THE 2010 PHILIP C. JESSUP INTERNATIONAL LAW

MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

2010

BETWEEN

THE REPUBLIC OF ASPATRIA

APPLICANT

AND

THE KINGDOM OF RYDAL

RESPONDENT

To Submit To The International Court of Justice the Differences between the States concerning The Windscale Islands

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STATEMENT OF JURISDICTION

The Republic of Aspatria ("Aspatria"), as Applicant, and the Kingdom of Rydal ("Rydal"), as Respondent, have submitted by Special Agreement their differences concerning the Windscale Islands for final resolution by the International Court of Justice ("this Court") pursuant to Article 40(1) of the Statute of the International Court of Justice ("the ICJ Statute"). This Court has jurisdiction over all claims in this case since both parties have ratified the United Nations Charter and the ICJ Statute. Article 5 of the Special Agreement provides that both parties accept any Judgment of this Court as final and binding, and will execute such Judgment immediately. Article 36(1) of the ICJ Statute provides that the jurisdiction of this Court comprises all cases which the parties refer to it, and Article 38(1) provides that this Court is to decide such disputes in accordance with international law.

STATEMENT OF FACTS

Captain Parrish of Rydal discovered the Windscale Islands ("the Islands") on 6 December 1777. After taking short leave on the Islands, he departed the Islands, leaving just the flag of Rydal and a stone carved declaration asserting Rydal's sovereignty.

In early 1778, the Viceroy of Aspatria sent Lieutenant Ricoy to settle and claim the Islands on behalf of Plumbland. He and his men established a fort and settlement, Salkeld, and remained on the Islands for 21 years until 20 December 1799. Nautical charts produced in Plumbland and Aspatria showed the Islands as belonging to Plumbland with the name "Windscale Islands". These charts were so widely used that the Islands subsequently became known by that name as shown on the charts.

When Lieutenant Ricoy and his men were ordered to return to Aspatria due to internal disturbances, Lieutenant Ricoy left the flag of Plumbland flying over the fort at Salkeld and a notice asserting Plumbland's sovereignty before leaving the Islands. During this time, Rydal made no return to the Islands, and had not protested at Aspatria's occupation.

On 6 September 1813, pursuant to a shipwreck on a small island in the archipelago, Admiral Aikton of Rydal and other survivors were forced to build a temporary settlement on the Islands. He thought the Islands belonged to Rydal as it was such indicated on his nautical charts.

In June 1817, the Viceroy of Aspatria sent Commander Crook to the Islands to establish a penal colony. Upon landing, he was outnumbered and out-armed by Admiral Aikton and his men, and hence chose to depart. However, he protested at Rydal's unfounded claim to the Islands. King Piero of Plumbland immediately sent a letter to Queen Constance of Rydal in the middle of 1818, protesting at Rydal's unlawful occupation of the Islands.

On 31 October 1819, Colonel Diaz, commander of an independence movement in Aspatria, led a successful night-time raid against Plumbland's garrison at Langdale, the capital of Aspatria, killing every last of surviving soldiers loyal to King Piero.

Aspatria was then declared independent on 2 November 1819. A Constitutional Convention was held in Langdale in January 1820, which established a federal system of government and provided that the Islands were included in the new Republic of Aspatria. Rydal had not protested to this public and open inclusion of the Islands into Aspatrian territory. Furthermore, on 1 July 1820, Colonel Diaz was elected President.

On 22 September 1821, Plumbland lost a long-fought war against Rydal and signed the Treaty of Great Corby, which recognized Rydal's title to the Islands and purported to transfer any sovereignty over the Islands that King Piero possessed.

In 1826, President Diaz made several unsuccessful attempts to seize the Islands. In 1827, he sent an ambassador, Miguel Trinidad, to Rydal. Queen Constance recognized Aspatria's independence and had her Foreign Minister, William Smith, take up any diplomatic matters

between the two States. Ambassador Trinidad argued that the Islands were a part of Aspatria under the principle of *uti possidetis juris ("uti possidetis")*, and that the Treaty of Great Corby was a nullity since Aspatria had ceased to be under Plumbland's rule. These were rejected by Foreign Minister Smith.

In 1841, King Piero recognised the independence of Aspatria in the Treaty of Woodside, excluding the Islands. Aspatria insisted in the inclusion of a clause acknowledging Aspatria's continued claim to the Islands.

In 1845, Aspatria established a permanent diplomatic mission in Rydal, and routinely asserted Aspatria's claim to the Islands during 1845-1880. Between 1880 and 1910, Aspatria suffered from serious political and economic crisis which led to a series of coups d'etat and counter-coups. Aspatria therefore recalled all of its ambassadors, and made no complaints concerning the Islands during that time. However, soon after civilian government was restored in 1910, a new Ambassador was appointed in 1911 and resumed asserting Aspatria's claim to the Islands.

Since independence, Aspatria has treated persons born on the Islands as their citizens, who were permitted free entry into Aspatria. Aspatria also consistently protested at Rydal's requirement of Aspatrian citizens to present a passport in order to visit the Islands.

In 1949, when Aspatria joined the United Nations, they brought the dispute over the Islands to the United Nations.

Trade steadily increased between Rydal and Aspatria, and in 1985, Aspatria and Rydal signed a Treaty Concerning the Encouragement and Reciprocal Protection of Investment ("the Aspatria-Rydal BIT"), entered into force in the same year.

In 2001, a report indicated significant oil reserves located within 200 nautical miles of the Islands' baselines.

In December 2006, the leader of the Assembly of Islands, First Minister Craven issued a public call for bids, approved by the Rydalian Government, for the rights to exploit the oil reserves in the Islands. The bidding process was promised to be "open, transparent and competitive".

Two bids were received. One was from Rydalian Oil Company ("ROCO"), incorporated in Rydal in 1972. It had a worldwide gross revenue of more than US$150 billion in 2007. It promised 45% of the net proceeds to the Islands and listed the existing resources located in Aspatria that would be used to extract and process the oil.

The other bid was from MDR's registered office in Rydal. MDR is an Aspatrian corporation specializing in extracting and processing oil, coal, and other fuel sources throughout the Southern Hemisphere. Its owner, Felix Monte de Rosa, is the fifth largest landowner in Rydal. The offer included an upfront payment of US$500 million upon signing the final license agreement and a promise to pay 50% of the net proceeds to the Islands. The bid included a

customer list, projected sales, proposed transportation routes and a plan to build a facility in the Islands and to employ Islanders for the enterprise.

In October 2007, the Assembly rapidly endorsed MDR's bid and First Minister Craven stated that MDR's bid was more economically attractive to the Islanders. However, on 1 November 2007, Governor Black withheld her signature and invited the Assembly to reconsider its recommendation. She publicly acknowledged the appealing nature of MDR's bid but also announced that the future of the Islands will be led by Rydal and confirmed the importance of safeguarding the long-term viability of the territory and its people.

