may try to challenge the jurisdiction of the Court. However, such arguments would be misplaced since the ICJ clearly has jurisdiction over this case by virtue of the Special Agreement and the jurisdictional clause in Article XIII of the Aspatria Rydal BIT.[47]

IV. Claim 2: Rejection of MDR's Bid

A. Standing

In the second claim, the directly affected party is MDR, whose bid for the license to exploit oil was rejected. Aspatria seeks to exercise diplomatic protection on behalf of MDR. Teams will be able to easily demonstrate the requirements for exercising diplomatic protection. First, MDR is genuinely linked to Aspatria because MDR is incorporated in Aspatria. Second, MDR has exhausted local remedies by seeking and being denied relief in a final judgment in Rydalian courts.[48]

B. Applicability of the BIT

Teams should first address whether the Aspatria-Rydal BIT applies to the dispute. *Aspatria* will argue that protection extends to investments and investors, and that both are present in this case. *Rydal* will argue that Aspatria cannot invoke the BIT because an investment has not been established. *Rydal* will claim that a bid to acquire a license does not amount to an investment.

---

[46] Case Concerning Elettronica Sicula S.P.A. (United States of America v. Italy), 20 July 1989 [hereinafter *ELSI*].

[47] Article XIII, Aspatria-Rydal BIT.

[48] Compromis ¶¶45, 61; Clarification 3; Correction 2.

1. Is there a protected investment?

The BIT defines "investment" as "every asset of an investor that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." The BIT identifies enterprises and license as examples of forms that an investment may take.

To qualify for investment treaty protection, an investment must incorporate certain legal and economic characteristics. The economic characteristics derive from the common conception of a foreign direct investment. The legal characteristics derive from the non-exhaustive list of examples, which are present in most investment treaties, of the characteristics and forms that define the term "investment."[49]

The characteristics of an "investment" identified in the Aspatri-Rydal BIT are:

- Commitment of capital or other resources
- Expectation of gain or profit
- Assumption of risk

The potential forms of an "investment" identified in the Aspatri-Rydal BIT are:

- enterprise
- shares, stock, and other forms of equity participation in an enterprise
- licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law

Aspatria	Rydal
"Investment" should be broadly defined based on the expansive language of the BIT.	Investment should be interpreted strictly. Even under the broad language of the BIT, an investment has not been established.
MDR has made an investment in Rydal because: 1. MDR *committed resources* in bidding for the Rydalian license: • MDR had to have a registered office in Rydal in order to make the bid • MDR committed to pay $500 million if the bid was selected • MDR committed corporate resources to be	The BIT does not cover prospective investments. There is no investment because MDR had not yet acquired the license and therefore could not expect any gain from their activities in Rydal. In making the bid, MDR did not contractually commit any money and had not assumed any risk. A bid for a contract is not an investment. Not even the acceptance of a bid is an investment. Until a contract has been concluded, an investment has

[49] *See, e.g.*, A. Adhar, ECONOMIC DEVELOPMENT INSTITUTE OF THEWORLD BANK, TERMS USED IN INVESTMENT DECISIONMAKING: A GLOSSARY 46 (1996); J. Downes & J. Goodman, DICTIONARY OF FINANCE AND INVESTMENT TERMS 350 (6th ed. 2003); F. Perry, A DICTIONARY OF BANKING 127 (1983) 127; G. Bannock and W. Manser, The Penguin International Dictionary of Finance 145 (3rd ed. 1999).

[50] "Whether costs, arising in the course of unsuccessful negotiations for a contract amount to an investment depends upon the circumstances. In the absence of a specific applicable treaty clause, the current understanding is that when the negotiations do not lead to a contract and no other type of investment is made, the potential investor is not in a position to raise a claim under a BIT. The applicability of the BIT presupposes the existence of an investment. In the leading case, *Mihaly v Sri Lanka*, the majority of the tribunal concluded: 'The Tribunal is consequently unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment. The *Mihaly v Sri Lanka* tribunal even went as far as stating, in an obiter dictum, that the existence of a duty, on the part of the host

Aspatria	Rydal
used for the oil exploitation • MDR expended time to develop a strategic plan 2. MDR reasonably *expected the gain* of receiving the license because MDR's bid was the most economically competitive and because the Assembly chose the bid.	not been made. *Mihaly v. Sri Lanka*[50] Moreover, the Compromis does not reveal why the registered office was established. No conclusion can be drawn that the office was established for the purpose of making the bid. Expenses arising from mere prospective or planned investments are not investments. A project must have been formalized or actually started in order to qualify as an investment.
The bid for the license is the expansion of MDR's already existing enterprise in Rydal, as evidenced by MDR's registered office in Rydal and Monte de Rosa's landholdings and other investments in Rydal.	The registered office is not sufficient on its own to be considered an enterprise. Nothing in the Compromis connects Monte de Rosa's landholdings and other investments in Rydal to the enterprise of oil exploitation and thus such interests cannot be used to prove the existence of an already existing enterprise.
Defining "investment" expansively to include bids for licenses accords with the policy of encouraging foreign investment by providing protection to any type investor commitment of resources, not just the straightforward cases where investors assume risk through contracts or infuse capital through equity purchases.	Defining "investment" liberally to include bids for licenses goes against the policy of preserving the sovereign right to control the entry of foreign investments according to domestic laws.
The applicability of the BIT is not dependent on a finding that an investment has been established. The protections of article IV of the BIT extend not only to investments, but also to investors.	It is unreasonable to interpret the BIT to extend to every situation where a national of another party is seeking entry to the host state. There is no precedent of any international arbitral tribunal finding that a BIT extends to protect a national of another party whose activities amount to nothing more than bidding on a prospective investment in the host state.

2. Is there a protected investor?

Unlike most BITs, the national treatment and MFN provision of the Aspatria-Rydal BIT (article IV) extends to investors as well as investments. If Aspatria fails to show that an investment exists, it may still be able to claim protection under these provisions. There are a few examples of similarly progressive national treatment and MFN provisions in real world BITs, the aim of which is to protect investors who incur significant expenditures in entering foreign markets and establishing investments.[51]

Aspatria	Rydal
Even if an investment has not been established, the	MDR could not have been considered an "investor

state, to negotiate in good faith would not be covered by the notion of investment." Dolzer & Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 70-71.

[51] See, e.g., U.S. Model Bilateral Investment Agreement and Canadian Model Foreign Investment Protection Agreement.

Aspatria	Rydal
Article IV protections of the BIT nevertheless extend to "investors", which include nationals of a Party who are "attempting to make an investment" such as MDR. (Note: Article IV covers investors and investments, while Article V and Article VI cover only investments. If Aspatria relies on this argument, they will be limited to claiming protection only under Article IV.)	attempting to make an investment" until its bid was accepted and MDR began negotiating a licensing contract with Rydal.
Protecting investors who are trying to establish an investment comports with the liberal economic view that BITs are intended to encourage foreign investment, and that protection at the stage of entry is necessary in order to achieve this aim. Aspatria will also point that some capital exporting countries, such as the United States and Canada, include increasing levels of pre-establishment protections in their model BITs.	Protection prior to the establishment of an investment is outside of the scope and purpose of BITs. Countries have the right to determine which foreign investments will be allowed within its borders. Every disappointed bidder should not be given an opportunity to raise a claim under a BIT.

3. Relationship between the Sovereignty Dispute to the BIT claims

(a). Is Aspatria's BIT claim an admission that Rydal has sovereignty over the Islands?

The BIT affords protection to nationals of one Party who have made an investment *in the territory* of the other Party. Aspatria is claiming that Rydal violated the BIT with respect to the investment of an Aspatrian corporation (MDR) in the territory of Rydal. This may lead some Respondent teams to argue that Aspatria's BIT claim is an admission that the Islands are within the territory of Rydal and therefore that Rydal is the rightful sovereign over the Islands. However, this argument itself relies on the investment being located in the Islands. While the oil is certainly located within the territory of the Islands, the investment is not the oil itself. "Investment" is a legal term of art, not a tangible item. Here, the investment is arguably not located within the Islands, but within Rydal proper (as an extension of an already existing enterprise – i.e., MDR and Monte de Rosa's business in Rydal). A Respondent oralist who makes the argument that Aspatria's BIT claim amounts to an admission should be prepared to define "investment" consistently with his or her theory.

(b). What happens to Aspatria's BIT claim if Aspatria wins on claims 1a and 1b?