On 14 November 2007, the Assembly approved ROCO's bid and Governor Black promptly signed the recommendation. The Islanders Longing for Sovereignty and Autonomy ("ILSA"), an independence movement on the Islands, characterized the decision as being high-handed. The next day, Monte de Rosa denounced the decision as "discrimination, pure and simple."

In November 2007, the Aspatrian authority initiated criminal proceedings against A & L Exploration Corporation ("ALEC"), a corporation incorporated in Aspatria, for its violations of the Natural Resources Act ("NRA"). Pursuant to the Aspatrian Criminal Code, the Aspatrian prosecutor applied for, and was granted with, a temporary freezing order seizing over ALEC's investments within Aspatria, pending the outcome of the ongoing criminal trial. If ALEC is cleared of any criminal activities, the seizure will be cancelled. However, shortly after the seizure, ALEC promptly applied for an appeal against the seizure. The application was denied by the Aspatrian legal system in November, 2008.

QUESTIONS PRESENTED

The Republic of Aspatria respectfully asks this honorable Court to adjudge:

I. Whether 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 entitled to independence based on the principle of self-determination;

II. Whether Rydal's rejection of MDR's bid constituted a violation of the Aspatria-Rydal BIT;

III. Whether Rydal has standing to invoke to the Aspatria-Rydal BIT to protect the assets of ALEC, and whether Aspatria violated the Aspatria-Rydal BIT.

SUMMARY OF PLEADINGS

Aspatria has legal title to the Islands by right of first occupation. They were the first to take effective occupation of the Islands, and continued to display their sovereignty after they left the Islands in 1799. Although the Islands were initially claimed on behalf of Plumbland, the Islands became part of the Aspatria under the principle of *uti possidetis juris* when it became independent on or before 1 July 1820. Rydal's possession of the Islands until today is therefore illegal and infringes Aspatria's territorial sovereignty. Alternatively, even if Rydal had legal title to the Islands by right of first occupation, Aspatria had acquired a prescriptive legal title to the Islands by their continuous and peaceful display of State authority.

Since the Islands are part of Aspatria's territory but not a colony of them, the Islanders are not entitled to independence based on the principle of self-determination. Accordingly, Rydal may not lawfully take steps giving effect to the independence of the Islands, and must cede administration over the Islands to Aspatria.

Aspatria can invoke the Aspatria-Rydal BIT to protect MDR because (1) the Aspatria-Rydal BIT is applicable to the Islands and (2) MDR satisfies the pre-condition for triggering the BIT.

Rydal's rejection of MDR's bid breached Article IV of the Aspatria-Rydal BIT. Rydal violated the national treatment standard by treating MDR less favorably than ROCO in like circumstances. Such less favorable treatment was based solely on nationality-motivated

discrimination and cannot be justified by any legitimate non-nationality-based reason.

Rydal's rejection of MDR's bid also breached Article V of the Aspatria-Rydal BIT because the nationality-based discrimination was also a direct breach of the fair and equitable standard and the principle of non-discrimination under customary international law.

The breaches cannot be justified by the principle of "necessity" under customary international law because Rydal did not experience any imminent peril. Nor can the breaches be treated as exceptions under the principle of "permanent sovereignty over natural resources" because MDR was using all means to contribute to the Islands rather than to exploit them.

Rydal does not have the necessary standing in bringing forward the present proceedings, as the purportedly injured national in this case, ALEC, is of Aspatrian, not Rydalian nationality. Furthermore, even if Rydal is able to succeed on the nationality ground, the rule governing the exhaustion of local remedies has not been satisfied by ALEC, as the legal proceedings against ALEC within the Aspatrian justice system have not reached their finality. In any event, Aspatria has not committed any expropriation against the properties of ALEC, since the seizure of the properties is going to be temporary if ALEC is ultimately cleared of any criminality.

PLEADINGS

I. RYDAL MAY NOT LAWFULLY TAKE STEPS GIVING EFFECT TO THE INDEPENDENCE OF THE ISLANDS AND MUST CEDE ADMINISTRATION OVER THE ISLANDS TO ASPATRIA

A. Sovereignty over the Islands belongs to Aspatria

1. The critical date for determining which party has sovereignty over the Islands is the middle of 1818

In territorial disputes, there is no single formula for determining the critical date.[1] It may be the date of a treaty of cession,[2] the date when a competing State took occupation of the disputed territory,[3] the date of independence of a new State,[4] or the date when the dispute crystallized.[5] It is also possible that no critical date is chosen by the Court at all,[6] as in where the dispute requires

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[1] Ian Brownlie, *Principles of Public International Law* (7th edn OUP, New York 2008) 126.

[2] *The Island of Palmas Case (or Miangas)* (1928) 2 RIAA 829, 845.

[3] *Legal Status of Eastern Greenland* [1933] PCIJ Rep Series A/B, No.53, 45.

[4] *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgment) [1986] ICJ Rep 554, 570.

[5] *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)* (Judgment) General List No 130 [2008] ¶32.

[6] *The Minquiers and Ecrehos Case (France v United Kingdom)* (Judgment) [1953] ICJ Rep 47, 59-60.

an examination of all the evidence.[7]

This is a proper case for there to be a critical date, as it is often adopted in territorial disputes with claims based on occupation and acquisitive prescription.[8] In the present case, when King Piero sent a letter to Queen Constance in the middle of 1818 protesting at Rydal's occupation of the Islands,[9] the issues between the parties were definable in concrete terms and capable of legal settlement.[10] Both parties had also taken up their final positions in terms of their respective rights.[11] The dispute had therefore crystallized.[12] As their rights were created by events occurring before the date of protest, that is the critical date.[13] Subsequent events cannot in themselves serve to indicate the legal situation of the Islands at that critical moment.[14] This Court shall therefore disregard subsequent acts for the purpose of establishing sovereignty,[15] unless they were a normal continuation of prior acts and were not undertaken for the purpose of improving the legal position of the party relying on them.[16]

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[7] *Argentine-Chile Frontier Case* (1966) 38 ILR 10, 80.

[8] L.F.E. Goldie, 'The Critical Date' (1963) 12 ICLQ 1251, 1267.

[9] *Compromis*, ¶15.

[10] Goldie (n 8) 1253.

[11] Goldie (n 8) 1254.

[12] *The Pedra Branca Case* (n 5) ¶34.

[13] Goldie (n 8) 1254.

[14] *Palmas Case* (n 2) 866.

[15] *The Pedra Branca Case* (n 5) ¶32.

[16] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)* (Judgment) [2002]

In any event, the critical date shall not be later than the date upon which Aspatria became independent, and inherited all of Plumbland's rights to the Islands under the doctrine of *uti possidetis juris*.[17] As will be submitted, Aspatria attained independence on 1 July 1820 the latest.

Legal Consequences flowing from the period of 6 December 1777 – the middle of 1818

2. Aspatria acquired legal title to the Islands by right of first occupation

Aspatria acquired legal title to the Islands by right of first occupation because the Islands had reverted to *terra nullius* during their occupation between early 1778 and 5 September 1813.[18]

i. The Islands reverted to *terra nullius* during Aspatria's occupation of them because Rydal's inchoate title had lapsed

Terra nullius denotes a territory belonging to no-one at the time of the act alleged to constitute the occupation.[19] Historical records indicate that the Islands were first discovered in

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ICJ Rep 682, ¶135.

[17] *The Frontier Dispute Case* (n 4) 570; Malcolm N. Shaw *International Law* (6th edn CUP, UK 2008) 509-510.

[18] *Compromis*, ¶6, ¶10.

[19] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, ¶79.

1777 by Captain Parrish of Rydal.[20] However, discovery alone does not give rise to a legal title, but merely an inchoate title.[21] To perfect the inchoate title, effective occupation had to be taken within a reasonable time,[22] otherwise the Islands would revert to *terra nullius*.[23] Effective occupation requires (i) a formal act of possession, (ii) an intention to occupy, and (iii) the performance of acts of administration.[24]

Captain Parrish's leaving of the flag of Rydal and the stone-carved declaration of sovereignty[25] are symbolic acts of possession.[26] Rydal may contend that during the 18th century a symbolic act of possession was wholly sufficient *per se* to immediately establish a valid title to discovered territories, and was not required to be supplemented by effective occupation,[27] particularly where uninhabited regions were involved.[28] However, this proposition is not well

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[20] *Compromis*, ¶5.

[21] *Palmas Case* (n 2) 845-846; Beatrice Orent and Patrica Reinsch, 'Sovereignty over Islands in the Pacific' (1941) 35 AJIL 443.

[22] *Palmas Case* (n 2) 846; *The Clipperton Island Case (France v. Mexico)* (1932) 26 AJIL 390, 393-394.

[23] Stephen Hall, *International Law* (LexisNexis, Hong Kong 2006) 256.

[24] *Palmas Case* (n 2) 846; Brownlie (n 1) 133.

[25] *Compromis*, ¶5.

[26] Brownlie (n 1) 140.

[27] A.S. Keller, O.J. Lissitzyn and F.J. Mann, *Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800* (Columbia UP, New York 1938) 148-149.

[28] *The Clipperton Island Case* (n 22), 394.

established in international law,[29] and is, at best, reflective of the position in the 19th century only.[30] Australia's early history demonstrates that "in the 17th and 18th centuries bare symbolic annexation was considered not to grant full sovereign rights over newly found regions, but only an inchoate title which finally perished unless followed and perfected by actual occupancy within a reasonable time".[31] Hence, there is insufficient consistency of State practice in the 18th century to recognize symbolic acts of possession as giving rise to an immediate, definitive title to discovered land.

Moreover, Rydal's title fails under the doctrine of inter-temporal law, which provides that even if Rydal's symbolic acts possession in 1777 had produced good title to the Islands, its continued existence is subject to the conditions required by the evolution of international law during the 19th century. This required the Islands to be under Rydal's exercise of effective sovereignty, and not merely reserved for them by virtue of a title no longer recognized by existing law.[32]

Rydal therefore had a mere inchoate title to the Islands, subject to perfection within a reasonable period. What constitutes a "reasonable period" depends on the factual

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[29] Gillian D. Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Australia 2006) 216.

[30] Friedrich August Freiherr von der Heydte 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law' (1935) 29 AJIL 448, 462-465.

[31] Heydte (n 30) 460.

[32] *Palmas Case* (n 2) 846.

circumstances.[33] Here, Rydal did not occupy the Islands or perform acts of administration until at least 1813 (i.e. 36 years after discovery). The temporary nature of the settlement at St. Bees also defeats any contention that there was a permanent intention to occupy the Islands. Within these 36 years, a reasonable period had lapsed. It is unreasonable for Rydal to put Plumbland on notice of its inchoate title for over 30 years without taking any further action to perfect it by effective occupation. The Islands therefore reverted to *terra nullius* during that period and were henceforth susceptible to occupation.

ii. Aspatria was the first to take effective occupation of the Islands

Aspatria was the first to effectively occupy the Islands. In early 1778, the Viceroy of Aspatria sent Lieutenant Ricoy to settle and claim the Islands on behalf of the King of Plumbland.[34] The establishment of the fort and settlement of Salkeld are clear acts of possession.[35] Furthermore, Lieutenant Ricoy and his men settled on the Islands between early 1778 and 20 December 1799. Although they were thereafter ordered to return to Aspatria, their leaving of the flag of Plumbland and the notice of sovereignty[36] put Plumbland in constructive possession of the Islands after 1799. Plumbland's title to the Islands was therefore established by effective occupation from early 1778 to 5 September 1813. Accordingly, when Admiral Aikton of

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[33] Heydte (n 30) 462.

[34] *Compromis*, ¶6.

[35] Hall (n 23) 252.

[36] *Compromis*, ¶7.

Rydal and his men landed on the Islands on 6 September 1813,[37] they were violating Plumbland's sovereign rights.

iii. Aspatria has a better relative title to the Islands than Rydal

Where there are two competing claims over the Islands, this Court shall decide which State has the superior claim.[38] Aspatria (succeeding from Plumbland's title) has made out a superior claim to the Islands since the intensity of their sovereign acts before the middle of 1818 far outweighed those by Rydal.[39] Aspatria had possession of the Islands for 35 years, while Rydal, by virtue of the acts of Admiral Aikton, took possession for roughly 6 years.

Furthermore, Aspatria attempted to establish a penal colony on the Islands in June 1817, and would have done so but for Admiral Aikton's illegal presence.[40] Therefore, if Admiral Aikton had not unlawfully occupied the Islands, Aspatria would have effectively occupied them during early 1778, continued to be in possession after 1799, and have administered the Islands from June 1817 onwards.

As submitted, Rydal's symbolic acts of possession in 1777 only gave rise to an inchoate title, which cannot "prevail over the continuous and peaceful display of authority by another State; for

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[37] *Compromis*, ¶10.

[38] *Palmas Case* (n 2) 869; *Eastern Greenland Case* (n 3) 46.

[39] *The Minquiers and Ecrehos Case* (n 6) 67.

[40] *Compromis*, ¶14.

such display may prevail even over a prior, definitive title put forward by another State".[41] The relative strength of Aspatria's title by continuous display of authority is therefore stronger.

iv. Plumbland had not abandoned the Islands when Aspatria left in 1799

Rydal may contend that Plumbland had abandoned the Islands in 1799. However, abandonment of territory requires a clear intention to renounce title.[42] In the present case, Plumbland had title to the Islands by virtue of effective occupation. The leaving of the flag of Plumbland and the notice of sovereignty after 1799 indicates there was no intention to abandon the Islands. Plumbland's temporary absence from the Islands therefore cannot imply forfeiture of an already perfected title.

3. Alternatively, Aspatria possesses title to the Islands by acquisitive prescription

Even if Rydal had acquired a legal title to the Islands in 1777 by the acts of Captain Parrish, the display of Plumbland's sovereignty over the Islands for 35 years during 1778 to 5 September 1813 constitutes acquisitive prescription.[43] This requires possession to be (i) exercised *à titre de souverain*, (ii) peaceful and uninterrupted, (iii) public, and (iv) endure for a certain length of time.[44]

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[41] *Palmas Case* (n 2) 846.