If Aspatria were to win on claims 1a and 1b with a finding by the Court that the rightful sovereign of the Islands is Aspatria and that the Islanders are not entitled to independence, then the Islands become the "territory of Aspatria." If the Islands are Aspatrian, then what happens to Aspatria's BIT claim against Rydal? Is the BIT rendered inapplicable if the court finds that the "investment" is no longer within the territory of Rydal? As explained above, it is very unclear exactly where the investment is, and therefore, a concession on the BIT's inapplicability is not necessarily required if Aspatria is successful on its territorial sovereignty claim. Moreover, Aspatria could argue that its BIT claim survives because Rydal is still responsible for any action it took as acting sovereign against Aspatrian investments within territory it believed to be Rydalian. In any event, neither party is likely to raise this point since Aspatria wants to preserve its BIT claim and Rydal would never admit to the possibility of losing on claims 1a and 1b. Nevertheless, this may be an interesting point that Judges may want to broach since it explores the relationship between the various claims of this case.

C. Rydal's Responsibility for the Rejection of the Bid

Aspatria will have to show that Rydal is responsible for the alleged treaty violation that occurred as a result of the bid being rejected. In this case, Rydal could argue that it was not responsible because it was the Assembly of the Islands that rejected the bid, not the government of Rydal.

Aspatria	Rydal
Rydal is responsible because the Governor of the Islands, an official appointed by Rydal to administer the territory, had ultimate authority to approve or reject bids.	Rydal is not responsible because the Assembly of the Islands has constitutional authority to control the exploitation of its natural resources.
Rydal is also responsible because it interfered with the decision of the Assembly of the Islands to approve MDR's bid. The Governor of the Islands withheld her approval and invited the Assembly to reconsider, after which the Assembly promptly approved the ROCO bid. If the Rydalian government had not interfered, MDR's bid would have been accepted.	Rydal is not responsible because the Assembly of the Islands changed its mind on its own accord.
Rydal is responsible for the result of the bidding process because it is a State with international legal personality, with rights and responsibilities, whereas the Windscale Islands are not because they lack statehood and are administered by Rydal.	An administering authority cannot be held responsible for every act of officials in the territories within its control, particularly when those officials are vested with their own authority. In this sense, Rydal cannot be held responsible for the acts of the Assembly, who decided to reject the bid.

D. Violation of the BIT

1. Article IV – National and Most Favoured Nation Treatment

Article IV of the Aspatria-Rydal BIT states that investments *and investors* shall be accorded treatment no less favorable in like circumstances than the host state accords to its own investors. This is commonly known as a "National Treatment" provision.[52]

When analyzing whether this guarantee has been upheld, a comparison must be made between foreign investors and nationals who are in "like circumstances." In analyzing the similarity of circumstances, reference should be made to comparable investors in the same industrial sector. Even where nationals and foreign investors in like circumstances have been treated differently, a violation may not have occurred if the disparate treatment is

[52] The BIT also requires no less favorable treatment than the host state accords to investors of a non-Party. This is commonly known as a "Most Favoured Nation" (MFN) provision. The MFN provision is not the focus of this claim since there were no bidders from other countries and since the Compromis does not make reference to BITs that were in force between Rydal and other countries. However, some sophisticated teams may argue that Rydal must treat Aspatria as favorably as it treats other countries that are, like Rydal, members of the World Trade Organization. *Maffezini v. Spain* (2000), Case No. ARB/97/7, Decision on Jurisdiction, ¶45 (ICSID) ("[I]f a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.")

justified by reasonable policy aims and by the circumstances prevailing at the time the measure is adopted.[53]

Aspatria	Rydal
Rydal violated the national treatment provision of the BIT by refusing to accept the Assembly's choice of MDR's BID, instead favoring the ROCO bid, which was objectively inferior. The MDR bid offered $500 million upon signing and 50% of the proceeds to the Islands, as well as a detailed strategic plan, which included building facilities on the Islands and employing islanders. ROCO's bid merely promised 45% of the proceeds to the Islands.	MDR did not suffer unfavorable treatment because both bidders were subjected to the same procedures for making the bid and the same process and standards of evaluation.
MDR's bid was rejected for the sole reason that MDR is a not a Rydalian company, as reflected in the Governor's statement that the future of the Islands lies with "that community of states led by Rydal."	Although admittedly rejected for reasons that are unquantifiable in immediate financial terms, MDR's bid was rejected for legitimate reasons. As the governor stated, MDR's bid was only appealing in the short term. By contrast, ROCO's bid safeguarded the long-term viability of the territory and people. The Assembly stated that ROCO's bid was lucrative for the Islands.
The right of permanent sovereignty over natural resources only belongs to peoples and nations, and the Islanders are neither. In any event, it is Rydal who has violated this principle, not Aspatria, by favoring a bid that is less beneficial to the wealth and economic development of the Islands, and by pressuring and manipulating the Assembly of Islands to depart from its original decision.	Under the principle of permanent sovereignty over natural resources (See General Assembly Resolution 1803), the Islanders are entitled to protect and control their natural resources. Thus, the MDR bid could be rejected as the Islanders see fit.

2. Article V – Fair and Equitable Treatment

Preliminary Note: To sustain a claim under Article V of the BIT, Aspatria must demonstrate that an investment exists since this particular protection, unlike Article IV, does not also apply to investors.

Article V of the Aspatria-Rydal BIT states that investments shall be accorded treatment in accordance with customary international law, including fair and equitable treatment, full protection and security, and non-discrimination. This is commonly known as a "Fair and Equitable Treatment" (FET) provision.

The fair and equitable treatment standard is a principle of customary international law. The customary origin of the fair and equitable treatment standard makes it possible to define its

---

[53] *SD Myers, Inc. v. Canada*, UNCITRAL Case, Partial Award of 13 November 2000, ¶ 250-53; *Methanex Corporation v. United States of America*, UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, ¶¶11-21; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL/NAFTA, Award, 26 January 2006, ¶177; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶220.

content even in the cases where the treaty at issue fails to describe or regulate its content.

If there is not a specific definition in the treaty at issue, the fair and equitable treatment accorded corresponds to the international minimum standard.[54]

The 1926 *Neer* decision by the US-Mexico Claim Commission is the landmark ruling on the international minimum standard. The case was brought by the United States on behalf of the family of Paul Neer, an American citizen who had been killed in Mexico. The Commission awarded damages to compensate the family for suffering caused by the Mexican government's lack of diligence in prosecuting the culprits. However, the Commission found that the failure of Mexican authorities to apprehend and prosecute the culprits did not per se violate the international minimum standard on the treatment of aliens. The Commission expressed what has become the classic formulation of the international minimum standard as follows:

> The propriety of governmental acts should be put to the test of international standards...the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.[55]

The tribunal in *Waste Management* defined "unfair and inequitable conduct" as that which 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 — as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[56]

The tribunal in *International Thunderbird Gaming*, while finding that the content of the minimum standard under NAFTA should reflect evolving international customary law, observed that:

> Notwithstanding the evolution of customary law since decisions such as the Neer claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high as illustrated by recent international jurisprudence.

---

[54] "[T]he BIT requires the signatory governments to treat foreign investment in a fair and equitable way. Under international law, this requirement is generally understood to provide a basic and general standard which is detached from the host State's domestic law. While the exact content of this standard is not clear, the Tribunal understands it to require an international minimum standard that is separate from domestic law, but that is, indeed, a minimum standard. Laws that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith." *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001, ¶ 367(quotations omitted).

[55] *L.F.H. Neer and Pauline Neer (USA) v. Mexico*, 4 R.I.A.A. 60 (1926).

[56] Waste Management, Inc. v Mexico, ICSID No. ARB(AF)/00/03, Award of 30 April 2004, ¶ 98.

> For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.[57]

There is a trend in case-law that also incorporates into the minimum standard the legitimate expectations of the investor at the time the investment was made. Some tribunals have also found that the stability of the legal and business framework in the State is an essential element in the standard of what is fair and equitable treatment. The tribunal in the *Tecmed* decision held:

> The Arbitral Tribunal considers that this provision of the [BIT], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[58]

Similarly, the tribunal in Waste Management, interpreting the minimum standard provision of NAFTA, concluded that "it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[59]

Teams should be very careful in framing the standard. They should be able to address whether the fair and equitable standard is intended to protect investors only from unjust or arbitrary treatment or whether the standard also encompasses the protection of legitimate expectations.