[42] *The Clipperton Island Case* (n 22) 394; Brownlie (n 1) 139.

[43] *Palmas Case* (n 2) 869.

[44] *Kasikili/Sedudu Island (Botswana v. Namibia)* (Judgment) [1999] ICJ Rep 1045, 1103; D.H.N.

First, possession exercised *à titre de souverain* means that possession must be by virtue of State authority.[45] Here, Lieutenant Ricoy and his men were instructed by the Viceroy of Aspatria to occupy the Islands, hence undertaken with State authority, and integral to Plumbland's sovereign claim.

Secondly, before Lieutenant Ricoy left the Islands, Plumbland occupied the Islands for an uninterrupted period of 35 years. Their display of sovereignty during that time was peaceful since it was not protested by Rydal.[46] Rydal's acquiescence is implied from their failure to manifest their opposition through diplomatic protests.[47] In relation to this, possession must also be public so that all interested States can be made aware of it.[48] Aspatria's possession was public since nautical charts produced in Plumbland and Aspatria showed the Islands as belonging to Plumbland, ascribed to them the name "Windscale Islands", and this name was the one by which they subsequently became known.[49]

Johnson, 'Acquisitive Prescription in International Law' (1950) 27 British Ybk Intl L 332, 343-348.

[45] Shaw (n 17) 505.

[46] Johnson (n 44) 345-347.

[47] Johnson (n 44) 353-354.

[48] Shaw (n 17) 505.

[49] *Compromis*, ¶9.

Finally, the possession must endure for a certain period of time.[50] The required length of time will depend upon all the circumstances, including the nature of the territory and the existence of competing claims.[51] Aspatria submits that 35 years was a reasonable length of time since it was sufficient for Rydal to have discovered the presence of Plumbland and protested.

During these 35 years, although physical possession of the Islands ceased, constructive possession remained. Plumbland had therefore continuously and peacefully displayed State authority on the Islands after 1799. Possession only ceased when Admiral Aikton of Rydal came into possession of the Islands on 6 September 1813. International law recognizes that sovereignty is continuous in principle, although it cannot be exercised in fact at every moment and every point of a territory.[52] The intermittence or discontinuity of display of sovereignty is therefore compatible with the maintenance of legal title particularly where uninhabited regions are involved.[53] However, during Aspatria's possession, Rydal had never protested at Plumbland's peaceful display of sovereignty. Aspatria has therefore acquired a prescriptive title to the Islands.

Legal Consequences flowing from the period of 15 September 1818 – 22 September 1821

4. Queen Constance's adoption of all the acts of Admiral Aikton did not perfect Rydal's inchoate title

[50] Johnson (n 44) 347.

[51] Shaw (n 17) 506.

[52] *Palmas Case* (n 2) 840.

[53] *Palmas Case* (n 2) 840.

Rydal may contend that their inchoate title had been perfected by Queen Constance's adoption of all the actions of Admiral Aikton on 15 September 1818.[54] However, the ratification came after the lapse of a "reasonable period" of nearly 40 years. Accordingly, the ratification is of no significance, since it came after the lapse of a reasonable time, and also after the critical date of the middle of 1818.

5. Aspatria attained statehood on or before 1 July 1820

Aspatria ceased to be a colony of Plumbland and became an independent State on or before 1 July 1820. 19th century State practice established that a seceding territory could properly be recognized as a State if it governed its territory effectively and with sufficient stability.[55] This view was crystallized in Article 1 of the Montevideo Convention on Rights and Duties of States 1933, which reflects custom.[56] It sets out the following qualifications of statehood: (i) a permanent population, (ii) a defined territory, (iii) government, and (iv) capacity to enter into relations with other States.

First, no evidence suggests that Aspatria had not maintained a permanent population. It was

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[54] *Compromis*, ¶15.

[55] James Crawford, *The Creation of States in International Law* (2nd edn OUP, New York 2006) 382.

[56] Joshua Castellino and Steve Allen, *Title to Territory in International Law – A Temporal Analysis* (Ashgate Publishing Limited, UK 2003) 97, D.J. Harris, *Cases and Materials on International Law* (6th edn Sweet & Maxwell, London 2004) 99.

originally a colony of Plumbland and is now a developed State.[57] Secondly, it is submitted that Aspatria had a defined territory. Although the status of the Islands is in dispute, this does not prevent Aspatria from attaining statehood.[58]

The third qualification of effective government requires the creation of a stable political organization.[59] Here, effective governmental control is inferred from (i) the success of the night-time raid against Plumbland's garrison at Langdale, the capital of Aspatria,[60] (ii) Plumbland's inability to spare forces to retake Aspatria,[61] and (iii) Aspatria's establishment of a federal government.[62]

Lastly, the capacity to enter into relations with other States requires a State to be independent as a matter of law.[63] Aspatria was declared independent on 2 November 1819.[64] A Constitutional Convention was then held in Langdale, leading to the Aspatrian Constitution in

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[57] *Compromis*, ¶2, ¶3.

[58] Harris (n 56) 100.

[59] T*he Aaland Islands Question (On Jurisdiction)*, Report of the International Committee of Jurists, League of Nations Official Journal, Special Supplement No.3 (1920) 9.

[60] *Compromis*, ¶17.

[61] *Compromis*, ¶18.

[62] *Compromis*, ¶19.

[63] *Customs Regime Between Germany and Austria* (Separate Opinion of Judge Anzilotti) [1931] PCIJ Rep Series A/B No.41, 57-58; Triggs (n 29) 153.

[64] *Compromis*, ¶18.

January 1820, which provided that Aspatrian law applied to the whole of its territory.[65] Colonel Diaz of Aspatria was then elected the first President of Aspatria on 1 July 1820.[66] Aspatria therefore had the capacity to enter into relations with other States under its own constitution and laws. Accordingly, the conditions of statehood were fulfilled.

Although Plumbland had not recognized the independence of Aspatria until 1841,[67] recognition by the former metropolitan State was not a precondition for statehood in the 19th century, provided other conditions had been met.[68] Moreover, recognition by other States was of mere declaratory effect.[69]

i. The Islands became a part of Aspatria under the principle of *uti possidetis juris*

Uti possidetis provides that a new State will come to independence with the same boundaries it had during which it was an administrative unit within the territory of a colonial power.[70] At the moment of attaining independence, *uti possidetis* freezes the territorial title as it

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[65] *Compromis*, ¶19.

[66] *Compromis*, ¶19.

[67] *Compromis*, ¶26; *Clarifications to the Compromis*, ¶1.

[68] Crawford (n 55) 376-379.

[69] Montevideo Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) art 3.