Aspatria	Rydal
The standard of protection in Article V of the BIT requires that State parties treat investments with due process. The bidding process promised to be "open, transparent, and competitive." The lack of transparency and veto rights involved in determining which bid would be selected was a violation of due process, attributable to Rydal, and thus a violation of the BIT.[60]	Rydal did not violate Article V since it made no commitment or promise that the winner of the bid would be the most profitable offer. Rydal did not waive its sovereign right to make a decision as one of convenience that included political and other considerations, in addition to profit. Rydal stayed within the rules of the bidding process as they were announced and therefore,

[57] *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL Case, Award of 26 January 2006, ¶ 194 (emphasis added; footnotes omitted).

[58] *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/02, Award ¶ 154 (29 May 2003).

[59] *Waste Management*, ¶ 98.

[60] *Metalclad v. Mexico*, ICSID (W. Bank) Case No. ARB(AF)/97/1 (August 30, 2000), 40 I.L.M. 36, 49 88 (2001).

Aspatria	Rydal
	there was no denial of fair and equitable treatment.
Rydal rejected MDR's bid on the basis of its nationality and therefore violated its obligation, codified in article V of the BIT, not to discriminate against Aspatrian investments.	Rydal did not reject MDR's bid on the basis of nationality but on other legitimate factors such as political concern over fallout because of the sovereignty dispute with Aspatria.
As the decision was discriminatory in nature, no public welfare exception can be argued.	Rydal rejected MDR's bid for the purpose of safeguarding a public welfare interest such as the control of the Island's natural resources.

V. Claim 3: Seizure of ALEC's Assets

A. Standing

Respondent's first challenge is to establish that Rydal has standing to bring a claim redressing the seizure of assets in an Aspatrian corporation (ALEC).

When explaining its theory of standing, Respondent should identify whose rights are being asserted and what authority supports standing for that entity. There are three possible injured parties:

- ALEC (which had its assets seized)
- ROCO (which owns 80% of the shares in ALEC), or
- Rydal (which has an investment treaty with Aspatria that was allegedly violated).

Before tackling this analysis, teams and judges should acknowledge and understand the difference between a State's standing to bring a claim before the International Court of Justice and a company's standing to bring a BIT claim before an arbitral tribunal. Examples abound of arbitral tribunals allowing indirect claims by companies based on an ever expansive meaning of the term "protected investment." However, teams should be very careful in using such precedents because standing before the ICJ may require a different framework of analysis that refers instead to the body of precedents decided by the Court on the standing of States who are exercising diplomatic protection on behalf of shareholders in injured corporations.

1. Spectrum of Standing Theories

Weak Standing Theories

Indirect Injury to Shareholder–Rydal cannot exercise diplomatic protection on behalf of Rydalian shareholders whose claimed harm is merely the indirect effect of the reduction of their monetary shareholder interest in ALEC because of the seizure of the shares. Such harm is too attenuated and only harms the pecuniary interests, not rights, of the shareholder.

Direct Injury to State – One possibly theory of standing is based on direct injury to Rydal, incurred as a result of Aspatria's violation of the BIT. Under this theory, Rydal will not have to resort to the doctrine of diplomatic protection since the state is claiming direct harm. However, articulating the reparation sought will be difficult since the harm caused to the state as a result of the treaty violation is more abstract than the concrete financial harm

suffered by the corporation or the shareholders as a result of the asset seizure.

Mediocre Standing Theory

Direct Injury to Company – Rydal cannot exercise diplomatic protection on behalf of ALEC since the nationality of ALEC is Aspatria, not Rydal. However, there may be a narrow exception allowing a state to exercise diplomatic *protection by substitution* on behalf of shareholders in the case of injury to the company when the harm is caused by the state of incorporation AND a locally incorporated company was a prerequisite to doing business; however, this exception is controversial and teams utilizing this theory must convincingly establish that this exception has become a rule of customary law.

Strong Standing Theory

Direct Injury to Shareholder – The strongest theory of standing is one based on direct injury to the rights of Rydalian shareholders, rights which are distinct from those held by the corporation itself. Respondent teams utilizing this theory must specify which shareholder rights were violated and where those shareholder rights come from. Since the Compromis gives no information about local Aspatrian laws on shareholder rights, Respondent teams will have to rely on general principles and/or the Aspatria-Rydal BIT as a source for direct shareholder rights. Respondent teams should be prepared to compare the provisions relied upon in the Aspatria-Rydal BIT to the provisions relied upon by the ICJ in its decision in *ELSI*.

- Respondent teams might argue that Aspatria indirectly expropriated ROCO's shares in ALEC because the shares were rendered useless, thus depriving shareholders of direct ownership rights. The challenge here will be distinguishing this deprivation from a simple loss in value of shares.
- Alternatively, Respondent teams might argue that a shareholder has the right to control and benefit from the assets of a company in which it owns a controlling shareholder interest. However, Respondents will have to combat the prevalent view in municipal law that a company and its shareholders are distinct entities.
- Respondent teams might also argue that the purpose of the Aspatria-BIT is to protect investments, and that investments are in part defined in terms of shareholdings. Thus, a Respondent team might argue that ROCO, as a shareholder, has direct rights under the BIT which give it standing to raise a claim with respect to the seizure of the assets.

2. Legal Authorities on Diplomatic Protection

Barcelona Traction, 1970

Incorporation Rule. In *Barcelona Traction*, the ICJ held that "the right of diplomatic protection of a company belongs to its national State,"[61] which was defined as the State

---

[61] *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Second Phase Judgment, 5 February 1970 [hereinafter *Barcelona Traction*].

under whose law the company was formed or in whose territory it has its registered office.[62] Since diplomatic protection may be invoked only with regard to nationals, a state does not have standing to espouse claims on behalf of a company incorporated somewhere else, not even when the controlling shareholders are nationals of the state. The ICJ reached this conclusion by relying on general principles of municipal law that uniformly treat a corporation as a distinct entity from its shareholders, shielding shareholders from liability beyond the value of their shares, but also preventing shareholders from having title to the assets of the corporation.

Exceptions to the Incorporation Rule. In *Barcelona Traction*, the Court suggested in obiter dictum that the following exceptions to the incorporation rule might exist:

- Diplomatic protection may be exercised on behalf of nationals whose direct rights as shareholders, as opposed to rights owed to the company, have been violated. The Court cited to municipal law as the source of such shareholder rights.[63]
- Diplomatic protection may be exercised on behalf of nationals for harm to the company in two exceptional situations as a matter of equity:
    - Where the company ceases to exist.[64]
    - Where the state of incorporation of the company is the state alleged to have committed the harm.[65]

Factual Distinctions. In *Barcelona Traction*, Belgium claimed that Spain violated its international obligations and thereby harmed a Canadian corporation doing business in Spain. Belgium was seeking to exercise diplomatic protection on behalf of Belgian shareholders in the Canadian corporation. In *Barcelona Traction*, the harm occurred in a state (Spain) that was different from the company's state of incorporation (Canada). By contrast, in the instant case, the company (ALEC) is incorporated in the same state in which the harm is claimed to have occurred (Aspatria). Another difference is that the Belgian shareholders in *Barcelona Traction* owned 88% of the shares of the injured corporation, whereas Rydalian shareholders own 80% of the shares of the injured corporation.

---

[62] In the *Nottebohm Case* (Liechtenstein v. Guatemala), Second Phase Judgment, 6 April 1955, which involved the nationality of a natural person, the ICJ held that the standard for determining nationality is the "genuine link" test. Many commentators have endorsed this test as a better standard for determining the nationality of a corporation, rather than the incorporation test pronounced in Barcelona Traction. *See, e.g.*, Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later*, 42 Stanford Journal of International Law 237 (2006).

[63] *Barcelona Traction*, ¶¶ 46-47.

[64] *Barcelona Traction*, ¶¶ 65-68.

[65] *Barcelona Traction*, ¶ 92. In separate opinions, three judges noted support for this proposition, pp. 72-75, 134, 191-93; four vigorously opposed it, pp. 240-241, 257-259, 318.

Electtronica Sicula (ELSI), 1989

In *ELSI*, the Court allowed the United States to bring a case against Italy to redress harm suffered by an Italian company which was wholly owned by U.S. shareholders. The ICJ's judgment did not explain why it allowed the case to proceed. However, the separate opinions of Judges Oda and Schwebel, and the ICJ's subsequent judgment in *Ahmadou Sadio Diallo* indicate that the U.S. was allowed to exercise diplomatic protection to protect direct rights that had been granted to U.S. shareholders in a Treaty of Friendship, Commerce and Navigation Treaty.

ILC Draft Articles, 2004 and 2006

In 2004 and 2006, the International Law Commission issued draft articles on diplomatic protection. The drafts reflect the ILC's interpretation of the decisions in *Barcelona Traction* and *ELSI*, as well as various other sources of customary international law.

> Article 9 State of Nationality of a Corporation
>
> For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated....[66]
>
> Article 11 Protection of Shareholders
>
> A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:
>
> (a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
>
> (b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.
>
> Article 12 Direct Injury to Shareholders
>
> To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Ahmadou Sadio Diallo, 2007

In *Diallo*, the ICJ confirmed that diplomatic protection can be exercised on behalf of a national whose direct rights as a shareholder in a foreign company have been violated. Unlike *ELSI*, in which the ICJ derived the direct rights of the shareholder from a treaty between the parties, the ICJ in *Diallo* said that such rights should be derived from the

---

[66] The 2004 draft articles required incorporation plus an additional connecting factor. ILC Report of 56th session (2004) A/59/10, Art. 9. The 2006 draft articles only require incorporation. *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 49, Art. 9.

municipal law of the Respondent State.

The ICJ also importantly held that "diplomatic protection by substitution" (when a state espouses a claim on behalf of a national shareholder for direct harm to a foreign company) is not a customary norm of international law, while acknowledging that a more limited rule of protection by substitution may exist where a company's incorporation in the State having committed the alleged violation of international law was required as a precondition for doing business there. The ICJ stopped short of affirming this more limited exception by finding that incorporation was not a precondition for doing business on the facts of the case.

3. Exhaustion of Local Remedies

Local remedies are not exhausted until legal recourse has been attempted to redress the alleged harm in the domestic judicial system and relief has been denied in a final judgment.

Rydal	Aspatria
Local remedies have been exhausted by ALEC, which challenged the legality of the seizure and lost, with no appeals being possible.	The legal proceedings against ALEC that led to the seizure are still pending; if ALEC is ultimately exonerated, the assets will be returned. Thus, it is vital for ROCO to pursue ALEC's legal remedies to the fullest extent before Rydal can be allowed to bring a claim before the ICJ on ROCO's behalf.

B. Applicability of the BIT

1. Who is the protected investor?

Since Rydal is espousing this claim, the protected investor is ROCO, a corporation of Rydalian nationality. Respondent teams should not try to argue that the protected investor is ALEC since this argument runs contrary to the jurisdictional provision of the Aspatria-Rydal BIT, which requires that claims before the ICJ be raised by "the Party of said Investor's nationality." Thus, while a Respondent team may successfully argue that Rydal may bring a claim on behalf of ALEC under a substitution theory of standing, such team will not be able to avoid this separate and distinct jurisdictional requirement of the BIT.

2. What is the protected investment?

Rydal	Aspatria
The protected investment under the BIT is ROCO's enterprise in Aspatria, which covers ROCO's shareholder interest in ALEC and the assets of ALEC.	The seized assets are not a protected investment under the BIT. Rydal is claiming protection on behalf of ROCO, a Rydalian company, which owns 80% of the shares in ALEC. While ROCO's shareholder interest in ALEC is a protected investment, such protection does not extend to the assets of ALEC. ROCO, as a shareholder, does not have a legal interest in the property of ALEC.

C. Violation of the BIT

1. What is expropriation?

The term "expropriation" refers to certain actions taken by a State that interfere with property rights. "Direct" expropriation is the taking of property through formal transfer of title or outright seizure. "Indirect" expropriation is an act that has the equivalent effect of direct expropriation without formal transfer of title or outright seizure.[67]

To prove that the seizure of assets was an internationally wrongful act, Respondent can rely on the general prohibition under customary law against expropriations without adequate compensation. Alternatively and to a greater benefit, Respondent can rely on the expropriation provisions of the Aspatria-Rydal BIT (assuming Respondent has proven that the BIT applies).

Article VI(a) provides that an investment may not be directly or indirectly expropriated unless:

- for a public purpose
- in accordance with due process
- without discrimination, and
- upon prompt, adequate and effective compensation

Article VI(b) provides that a measure is not expropriation if it was adopted and applied:

- in good faith,
- without discrimination, and
- in order to protect legitimate public welfare objectives

2. Was there an expropriation?

Because Aspatria did not offer or give compensation, Rydal will focus on arguing that Aspatria violated Article VI(a) of the BIT by expropriating without paying adequate compensation. On the other side, Aspatria will focus on the customary definition of indirect expropriation, as well as the public welfare exception in Article VI(b) of the BIT, to argue that the temporary seizure of assets does not amount to expropriation, and as such, no compensation was due.

Rydal	Aspatria
The seizure of the assets amounted to an expropriation of those assets because it deprived ALEC of any use or economic benefit of the property for an indefinite amount of time. A very prolonged deprivation of property can be considered	The seizure is temporary and the assets may be returned. No deprivation has taken place and thus A partial decrease in the value of shares resulting from the seizure does not constitute expropriation.[69]

[67] U.S. Model BIT (2004).

Rydal	Aspatria
expropriation. The seizure of the assets also amounted to an expropriation of ROCO's shareholder interest in ALEC since the seizure rendered the shares in the company worthless, thereby depriving ROCO of any use or economic benefit of owning the shares.[68] The expropriation was a violation of the BIT because no compensation was offered or given.	
Even if the NRA was adopted to protect a public welfare objective, its application to ALEC was not in pursuance of that objective. Moreover, the measure was discriminatory and not in good faith since the government could have achieved the objective through other more peaceful means.	The holding of assets by the Court was not an expropriation under article VI(b) because it was taken in good faith in accordance with Aspatrian Criminal Code. It was done without discrimination since the nature of the regulation is general and applies to all companies that operate in the country. Furthermore, the action had the legitimate public welfare objective of not escalating the ongoing dispute with Rydal regarding the Windscale Islands.

3. Was there a violation of the BIT's Fair Equitable Treatment Provision?

Respondent teams may also argue that the seizure of assets was a violation of Article V of the BIT which calls for fair and equitable treatment of covered investments.

Rydal	Aspatria
The action taken against the assets of ALEC is a denial of due process and therefore a denial of Aspatria's obligation to accord ROCO and its investments fair and equitable treatment: • There is no prima facie case connecting ALEC to the bidding process or any other alleged criminal activity that would be inconsistent with an Aspatrian license to exploit natural resources. • The seizure was clearly a political retaliation, rather than a legitimate application of the law, against ROCO for its involvement and success in the bidding process.	Aspatria did not treat ROCO or its investments unfairly or inequitably. Aspatria simply took action authorized by its criminal code and the NRA. All due process required under domestic and international standards were accorded to ALEC.

[68] *GAMI v. Mexico*.

[69] *GAMI v. Mexico*, UNCITRAL Arbitral Tribunal, 15 November 2004 (deciding that claimant's shares had not been directly expropriated and that in order to prove the existence of an indirect expropriation, claimant had to prove that it had sustained something "tantamount" to expropriation, that is, rendering the shares "useless" or all or part of the assets "totally deteriorated").

Appendix A: Basic Materials

The following Basic Materials were provided to teams as a starting point for research. Teams are encouraged to conduct their research beyond these materials. Teams are also warned that inclusion of any particular text in the Basic Materials does not entail that the content of the text reflects current prevailing theory or practice, or that it is necessarily applicable to the facts of the Compromis.

First Batch

Statute of the International Court of Justice

Charter of the United Nations

Vienna Convention on the Law of Treaties

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESR)

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)

Draft Articles on Diplomatic Protection, with commentaries, adopted by the International Law Commission at its 58th session (2006)

United Nations General Assembly Resolution 1514 (XV), Declaration on the granting of independence to colonial countries and people (4 December 1960)

United Nations General Assembly Resolution 1541 (XV), Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter of the United Nations (15 December 1960)

United Nations General Assembly Resolution 1654 (XVI), The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples (27 November 1961)

United Nations General Assembly Resolution 1803 (XVII), Permanent sovereignty over natural resources (14 December 1962)

United Nations General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (24 October 1970)

The Island of Palmas Case (or Miangas) (United States of America v. The Netherlands), Permanent Court of Arbitration, Award (4 April 1928)

Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), ICJ Judgment (23 May 2008)

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ Second Phase Judgment (5 February 1970)

Second Batch

The Aaland Islands Question (On Jurisdiction), Report of the International Committee of Jurists, League of Nations Official Journal, Special Supplement No. 3 (1920)

- Original
- ILSA Reprint

The Aaland Islands Question (On the Merits), Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106 (1921)

Clipperton Islands Case (Mexico v. France), Arbitral Award, Judicial Decisions Involving Questions of International Law (28 January 1931)

The Minquiers and Ecrehos Case (France/United Kingdom), ICJ Judgment (17 November 1953)

Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), ICJ Judgment (22 December 1968)

Western Sahara, ICJ Advisory Opinion (16 October 1975)

Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy), Judgment

- ICJ Judgment (20 July 1989)
- Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic (2 February 1948), Oral Arguments and Documents, Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)

American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (21 February 1997)

Case Concerning Kasikili/Sedudu Island (Botswana/Namibia), ICJ Judgment (13 December 1999)

Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award (15 March 2002)

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), ICJ Objections (24 May 2007)

Hurst Hannum, Rethinking Self-Determination, 34 Virginia Journal of International Law 1 (1993)

Lawrence Jahoon Lee, Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later, 42 Stanford Journal of International Law 237 (2006)

Stephen M. Schwebel, Lecture: The Overwhelming Merits of Bilateral Investment Treaties, 32 Suffolk Transnational Law Review 263 (2009)

Appendix B: Timeline

17th – mid 20th Century	Rydal establishes a number of colonies around the world. (¶ 4)
1610 - Independence	Aspatria is a colony of Plumbland. (¶ 3)
6 December 1777	Captain Parrish discovers, takes short leave on one of the larger islands and leaves behind the flag of Rydal and a stone carved with a declaration asserting sovereignty over the Islands. (¶ 5)
Early 1778	A ship from Plumbland, *The Salkeld*, comes across the Islands. (¶ 6)
Shortly after 1778	Viceroy of Aspatria sends Lieutenant Ricoy to settle on the Islands and claim them on behalf of Plumbland. Ricoy establishs a fort and a settlement, Salkeld. (¶ 6)
20 December 1799	Ricoy and his men return to Langdale, leave flag of Plumbland flying at Salkeld and a notice that the Islands will forever remain the territory of Plumbland. (¶ 7)
6 September 1813	Rydal ship, *HMS Applethwaite*, under Admiral Aikton, wrecks on one of the smaller islands; survivors build a temporary settlement, St. Bees. (¶ 10)
January 1814	War breaks out between Rydal and Plumbland. (¶ 11)
May 1815	Slave ship *The Unthank* drifts into the harbour at St. Bees; Aikton declares slaves free; all passengers swear loyalty to Rydal. (¶ 12)
By 1816	Aikton and his men have explored most of the other islands and discovered abandoned settlement of Salkeld. (¶ 13)
June 1817	*The Grizedale*, a ship from Plumbland, is sent by Viceroy of Aspatria to the Islands under Commander Javier Crook to establish a penal colony. Admiral Aikton informs Crook that he must leave at once. Crook leaves. (¶ 14)
Mid-1818	King of Plumbland learns from his Viceroy that Rydalians are occupying the Islands. He sends letter of protest to Rydal. Rydal replies, rejecting Plumbland's claim to the Islands and asserting its own. (¶ 15)
1819	Rydal/Plumbland war intensifies. Independence movement emerges in Aspatria. (¶ 17)
March 1819	Rydal sends *HMS Braithwaite* to Islands under Vice-Admiral Wilkinson, the newly-appointed governor. Ship returns to Rydal with those who wish to leave; most remain because they've been promised land. (¶ 16)
31 October 1819	Colonel Alejandro Diaz, in a fight for Aspatria's independence from Plumbland, leads raid against the garrison at Langdale. Attack succeeds and the few who remain loyal to Plumbland are killed. (¶ 17)
2 November 1819	Diaz and supporters sign Aspatrian Declaration of Independence, and send copy sent to Plumbland. (¶ 18)
January 1820	Constitutional Convention is held in Langdale, Constitution includes Islands in the new Republic of Aspatria. (¶ 19)
20 March 1820	King of Plumbland declares that Diaz and his supporters are traitors. (¶ 18)
1 July 1820	Colonel Diaz is elected President of Aspatria. (¶ 19)
Mid-1821	Plumbland sues Rydal for peace. (¶ 20)
22 September 1821	Plumbland and Rydal sign Treaty of Great Corby, in which Plumbland transfers any sovereignty it has over Islands to Rydal. (¶ 20)
By 1823	Attempts at revolution in Plumbland, people starving, retaking of Aspatria impossible. King still refuses to acknowledge the independence of Aspatria. (¶ 21)
1826	Diaz sends a force to seize the Islands. After several unsuccessful attempts to take Salkeld, the force withdraws. (¶ 22)
1827	Diaz sends an ambassador to Rydal. Rydal receives ambassador, recognizes Aspatria's independence of Aspatria. Rydal's Secretary of State and the Aspatrian Ambassador negotiate the status of the Islands for six months, no resolution is reached. (¶ 23-25)
1839	Plumbland prevails in 16-year conflict against revolutionaries. Weary of conflict, Plumbland recognises the independence of Aspatria, excluding the Islands, in the Treaty of Woodside. (¶ 26)
1845	Aspatria establishes a permanent diplomatic mission in Rydal. (¶ 27)

1845 - 1880	Aspatria routinely reiterates its claim to the Islands. Rydalian Foreign Ministry dismisses these complaints. (¶ 27)
1880 - 1910	Aspatria experiences a crisis leading to coups d'etat. Aspatria recalls its Ambassadors, lodges no complaints or attempts to control the Islands. Rydalian governors control the Islands. Island population grows; is supplemented by immigrants mainly from Rydal. (¶ 30)
By 1899	Island population is 4,420. (¶ 28)
1903	King of Rydal orders Governor of Islands to establish an Assembly as a forum for Islanders to express views; Governor retains sole authority. (¶ 29)
1910	Civilian government is restored in Aspatria. (¶ 30)
1911	Aspatrian President Porfirio Sebastiani appoints new Ambassador to Rydal. (¶ 30)
By late 1930s	A trading link is established between the Islands and Aspatria. (¶ 31)
Until World War II	Foreign commercial activity on the Islands, especially by Aspatrian companies, is limited due to restrictions imposed by Rydal; Islands depend on Rydal for investment and economic sustenance. (¶ 32)
1945	Rydal joins the United Nations, designates the Islands a non-self-governing territory. (¶ 34)
1947	Rydal gives a constitution to the Islands. Rydal remains sovereign, but gives considerable control over governance to the Assembly. (¶ 35)
1949	Aspatria joins the United Nations in 1949, asks members to recognise its sovereign rights to the Islands and call for Rydal to cede governance. (¶ 36)
Mid- 20th Century	Rydal ceases establishing colonies around the world. (¶ 34)
Since 1962	UN Special Committee regularly takes up competing claims to the Islands. Special Committee expresses concern for the interests of Islanders, Rydal says it will respect the will of Islanders re self-governance/independence. (¶ 37)
1972	ROCO is incorporated in Rydal. (¶ 40)
1970s - 1980s	Trade steadily increases between Rydal and Aspatria. (¶ 39)
1980s	The Special Committee begins allowing a delegation from the Islands to make presentations at the Committee's meetings, despite Aspatria's protests. (¶ 38)
1985	Aspatria and Rydal sign Aspatria-Rydal BIT. (¶ 39)
1991	Natural Resources Act of 1991 is enacted in Aspatria making it a criminal offence for an Aspatrian company to take any action inconsistent with an exclusive government license concerning natural resources. (¶ 41)
1997	Oil is discovered in the basin around the Islands. Rydal contracts with ROCO, a Rydalian company, to explore the oil reserves. (¶ 42)
By 1999	Island population is 7,054. (¶ 28)
2001	ROCO submits its findings, indicating significant reserves within 200 nautical miles of the Islands' baselines. (¶ 42)
2002	Members of ILSA are elected to the Assembly of the Islands in growing numbers. (¶ 43)
2003	MDR, an Aspatrian company, petitions the Aspatrian government for an exclusive license to extract oil from the Islands. President of Aspatria approves the petition, Parliament endorses it in legislation. Prime Minister of Rydal protests. (¶ 46-48)
2006	Members of ILSA are elected to the Assembly of the Islands in growing numbers. (¶ 43)
December 2006	First Minister of the Islands announces that the Rydalian government has approved an Assembly plan to invite bids to exploit the oil reserves, issues public call to bidders. Rydalian officials protest the bidding process. (¶ 49)
Between December 2006 and October 2007	Assembly receives bids from ROCO and MDR. (¶ 50)
October 2007	Committee of the Assembly of the Islands recommends MDR's bid be approved. Assembly endorses the Committee's recommendation and forwards it to Governor Black for her signature. (¶ 52)
A week in October 2007	The Governor consults with the Rydalian Prime Minister. (¶ 53)