[70] M.N. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1996) 67 British Ybk Intl L 75, 94.

is.[71]

At all material times since Lieutenant Ricoy acquired possession of the Islands, Plumbland had never administered the Islands except via the Viceroyalty of Aspatria. Accordingly, the Islands became a part of Aspatria upon attaining statehood. [72]

ii. The Islands were not ceded to Rydal by the Treaty of Great Corby

Rydal may contend that the Islands were ceded to it by Plumbland by the Treaty of Great Corby on 22 September 1821.[73] As Aspatria had been declared independent in 1819 and attained statehood prior to the Treaty of Great Corby,[74] any recognition of Rydalian title to the Islands does not bind Aspatria. Furthermore, as submitted, the Islands became part of Aspatria under the principle of *uti possidetis*.[75] Hence, they were not Plumbland's to give.[76] Accordingly, Rydal received nothing under the Treaty of Great Corby.

Legal Consequences flowing from the period of 23 September 1821 – present

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[71] *The Frontier Dispute Case* (n 4) 568.

[72] *The Frontier Dispute Case* (n 4) 566; *Case Concerning the Lands, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening) [1992] ICJ Rep 351, ¶28.

[73] *Compromis*, ¶20.

[74] *Compromis*, ¶18.

[75] *Compromis*, ¶19.

[76] *Palmas Case* (n 2) 843.

6. Rydal had not peacefully displayed State authority

Rydal may contend that it had peacefully and uninterruptedly displayed State authority. However, any conduct of Aspatria indicating a lack of acquiescence, for example protests, will prevent Rydal's possession from being peaceful and uninterrupted.[77] The presence of Admiral Aikton was protested by Plumbland,[78] and since then, Aspatria had attempted to capture the Islands twice,[79] after which it persistently protested against Rydal's exercise of sovereignty over the Islands via diplomatic means.[80] Aspatria also brought the matter to the United Nations,[81] and now to this Court.

Although between 1880 and 1910 no protests were made due to political and economic crisis in Aspatria, assertion of Aspatria's claim to the Islands resumed after civilian government was restored.[82] The 30-year period of silence is not to be regarded as acquiescence, since Aspatria had reason to recall its ambassadors in response to the series of coups d'etat and counter-coups.[83] On the whole, protests were persistent and a lack of acquiescence was evident.

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[77] *Palmas Case* (n 2) 868; Brownlie (n 1) 126.

[78] *Compromis*, ¶14, ¶15.

[79] *Compromis*, ¶14, ¶22.

[80] *Compromis*, ¶24, ¶27, ¶33.

[81] *Compromis*, ¶36, ¶37.

[82] *Compromis*, ¶30.

[83] I.C. MacGibbon 'The Scope of Acquiescence in International Law' (1954) 31 British Ybk Intl L 143, 170-171.

Accordingly, Rydal had not peacefully displayed State authority over the Islands.

B. The Islanders are not entitled to independence based on the principle of self-determination

1. The right to self-determination applies only in the colonial context

The principle of colonial self-determination and the legal consequences of its application during decolonization are uncontroversial:[84] it enjoys an *erga omnes* character.[85] Should the Islands be a colony, the Islanders would be entitled to independence based on the principle of self-determination.[86] However, outside the context of decolonization, self-determination does not confer a right on racial or ethnic minorities to establish a separate State.[87]

A distinction must be drawn between external self-determination, which gives right to a colony to become independent from its metropolitan State, and internal self-determination, which provides that minorities shall have all the rights accorded to minorities and ethnic groups under international law.[88] Although the right to self-determination is customary law,[89] it has evolved

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[84] Malcolm D. Evans (ed), *International Law* (2nd edn OUP, New York 2006) 226.

[85] *East Timor (Portugal v. Austria)* (Judgment) [1995] ICJ Rep 90, 102.

[86] Declaration on the Granting of Independence to Colonial Territories and Peoples UNGA Res 1514(XV) (14 December 1960) (GICTP).

[87] Evans (n 84) 226.

[88] *Reference re Secession of Quebec* (1998) 2 SCR 217, ¶126, ¶138; Evans (n 84) 226-227.

within a framework of respect for the territorial integrity of existing States.[90] Aspatria submits that the Canadian decision in *Reference re Secession of Quebec*, insofar as it suggests that in the non-colonial context, external self-determination applies in extreme and exceptional circumstances where a "people" is subject to alien subjugation, domination or exploitation, is without legal foundation.[91] In any event, the rights of the inhabitants on the Islands are constitutionally protected.[92] Accordingly, external self-determination has no application in the present case.

2. The Islands are not a colony since they are a part of Aspatrian territory

Colonial territories are geographically separate territories which are dependent upon and subordinate to a metropolitan State. The United Nations Charter refers to two classes of such territories, non-self-governing territories and trust territories, covered respectively by Chapters XI and XII of the Charter.[93]

When Rydal joined the United Nations in 1945, they designated the Islands a non-self-

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[89] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1970] ICJ Rep 16, 31; *Western Sahara* (n 19) 31-32.

[90] GICTP (n 86) ¶6; *Reference re Secession of Quebec* (n 88) ¶127.

[91] *Reference re Secession of Quebec* (n 88) ¶133.

[92] *Compromis*, ¶35.

[93] J Crawford, 'State Practice and International Law in Relation to Unilateral Secession' (1998) 69 British Ybk Intl L 85, 87.

governing territory.[94] Therefore, if the Islands belong to Rydal, they are a colonial territory entitled to self-determination.

The same does not apply if the Islands are Aspatria's territory. Aspatria does not treat the Islands as their colony; they impose no import duties on goods from the Islands,[95] and treat persons born on the Islands as citizens of Aspatria.[96] In contrast, Rydal treated the Islands as its colony by classifying the Islanders as "Rydalian Dependent Territory citizens" who do not possess full Rydalian citizenship.[97]

Furthermore, the Aspatrian Constitution included the Islands as its territory upon secession from Plumbland. It is therefore not a colony, but a part of Aspatria. As the right to self-determination does not apply outside the context of decolonization,[98] and international law favors the territorial integrity of States, any act of attaining independence in this situation would amount to a unilateral secession which is a matter of domestic law for Aspatria.[99] Rydal must therefore refrain from giving effect to the independence of the Islands which is neither a colony nor its colony.

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[94] *Compromis*, ¶34.

[95] *Compromis*, ¶31.

[96] *Compromis*, ¶33.

[97] *Clarifications to the Compromis*, ¶7.

[98] *Reference re Secession of Quebec* (n 88) ¶138.

[99] *Reference re Secession of Quebec* (n 88) ¶112.

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

A. The Aspatria-Rydal BIT is applicable to the Islands

1. Aspatria-Rydal BIT is extended to the Islands which is a Non-Self-Governing Territory of Rydal

It is generally accepted that treaties are applicable to all territories that the contracting States are internationally responsible for.[100] Even when the State is exercising foreign occupying power, it assumes international obligations towards the occupied territories and treaties signed will be applicable *de jure* to the said territories.[101]

Therefore, the provision of the Aspatria-Rydal BIT which covers "investments by investors of one Party in the territory of the other Party…"[102] is interpreted as referring to territory within the State's jurisdiction.[103] Rydal, who exercises jurisdiction over the Islands by maintaining exclusive authority over their foreign relations,[104] also extends the Aspatria-Rydal

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[100] Sir H Waldock, 'Third report on the law of treaties' (1965) 2 ILC Ybk 15.