1 November 2007	Rydalian Prime Minister withholds her signature, invites the Assembly to reconsider its recommendation. (¶ 53)
14 November 2007	Assembly approves the ROCO bid. ILSA members issue joint press release stating they approve the bid but are concerned with how the Governor treated the matter. The Governor signs the recommendation, announces that the First Minister will initiate negotiations with ROCO towards a final contract. (¶ 54)
15 November 2007	Monte de Rosa holds press conference denouncing the decision as discriminatory. (¶ 55)
16 November 2007	Public Prosecutor of Aspatria files criminal charges against ALEC under the National Resources Act, also files an administrative petition asking court to seize all assets of ALEC associated with acts constituting the criminal charges. Court orders the seizure, Aspatrian police seize assets. ALEC files a petition with the Supreme Administrative Court of Aspatria to cancel the order. (¶ 56-57)
3 December 2007	MDR files a judicial challenge in the courts of Rydal against the results of the Rydalian bidding process, case is dismissed for lack of standing to sue. Expedited appeals from that dismissal fail to overturn it. (¶ 61)
3 March 2008	The Supreme Administrative Court denies ALEC's petition. (¶ 58)
4 March 2008	Counsel for ALEC complains that slow pace of justice in Aspatria means the temporary seizure of assets is permanent. (¶ 59)
1 April 2008	Prime Minister of Rydal protests to President of Aspatria that the seizure was unlawful. President of Aspatria responds to the contrary. (¶ 60)
22 August 2008	Supreme Court denies discretionary review of MDR's appeal. Monte de Rosa calls upon Aspatrian government to assert its rights under Aspatria-Rydal BIT. (¶ 61)
August-ish 2008	Non-violent protests spark in the Islands as a result of the Governor's rejection of the Assembly's acceptance of MDR's bid. ILSA calls for referendum on independence for the Islands. (¶ 62)
6 September 2008	First Minister calls meeting of the Assembly which passes a resolution to hold referendum on independence, and calls upon Rydal for assistance upon Assembly's further resolution if independence is chosen. (¶ 62)
6 December 2008	A plebiscite is held. (¶ 63)
8 December 2008	Assembly concludes that 76% of Islanders voted in support of full independence. First Minister schedules session of Assembly to consider steps required to effectuate independence. Prime Minister of Rydal issues statement in support of Islanders' desire for independence. Aspatrian President condemns referendum as illegal. (¶ 63-65)
1 February 2009	Prime Minister of Rydal sends note to President of Aspatria requesting that the two governments negotiate a Special Agreement for submission to the ICJ. President of Aspatria accepts the offer to negotiate. (¶ 66, 68)
16 September 2009	Rydal and Aspatria submit joint notification transmitting Special Agreement to ICJ Registrar. (¶ 68)

Appendix C: Introduction to International Law

This section is an introduction to public international law for Jessup judges who might not have professional experience or training in the field. There are important distinctions between international law and most domestic legal systems. The most significant for the moot judge is the rigid definition of what sources of law are acceptable before the Court.

A. General

The conduct and rules of the International Court of Justice (ICJ) are governed by the Statute of the Court. Under Article 38(1) of the ICJ Statute, the ICJ may consider the following sources of international law in order to decide disputes before it:

(a) treaties or conventions to which the contesting States are parties;

(b) international custom, as evidence of a general practice accepted as law;

(c) general principles of law recognized by civilized nations;

(d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators disagree as to whether these sources are listed in order of importance.

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute states that decisions of the Court are binding *only on the parties to the case*, and are without formal effect as precedent. In practice, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Resolutions of the United Nations General Assembly are not, of themselves, binding upon the Court. Although Resolutions may be evidence of customary international law, the General Assembly is not analogous to a domestic legislature.

B. Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the Vienna Convention on the Law of Treaties (VCLT).

Article 26 of the VCLT sets out the fundamental principle relating to treaties, *pacta sunt servanda*, which provides, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Once a State becomes a party to a treaty, it is bound by that treaty.

Article 34 of the VCLT adds that a treaty does not create rights or obligations for State that are not parties to the treaty. However, even if a State is not party to a treaty, the treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this "back-door" means by which a treaty may become binding on non-parties. The ICJ has also

recognized this possibility in the *North Sea Continental Shelf Cases (Germany v. Denmark)*, 1969. Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the International Covenant on Civil and Political Rights – may reflect or codify customary international law, while other parts do not.

Article 31 of the VCLT states that "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." The article further provides that the context of a treaty can be taken from a variety of sources including the treaty's preamble and annexes, any prior or subsequent agreements between the parties related to the treaty, and any relevant rules of international law. Article 32 states that when interpretation methods under Article 31 would lead to an ambiguous or unreasonable result, supplementary methods of interpretation can be used, including reference to the preparatory work of the treaty and the circumstances of its conclusion.

C. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of law because the community of states treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a state whether or not it has affirmatively assented to that rule.

To prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris* – the mutual conviction that the recurrence (of state practice) is the result of a compulsory rule.

"State practice" is the objective element, and simply means a sufficient number of states behaving in a regular and repeated manner consistent with the customary norm. Evidence of state practice may include a codifying treaty, if a sufficient number of states sign, ratify, and accede. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create "regional customary international law" or whether the practice of particularly affected states, *e.g.* in the area of space law, can create custom that binds other states, although the ICJ has acknowledged the possibility.

Opinio juris is the psychological or subjective element of customary international law. It requires that the state action in question be taken out of a sense of legal obligation, as opposed to mere expediency. Put another way, *opinio juris*, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it." MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations. Each of these items might be employed as evidence of state practice, *opinio juris*, or both.

In the *North Sea Continental Shelf Cases*, the ICJ stated that the party asserting a rule of customary international law bears the burden of proving it meets both requirements.

D. General Principles of Law

The third source of international law consists of "general principles of law." Such principles are gap-filler provisions, utilized by the ICJ in reference to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature (e.g., burden of proof and admissibility of evidence). Many others, such as waiver, estoppel, unclean hands, necessity, and *force majeure,* may sound familiar to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law.

It is important to note, however, that "equity" in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* (within the case) application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono* (that is, to simply decide the case based upon a balancing of the equities), a separate matter treated under Article 38(2) of the Statute.

E. Decisions and Publicists

The final source of international law is judicial decisions and teachings of scholars. This category is described as "a subsidiary means of finding the law." Judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

"Teachings" refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published article constitutes an Article 38(1)(d) "teaching." However, the provision is expressly limited to teachings of "the most highly qualified publicists." For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. Within the context of a specific field, there are additional scholars who would be regarded as "highly qualified publicists."

F. Burdens of Proof

In the *Corfu Channel Case*, the ICJ set out the burdens of proof applicable to cases before it. The Applicant normally carries the burden of proof with respect to factual allegations contained in its claim by a preponderance of the evidence. The burden falls on the Respondent with respect to factual allegations contained in a cross-claim. *U.K. v. Albania,* 1949.

Appendix D: People and Places

A&L Exploration Corporation ("ALEC"): Company incorporated in Aspatria, subsidiary of ROCO. ROCO owns 80% of the shares in ALEC, and the remaining 20% are owned by more than 5,000 shareholders of various nationalities. (¶40, 41, 50, 56, 57, 58, 59, 60, 66)

Abbott, Agnes: Prime Minister of Rydal from at least 2003 to 2009. (¶48, 53, 60, 64, 66)

Aikton, Admiral George: Commander of HMS Applethwaite which was wrecked on one of the smaller islands on the night of 6 September 1813. (¶10, 12, 13, 14, 15)

ALEC: see A&L Exploration Corporation.