[101] *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136, 171-181.

[102] *Compromis, Annex I,* Preamble ¶2.

[103] *Legal Consequences of the Construction of a Wall* (n 101) 178-179.

[104] *Compromis*, ¶35.

BIT to the Islands.

2. MDR's office in Rydal is an "investor" protected by the Aspatria-Rydal BIT

i. The regional office of MDR in Rydal is an enterprise of a foreign State

"Investor of a Party", as defined in the Aspatria-Rydal BIT, includes "an enterprise of a Party".[105] MDR's office in Rydal is a local affiliate of a foreign corporation and is undoubtedly a foreign enterprise of MDR[106].

ii. Alternatively, the regional office of MDR is a "national" of a foreign State

When treaties are "habitually framed in the same way, a court may regard the usual form as the law even in the absence of a treaty obligation".[107] *Opinio juris* is not required because the frequency of treaty provisions results in the creation of international custom.[108]

It is common State practice in bilateral investment treaties ("BITs") to treat the

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[105] *Compromis, Annex I,* Preamble ¶6.

[106] *Compromis,* ¶51.

[107] Brownlie (n 1) 13.

[108] Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Grotius, Cambridge 1982) 378.

nationality of a parent corporation's regional office to be the same as the parent corporation. Such a provision is present in almost 2800 BITs and in Article 25(2)(b) of the International Centre for Settlement of Investment Dispute Convention ("ICSID Convention"), satisfying the criteria for creating a custom.

The letter accompanying the bid and the conference denouncing the bid decision were addressed by Monte de Rosa, owner of MDR, incorporated in Aspatria.[109] It evidences that MDR's office in Rydal is under material control of MDR and hence attracts protection of the Aspatria-Rydal BIT as a national of Aspatria.

3. The bid is an "investment" being protected under the Aspatria-Rydal BIT

It is common drafting practice in investment treaties to expressly refer in the preamble to any specific economic sectors where foreign investments are restricted.[110]

i. The Aspatria-Rydal BIT protects investments related to national exploitation

The preamble of the Aspatria-Rydal BIT refers only to the parties' desire "to create favorable conditions for greater economic cooperation … for investment by investors of one

[109] *Compromis*, ¶51, ¶55.

[110] UNCTC 'Bilateral Investment Treaties' (1988) UN Doc ST/CTC/65, 20-21.

Party in the territory of the other Party".[111] No specific area is defined where investment protection is restricted.

ii. The Aspatria-Rydal BIT protects the bid as pre-establishment investment

A pre-establishment right is the foreign investment's right to enter into the host market.[112] "Investment" defined in the Aspatria-Rydal BIT includes "licenses", "authorizations" and "permits",[113] which are clearly forms of pre-establishment procedures. Rydal used the bidding process to determine who would be entitled, under licence, to exploit oil around the Islands. Any bids are therefore investments protected by the Aspatria-Rydal BIT.[114]

4. The Court are unable to look beyond the express terms in the Aspatria-Rydal BIT to determine its applicability to the Islands

Where there is no *travaux preparatories* available to supplement treaty interpretation,[115] the Court must confine itself to the actual terms of treaty as expression of the parties' common

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[111] *Compromis, Annex I*, Preamble ¶2.

[112] WTO, 'Modalities for Pre-establishment Commitments Based on a GATS-Type, Positive List Approach' (2002) WTO Doc WT/WGTI/W/120.

[113] *Compromis, Annex I*, Preamble ¶5.

[114] *Compromis*, ¶49.

[115] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 331 UNTS 1155 (VCLT) art 32.

intention.[116]

Although one Prime Minister of Rydal mentioned that the issue of the Islands was to be resolved in the future,[117] this unilateral declaration did not form any supplementary means of interpretation to the Aspatria-Rydal BIT. It is at most the motive of Rydal to exclude the Islands and has no legal bearing.[118] The actual common intention, stated explicitly in the Aspatria-Rydal BIT, is to "promote economic development" and to "simulate entrepreneurship and increase prosperity in both States based on the principles of equality and mutual benefit".[119] The Islands' ownership will only matter if it is expressed in the Aspatria-Rydal BIT. Nevertheless, exploring oil on the Islands under a confined authorizing system produces mutual benefit economically.

5. Rydal cannot use the principle of "self-determination" to deny the applicability of the Aspatria-Rydal BIT to the Island

As submitted under Declaration I, the principle of "self-determination" does not apply to the Islanders. Therefore, Rydal cannot use this principle to exclude the Islands from the scope of the Aspatria-Rydal BIT.

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[116] *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112, 126; VCLT (n 115) art 31(1).

[117] *Compromis*, ¶39.

[118] M. Sornarajah, *The International Law on Foreign Investment* (CUP, Cambridge 2004) 218.

[119] *Compromis, Annex I*, Preamble ¶3.

Even if the principle is applicable in the present situation, it is doubtful whether it has the status of *jus cogens*, no matter whether it is within or outside the decolonization context.[120] Therefore, the principle of "self-determination" cannot be invoked to limit the scope of the Aspatria-Rydal BIT according to Article 53 and Article 69 of VCLT.

6. In any event, Rydal cannot use the principle of "permanent sovereignty over natural resources" to exclude the Islands from the Aspatria-Rydal BIT

Rydal may argue that according to UN Resolution 3821, the Islands' sovereignty over natural resources superseded any international contractual promise,[121] such as the Aspatria-Rydal BIT.[122] Although Resolution 3821 is the latest resolution on this matter, the principle of "permanent sovereign over natural resources" is in all time recognized only as a "right", as it is defined in ICCPR and ICESCR.[123] Nevertheless, only Resolution 1803 (XVII)[124] is accepted as restating the custom.[125] Paragraph 8 provides that "[f]oreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith." Therefore, the

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[120] Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 VJIL 1, 31-35; Brownlie (n 1) 515; Crawford (n 55) 101.

[121] UNGA Res 3281 (1974) GAOR 29th Session Supp 31

[122] UNGA Res 3281 (1974) GAOR 29th Session Supp 31

[123] Alice Farmer, 'Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries' (2006) 39 NYUJILP 417.

[124] UNGA Res 1803 (1962) GAOR 17th Session Supp 17

[125] I. Seidl-Hohenveldern, 'International Economic Law: General Course on Public International Law' (1986) 198 Recueil des Cours 9, 50.

right is not absolute, nor is it a *jus cogens*.[126]

Therefore the principle of "permanent sovereign over natural resources" cannot be employed to negate the validity of the Aspatria-Rydal BIT to the Islands.

B. Rydal's rejection of MDR's bid materially breached its obligation under Article IV and V of the Aspatria-Rydal BIT

Pursuant to Article 26 of VCLT, a treaty is binding upon the parties to it and must be performed in good faith. Treaty parties are obliged to act reasonably to realize the treaty's purpose.[127] Rydal's rejection of MDR bid violated its obligations to act in good faith and reasonably.

1. Rydal's rejection of MDR bid violated the national treatment standard accorded under Article IV of the Aspatria-Rydal BIT

The "national treatment" standard defines the treatment that a State must accord to foreign investors, that is, equivalent to the treatment of nationals of the host country.[128] Rydal has breached this obligation because it has treated MDR less favorably than its local investor in "like

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[126] Seidl-Hohenveldern, (n 126) 21, 58-59, 133; *Aminoil v Kuwait* (1982) 21 ILM 976.

[127] *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* (Judgment) [1997] ICJ Rep 7, 68.

[128] UNCTD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (UN, New York 2007) 42.

circumstances".

i. The investments of MDR and Rydal's own investor, ROCO, are in "like circumstances"

The concept of "like" has a wide range of meanings from similar to identical.[129] Where the national and foreign investors are in competition, it will form the basis for "like circumstances" comparison.[130]

MDR, an Aspatrian investor, and the Rydalian ROCO, were attempting to obtain a license for the same investment of oil exploitation around the Islands under the same set of conditions defined by the Rydalian Government.[131] The pre-conditions have framed the parties in "like circumstances" for comparison.

ii. MDR is less favorably treated than Rydalian investor

When there is a lack of legitimate rationale for discrimination in "like circumstances", the tribunal will presume that the difference in treatment arose from the difference in nationality.[132]

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[129] *Pope & Talbot Inc. v. Canada,* UNCITRAL, Merits, Phase 2 (10 April 2001) ¶75

[130] *S.D. Myers v. Canada* (2002) 121 ILR 7; *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No.UN3467, Final Award (1 July 2004).

[131] *Compromis*, ¶49.

[132] Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer Law & Business, Austin 2009) 36.

a. Rejecting MDR bid is solely nationality-based discrimination

While the disparate treatment demonstrates significant indication of prejudice based on national origin, any differential treatment violates national treatment.[133] Nationality-based discrimination is presumed when a foreign investment receives less favorable treatment than a domestic investment in the same business.[134]

Governor Lucy Black asserted that the Islands were "led by Rydal, which shares a common history, culture and value". She withheld MDR bid to "safeguard the long-term viability of the territory and its people".[135] This statement implied that the Governor considered the bidder's nationality as a material factor in deciding whether to endorse the bid. Given the acknowledgment of MDR bid's "appealing" nature, rejecting such was obviously nationality-related.[136]

b. MDR's bid does not contrast to any Rydal's policy so as to form a legitimate non-nationality-based reason for discrimination

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[133] *The Loewen Group Inc & Raymond L. Loewen v. United States*, ICSID Case No.ARB(AF)/98/3, Award (26 June 2003).

[134] *Feldman v. Mexico,* ICSID Case No.ARB(AF)/99/1, Award (December 16, 2002) ¶181.

[135] *Compromis*, ¶53.

[136] *Compromis*, ¶53.

Foreign investors are less favorably treated under an ostensibly neutral government measure when they are disadvantaged.[137] Any difference in treatment demands justification reasonably related to rational policies.[138]

The bid submitted by MDR was clearly more attractive than ROCO's. First, MDR's offer, which included a plan to build a facility on the Islands and to employ Islanders for the enterprise,[139] was beneficial economically and socially. Second, the First Minister of the Islands acknowledged that MDR bid was more economically appealing.[140] Third, MDR bid was rapidly endorsed by the Assembly of Rydal.[141] There was no rational policy to justify Rydal's rejection of MDR's highly favorable bid.

2. Rydal's rejection of MDR bid violated the minimum standard treatment protected under Article V of the Aspatria-Rydal BIT

Article V of the Aspatria-Rydal BIT expressly ties its protection to customary international law, which provides for a minimum set of principles that States must respect when dealing with foreign nationals.[142]

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[137] *Pope & Talbot Inc.* (n 129).

[138] *Pope & Talbot Inc.* (n 129).

[139] *Compromis*, ¶51.

[140] *Compromis*, ¶52.

[141] *Compromis*, ¶52.

[142] Andreas Hans Roth, *The Minimum Standard of International Law Applied to Aliens* (A.W.

i. MDR has not been treated fairly and equitably in the bidding process

Any measure that involves discrimination is contrary to the fair and equitable treatment standard under customary international law.[143] Rydal's nationality-based authorization process, contrary to the national treatment standard, also breached the fair and equitable standard.

Legitimate expectations, as a general principle of law, are another dominant element of the fair and equitable standard.[144] Where the government makes a promise for a transparent tendering process, which an investor relies, a legitimate expectation arises.[145] Rydal's assurance that the bidding process would be "open, transparent and competitive"[146] created a legitimate expectation on investors in the bidding process. Any determining factor of the bid, such as investor's nationality, should be disclosed. Rydal breached the fair and equitable standard through such omission and irreparably harmed MDR's economic interest by impairing its possibility of using the resources for alternative opportunities.

Sijthoff, Leiden 1949) 127.

[143] *CMS Gas Transmission Company v. The Argentina Republic*, ICSID Case No.ARB/01/8, Award (12 May 2005).

[144] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006).

[145] Katia Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Development' in August Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008) 122.

[146] *Compromis*, ¶49.

ii. Rydal breached the customary international law of non-discrimination by rejecting MDR's bid based on nationality

"Discrimination" entails two elements: First, measures directed against a particular party must be for reasons unrelated to the substance of the matter, for example, the corporation's nationality. Second, it entails like person being treated in an inequivalent manner.[147]

As submitted above, in the bidding process, MDR, who is a "like investor" as ROCO, was discriminated against solely because of its Aspatrian nationality, which is unrelated to the business of oil exploration. Therefore, Rydal violated Article V of the Aspatria-Rydal BIT.

3. There is exception or justification to support Rydal's violation of Article IV and V of the Aspatria-Rydal BIT

i. Rydal cannot invoke "necessity" as a defence for its breach of the Aspatria-Rydal BIT

The defence of necessity, allowing a State to depart from its international obligation,[148]

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[147] R. Doak Bishop, James Crawford and W. Michael Reisman, *Foreign Investment Disputes Cases, Materials and Commentary* (Kluwer Law International, Frederick 2005) 949.

[148] *Gabcikovo-Nagymaros Project* (n 127) 40-41; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (CUP, Cambridge 2002) 178-186; Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UNGAOR, 56th Session, Supp No.10, p.43, UN Doc A/56/10 (2001) art 25(1).

can only be invoked when the State faces an imminent peril.[149] In the instant case, MDR's proposal generates economic benefits to the Islanders and imposes no imminent risk at all.

ii. Rydal cannot use the principle of "permanent sovereignty over natural resources" as justification to impair its treaty's obligations

The principle of "permanent sovereignty over natural resources" never shields a State's wrongful acts,[150] such as to violate its treaty obligation by nationality discrimination.