Andrew, King of Rydal: King of Rydal who issued a Commission to Captain Parrish prior to December 1777. (¶5)

Applethwaite, HMS: Naval ship from Rydal, under the command of Admiral Aikton, which was wrecked on one of the smaller islands on the night of 6 September 1813. (¶10, 15, 16, 28)

Asahi Shimbun: Newspaper published in Tokyo to which Felix Monte de Rosa gave an interview in August 2008. (¶61)

Aspatria, Republic of: a developed country in the Southern Hemisphere which was a colony of Plumbland from 1610 until 1819. Claims sovereignty of the Islands which are 500 miles to the west. The closest country, by some distance to the Islands. (¶2 ff)

Aspatria-Rydal BIT: Treaty Concerning the Encouragement and Reciprocal Protection of Investment concluded in 1985, the relevant provisions of which are at Annex I to the Compromis. (¶39, 60, 61, Annex 1)

Black, Lucy: Governor of the Islands from at least 2006 to 2009. (¶49, 52, 53, 54, 62)

Braithwaite, HMS: Naval ship from Rydal, under the command of Vice-Admiral Wilkinson, which was sent to the Islands in March 1819. (¶16, 28)

Constance, Queen: Queen of Rydal from 1813, or shortly before that, until at least 1827. (¶12, 15, 16, 20, 23)

Craven, Nigel: First Minister of the Islands from at least 2006 to 2009. (¶49, 52, 54, 62, 64)

Crook, Commander Javier: Commander of The Grizedale, a ship sent by the Viceroy of Aspatria to establish a penal colony on the Islands, which arrived off Salkeld in June 1817. (¶14)

Diaz, Colonel Alejandro: Self-proclaimed leader of the independence movement in Aspatria which led the raid on the garrison in Langdale on 31 October 1819, which led to the declaration of independence of Aspatria on 2 November 1819. Was elected the first President of Aspatria on 1 July 1820. (¶17, 18, 19, 22, 23)

Great Corby, Treaty of: Peace treaty between Rydal and Plumbland which was signed on 22 September 1821. Plumbland acknowledged Rydal's sovereignty over the Islands and was required to give up the majority of its army and navy. (¶20, 21, 24, 36)

Grizedale, The: Ship sent by the Viceroy of Aspatria under the command of Commander Crook to establish a penal colony on the Islands, which arrived off Salkeld in June 1817. (¶14)

Hotton, Francisco: Ambassador of Aspatria to the United Nations in 1949. (¶36)

ILSA: see Islanders Longing for Sovereignty and Autonomy. (¶43, 52, 54, 62)

Islanders Longing for Sovereignty and Autonomy ("ILSA"): A movement in the Islands seeking independence from Rydal. Growing numbers of ILSA members were elected to the Assembly of the Islands in the 2002 and 2006 elections. (¶43, 52, 54, 62)

Islands, The: see Windscale Islands.

Langdale: Capital of Aspatria. (¶7, 17, 19)

Lavin, Cecilia: President of Aspatria from at least 2003 to 2009. (¶47, 48, 49, 60, 65, 66, 68)

MDR Limited: an Aspatrian corporation engaged in the business of extracting and processing oil, coal and other fuel sources in the Southern Hemisphere. Owned by Felix Monte de Rosa. (¶45, 46, 48, 50, 51, 52, 54, 62, 67)

Monte de Rosa, Felix: One of the 25 wealthiest individuals in the world and fifth largest landowner in Rydal. Owner of MDR Limited. (¶45, 46, 47, 48, 51, 53, 55, 61, 67)

NRA: see National Resources Act 1991.

National Resources Act 1991 ("NRA"): Legislation passed in Aspatria in 1991 to protect the natural resources of Aspatria. Restricts licences to exploit natural resources to Aspatrian companies and makes it a criminal offence for an Aspatrian company to take action inconsistent with a licence or patent of the Aspatrian government. (¶41, 47, 56)

Parrish, Captain Geoffrey: Commander of The Wansfell, which was on a voyage of naturalist discovery, when it was the first to discover the Islands on 6 December 1777. (¶5, 15)

Piero, King: King of Plumbland from before 1779 until at least 1839. (¶7, 15, 17, 18, 20, 21, 26)

Plumbland, Kingdom of: a developed country in the Northern Hemisphere, approximately 6,000 miles from Aspatria. Was the colonial power of Aspatria from 1610 until 1819. (¶3, 6, 7, 9, 11, 13, 15, 17, 20, 21, 24, 25, 26, 36)

Ricoy, Lieutenant Manuel: Sent by the Viceroy of Aspatria to establish a settlement on the Islands in around 1779. (¶6, 7, 8, 13)

ROCO: see Rydalian Oil Company.

Rydal, Kingdom of: a developed country in the Northern Hemisphere, approximately 7,500 miles from the Islands. Now a constitutional monarchy with the Kind as head of state and the Prime Minister as head of government. (¶4 ff)

Rydalian Oil Company ("ROCO"): Incorporated in Rydal in 1972, a multi-national energy corporation with a worldwide gross revenue of more than US$150 billion in 2007. Owns 80% of shares of ALEC. (¶40, 41, 42, 50, 54, 56, 66)

Salkeld: Settlement on the Islands established by Lieutenant Ricoy in around 1779. (¶6, 7, 8, 13, 14, 15, 22)

Salkeld, The: Naval ship from Plumbland that came across the Islands in early 1778. (¶6)

Sebastiani, Porfirio: President of Aspatria in 1911. (¶30)

Smith, William: Foreign Minister of Rydal in 1827. (¶23, 24, 25)

Sodor, State of: State of origin of the slave ship The Unthank which entered the harbour at St. Bees in May 1815. (¶12)

St. Bees: Settlement established on the Islands by Admiral Aikton and has men, following the wrecking of HMS Applethwaite on the night of 6 September 1813. (¶10, 12)

Times of Rydal, The: Weekly newspaper published in Rydal. (¶45, 48)

Treaty Concerning the Encouragement and Reciprocal Protection of Investment ("the Aspatria-Rydal BIT"): Treaty concluded in 1985, the relevant provisions of which are at Annex I to the Compromis. (¶39, 60, 61, Annex 1)

Trinidad, Miguel: Ambassador from Aspatria sent in 1827 to negotiate with Rydal. (¶23, 24)

Unthank, The: Slave ship from Sodor which had been damaged in a storm and which entered the harbour at St. Bees in May 1815. (¶12, 14, 28)

Wansfell, The: the ship commanded by Captain Parrish which first discovered the Islands on 6 December 1777. (¶5)

Wilkinson, Vice-Admiral Arthur: Appointed Governor of the Islands by Queen Constance in March 1819. Commander of HMS Braithwaite which was sent to the Islands in March 1819. (¶16)

Windscale Islands ("the Islands"): an archipelago in the Southern Hemisphere lying in the Eden Ocean, approximately 500 miles due west of Aspatria. A colony of Rydal. (¶1 ff)

Woodside, Treaty of: Treaty signed in 1839 in which Plumbland acknowledged the independence of Aspatria. (¶26)

Appendix E: Suggested Questions

International Law Generally

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38 of the ICJ Statute?

2. What is customary international law? What are the elements of customary international law?

3. When asserting a state's obligation under customary international law:

A. Where can we find evidence of relevant state practice?

B. What is *opinio juris*? How is it proven?

4. Is the ICJ bound by its prior decisions?

5. What are *travaux preparatoires*? When are the records of the drafting and negotiations of a treaty relevant?

6. Why have you brought these matters to this Court instead of before an arbitral tribunal?

7. What specific remedies is the Applicant/Respondent seeking? Is the ICJ permitted by its Statute to grant those remedies?

8. What is the basis of standing for the party seeking relief?

9. What is the standard of proof with respect to this issue? Which party bears the burden of proof?

10. If this Court determines that the lack of factual certainty allows multiple, conflicting inferences, what should this Court do then?

11. If a state has conflicting obligations under two treaties (or under a treaty on the one hand and customary international law on the other), which obligation controls? What principles does the Court use to determine which obligation controls?

Sovereignty

1. Considering that Rydal is currently occupying and administering the Windscale Islands, does this impact which state has the burden of affirmatively proving its right to sovereignty over the Islands?

2. Do symbolic acts of sovereignty such as posting of flags on claimed territory have any legal effect under international law?

3. Should the rule of first discovery or the rule of first occupation apply in this case? If the rule of first discovery applies, when did Rydal perfect its inchoate title? How did

the Viceroyalty of Aspatria's intervening presence on the Islands affect Rydal's inchoate title?

4. Does the analysis change given that Aspatria and Rydal did not know of each other's competing claims until 1818?

5. Were Lieutenant Ricoy's activities sufficient to establish Plumbland's title to the entire archipelago?

6. Did Rydal effectively occupy sufficient territory to acquire title to the entire archipelago?

7. Did Plumbland effectively occupy the Islands through Lieutenant Ricoy's activities at Salkeld?

8. Even if Aspatria didn't have effective control over a necessary portion of the Island archipelago, can't the same be said for Rydal?

9. Does the activity of slave ships and pirates show an absence of effective control as required under the Clipperton Islands standard?

10. Did the Viceroyalty of Aspatria abandon the Islands?

11. Did Rydal effectively occupy or acquire prescriptive title to the Islands by Admiral Aikton's actions?

12. What was the effect of Queen Constance retroactively adopting Admiral Aikton's acts?

13. Is there any significance to Commander Javier Crook's attempt to establish a penal colony on the Islands at the behest of the Viceroyalty of Aspatria?

14. Over the years when Plumbland and Rydal made competing claims to the Islands, did the Islands ever return to the state of *terra nullius*?

15. What is the critical date for evaluating the competing claims by Aspatria and Rydal to historical title?

16. Does critical date theory presuppose an answer to the question of which state had sovereignty over the disputed territory?

17. What is the principle of uti possidetis juris and should we apply it to the present case?

18. Under the principle of uti possidetis juris, does a territory acquire its former administrative boundaries or its former boundaries of occupation?

19. Is uti possidetis juris customary international law, or a general principle of international law?

20. Is there any other example of an island 500 miles away from a colony being within the administrative boundaries of that colony?

21. Historically, when has the principle of uti possidetis juris been applied?

22. Does the declaratory theory of independence, constitutive theory of independence, or some other theory apply to our determination of when Aspatria acquired statehood?

23. What were the consequences, if any, of the Treaty of Great Corby?

24. If we assume that Aspatria's statehood was not recognized by the community of states until after the Treaty of Great Corby, when did Aspatria acquire statehood?

25. If Aspatria did not acquire statehood until later than it claims, does that mean Rydal was permitted to exercise sovereign acts in the interim and gain prescriptive title while Aspatria was legally unable to do so?

26. What is the importance of the Treaty of Woodside to this dispute?

27. What is the significance of Aspatria's failure to lodge complaints against Rydal's occupation of the Islands from 1880-1910?

28. What standard should be used to determine when protests have "ceased" and whether a state should be "reasonably expected" to continue protesting?

29. If this Court decides Aspatria has rightful title over the Islands, what measures should the Court mandate?

30. Are there any other interests that the Court should consider before deciding the fate of the Islanders?

<u>Self-Determination</u>

1. What is the definition of self-determination?

2. When the right to self-determination conflicts with the right to territorial integrity, which should prevail?

3. Are the Islanders entitled to external self-determination?

4. Are the islanders a "people"?

5. When were the Islands put on the list of non-self governing territories? Was this done pursuant to an act of the U.N. General Assembly? What is the significance of being on the list?

6. Does a group constitute a people if that group lives in a non self-governing territory? Must the group be native to that territory?

7. What standard should this Court apply to determine whether the Islanders are a "native" population?

8. If this Court finds that the islanders are not a people, will that decision determine whether or not they have the right to secede?

9. Is there a difference between the right of colonial territory to secede and the right of people to secede?

10. Does the right of self-determination require that independence be granted to all peoples who seek to secede?

11. What is the difference between internal and external self-determination?

12. Under what circumstances are people entitled to internal self-determination?

13. Under what circumstances are people entitled to external self-determination?

14. Is Rydal required (or entitled) to assist the islanders in their transition toward independence?

15. Does the ICCPR create an affirmative duty for Rydal to assist the Islanders toward independence?

16. Is Rydal permitted to assist the Islanders' transition to independence by virtue of being a specially affected state?

17. Does General Assembly resolution 1514 reflect customary international law?

18. Is Rydal currently respecting the islanders' right of internal self-determination?

19. Does the Governor's right to effectively overturn the Assembly's vote comport with the Islanders' right to self-determination?

20. Should the principle of permanent sovereignty over natural resources factor into our analysis, and if so, how?

21. If this Court finds that Aspatria has sovereignty over the Islands, can Aspatria guarantee that it will respect the islanders' right to internal self-determination?

22. What sovereignty disputes in the world today or in history is the present case similar to? Can any guidance be gained from how the international community reacted to those controversies?

<u>Standing</u>

1. Why does Rydal have standing to bring claim II before this Court?

2. What are the requirements for exercising diplomatic protection?

3. Who is being diplomatically protected by Rydal in this case? From what harm?

4. Have local remedies been exhausted?

5. Can Rydal exercise diplomatic protection on behalf of a company incorporated in Aspatria?

6. Can Rydal exercise diplomatic protection on behalf of Rydalian shareholders in an Aspatrian company?

7. What are the relevant cases decided by the ICJ on the exercise of diplomatic protection on behalf of nationals who are shareholders in companies?

8. What is the relevance of the absence of a pertinent treaty protecting investments in *Barcelona Traction* and *Ahmadou Diallo* and the presence of such a treaty in *Elettronica Sicula*?

9. Can a potential exception to the customary international law rules of diplomatic protection, as identified by the International Law Commission's Draft Articles on Diplomatic protection, apply if there is a treaty that specifically protects certain investment activities but not others?

10. When is a shareholder directly injured and when is a shareholder indirectly injured?

11. Is there an exception to the customary international rule that a company can be diplomatically protected only by the state of its nationality?

12. Was ROCO required to incorporate a subsidiary in Aspatria as a precondition for doing business there?

Bilateral Investment Treaties

Generally

1. Is an investment dispute between states a proper subject for adjudication by the ICJ?

2. Does the Aspatria-Rydal BIT apply to this dispute?

3. What provision(s) of the Aspatria-Rydal BIT were violated?

4. What test must be met to show that the "national treatment" provision of the Aspatria-Rydal BIT was violated?

Rejection of MDR's BID

1. What is the scope of the BIT's requirement to abide by customary international law? What protections and what obligations does it create that the treaty would not otherwise afford?

2. Does the BIT protect Felix Monte de Rosa or MDR Limited?

3. Can there be an "investor" without an investment under the Aspatria Rydal BIT?

4. If this Court finds there is no protected investment, can Aspatria invoke any of the provisions of the Aspatria-Rydal BIT?

5. Does the BIT apply to the bid or the bidding process?

6. Does the BIT cover prospective investments?

7. Does the bid constitute an investment?

8. Is a certain type of expenditure required to show that the bid constituted an investment? If so, was such an expenditure made in this case?

9. Is an attempt to make an investment the same as a pre-investment expenditure? Does it matter whether an investment ultimately materializes?

10. What factors should this Court consider when determining whether something constitutes an investment under the BIT?

11. If there is an investment, *where* should we consider it to be? In the territory of Rydal, Aspatria, the Windscale Islands, or somewhere else?

12. If the investment Aspatria is seeking to protect "in" the Islands, can Aspatria's BIT claim be interpreted as an admission that the Islands are in the territory of Rydal?

13. What resources did MDR commit in the bid?

14. Does MDR have a business enterprise in Rydal?

15. Does MDR's registered office in Rydal constitute an investment?

16. Does it matter why MDR established a registered office in Rydal?

17. What "legitimate" policy objectives authorize differential treatment of investors protected by a most favored nation clause?

18. What fair and equitable treatment standard should this Court apply?

19. What constitutes less favorable treatment?

20. Does your argument require this Court to find that MDR's bid was objectively superior to ROCO's bid? If so, what standard she we use to make that determination?

21. Did Aspatria violate the BIT when it granted MDR an exclusive license to exploit oil in the basin around the Windscale Islands?

22. What test should this Court use to determinate whether the Governor's actions were discriminatory? Should we consider whether the intent was discriminatory, or the effect?

23. Does withholding a signature equate to a rejection?

24. Was the Governor properly considering the long-term commercial viability of one bid versus the other?

25. If there is a certain type of evidence and certain statements are made by the Rydalian government, does the burden shift at any point to Rydal to rebut a presumption of discrimination?

26. If this Court determines that the bid constitutes an investment, how will this decision affect the behavior of international investors and the future negotiation of BITs?

27. Is Rydal ultimately responsible for the outcome of the bidding process?

Seizure of ALEC's Assets

1. If Rydal violated the BIT, would that authorize Aspatria to violate the BIT?

2. What is the protected investment? Was the injury suffered by ALEC or ROCO?

3. Are assets of an investment protected under the Aspatria-Rydal BIT?

4. How are the shareholders impacted as compared to how the company is impacted?

5. What shareholder rights are protected?

6. Does the BIT give rights to shareholders beyond what they have under customary international law?

7. Was the seizure of ALEC's assets an indirect expropriation?

8. Does the devaluation of shares constitute an indirect expropriation? What about the depreciation of the seized assets?

9. Is it acceptable that Aspatria has not provided compensation since the criminal case is still ongoing?

10. When is a seizure considered "permanent"?

11. Does Rydal have the burden of showing that the seizure is permanent or does Aspatria have the burden of showing that the seizure is indefinite? Does the burden shift at any point?

Reparations

1. How should this Court quantify losses for the injury?

2. What form of reparations are you seeking?

3. Wouldn't it be premature to grant compensation? Could this pose the risk of double recovery in the event the Aspatrian court's lifted the seizure and returned the assets?