A promise to pay 50% of the net proceed to the Islands, in addition to the building of facility and the employment of local labors, illustrates the significance contribution MDR intended to make to the Islands.[151] It is therefore not justifiable for Rydal to invoke this principle to negate its obligations under the Aspatria-Rydal BIT.

III. RYDAL DOES NOT HAVE STANDING IN THE PRESENT PROCEEDINGS TO PROTECT THE ASSETS OF ALEC, AN ASPATRIAN CORPORATION. IN ANY EVENT, ASPATRIA DID NOT VIOLATE THE ASPATRIA-RYDAL BIT BY SEIZING RYDALIAN PROPERTIES

A. Rydal cannot invoke diplomatic protection on behalf of ALEC since ALEC is an

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[149] *CMS Gas Transmission Company* (n 143) ¶355.

[150] Bishop, Crawford and Reisman (n 147) 950.

[151] *Compromis*, ¶51.

1. When a State has purportedly mistreated a foreign national, only that foreign national's own State is entitled to invoke diplomatic protection

When a State invokes diplomatic protection on behalf of its nationals, the State is asserting its own right, the bond of nationality between the State and the individual confers upon the State the right of diplomatic protection.[152]

Therefore, Rydal is able to diplomatically protect ALEC only if ALEC is regarded in law as a Rydalian national.

2. If the purportedly mistreated national is a corporation, then the place of incorporation is determinative for the purpose of ascertaining the State that has the right to invoke diplomatic protection

The right of diplomatic protection in favour of a corporation is attributable to "the State under whose law of which [the corporation] is incorporated and in whose territory it has its registered office."[153]

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[152] *Panevezys-Saldutiskis Railway Case (Estonia v Lithuania)* (Preliminary Objections) PCIJ Series A/B (1939) No.76, 16; ILC, Draft Articles on Diplomatic Protection UNGAOR, 61st Session, Supp No.10 (A/61/10) (2006) art 3.1.

[153] *Barcelona Traction Case (Belgium v Spain)* [1970] ICJ Rep 70; Draft Articles on Diplomatic Protection, (n 152) art 9.

ALEC is incorporated in Aspatria.[154] Therefore, any right of diplomatic protection is only available to Aspatria, not Rydal.

3. The nationalities of the corporation's shareholders are immaterial for the purpose of ascertaining the States that have the right to invoke diplomatic protection

Although the purported mistreatment may have affected the value of the shareholder's investment in the corporation, the corporation is a separate legal entity from its shareholders. The properties of the corporation belong to the corporation, and so long as the corporation legally exists, the shareholder has no right to the corporate assets.[155]

Therefore, when a wrong is committed against the corporation's assets, only the corporation, not the corporation's shareholders, has standing.[156]

The assets that have been seized by the Aspatrian authorities belong to the corporation of ALEC, not its shareholders.[157] Even if Rydal is successful in characterizing this seizure as unlawful, it is ALEC, not its Rydalian shareholder, that has the legal right to initiate legal

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[154] *Compromis*, ¶40.

[155] *Barcelona Traction Case* (n 153) 41; *Salomon v A Salomon & Co Ltd* [1897] AC 22.

[156] *Barcelona Traction Case* (n 153) 44; *Foss v Harbottle* [1843] 67 ER 189.

[157] *Compromis*, ¶57.

proceedings. Since ALEC is not a Rydalian national, Rydal is therefore not in a position to diplomatically protect ALEC.

4. As one exception to the custom on diplomatic protection, the shareholder's own State may be able to invoke diplomatic protection, if the corporation is wound-up

If the corporation ceases to exist legally, then the State of the corporation's shareholder may be positioned to invoke diplomatic protection. As long as the corporation has not been wound-up, the corporation itself is capable of instituting actions against wrongs committed on the corporation. If so, the State of the shareholder has no business in extending diplomatic protection in favour of the shareholder.[158] The fact that the corporation's assets may have been placed in receivership that renders the corporation paralyzed or "practically defunct" is not strong enough for declaring that the corporation no longer exists in law: nothing short of a legal demise can satisfy this test of existence.[159]

Nowhere in the Compromis states that ALEC has been wound-up or liquidated. Quite to the contrary, even with the seizure of ALEC's assets, ALEC is not defunct at all, as ALEC is still able to engage legal representations in both civil and criminal proceedings in Aspatria.[160]

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[158] *Barcelona Traction Case* (n 153) 66.

[159] *Barcelona Traction Case* (n 153) 65-67; Draft Articles on Diplomatic Protection (n 152) art 11(a); *Agrotexim and other v. Greece* (App no 14807/89) (1995) Series A No.330-A 68.

[160] *Compromis*, ¶58, ¶59.

Therefore, ALEC still exists legally, and this status bars Rydal from invoking diplomatic protection on behalf of ALEC's shareholders.

5. As another exception to the custom on diplomatic protection, Rydal may be able to invoke diplomatic protection on behalf of the Rydalian shareholder, if the seizure has infringed the Rydalian shareholder's right

When the shareholder's rights, such as the rights to dividends declared, to vote in general meetings, or to claim residual assets in the event of liquidation as conferred by the municipal laws of the State where the corporation has been incorporated, have been directly infringed, then this set of direct rights belonging to the shareholder may support the case for the shareholder's own State to invoke diplomatic protection.[161]

However, this is a narrow exception to the general customary position that only the State of a national whose legal rights have been infringed may proceed with an international claim on the basis of diplomatic protection.[162]

Nowhere in the Compromis states that the assets seized actually belonged to the shareholder's themselves in their personal capacities. Nowhere in the Compromis states that the

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[161] *Barcelona Traction Case* (n 153) 47.

[162] *Case of Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Preliminary Objections) ICJ Rep 63.

shareholders of ALEC are deprived of the benefits, as well as the liabilities, attached to their shares. Even more specifically, the Compromis does not support the proposition that the shareholders of ALEC have been prevented from convening general meetings in order to manage the corporation. Quite to the contrary, the Compromis states that ALEC "promptly" appealed against the seizure within the Aspatrian legal system,[163] which can only mean that the shareholders are actually still exercising the management power of ALEC.

Therefore, given that the shareholder's direct rights have not been infringed, the shareholder's State, Rydal, cannot extend diplomatic protection in favour of the shareholder.

6. Rydal cannot rely on the theory of diplomatic protection by substitution, as this theory is not a part of custom

Rydal may contend that there exists a norm of substitution, whereby the shareholder's State may be able to invoke diplomatic protection if the purportedly injured corporation is incorporated within the State that has committed the alleged wrongs.[164]

However, this theory never received unequivocal judicial support[165] and was rejected by

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[163] *Compromis*, ¶58.

[164] *Barcelona Traction Case* (n 153) 92; Draft Articles on Diplomatic Protection (n 152) art 11(b).

[165] *Electtronica Sicula SpA (ELSI) Case (United States v Italy)* (Judge Oda's Separate Opinion) [1989] ICJ Rep 15.

this Court.[166] The rejection was based on the observation that such a proposition often only manifests itself in BITs. The fact that the contracting States are prepared to draft such a clause into these BITs is evidence itself that the States themselves do not recognize this substitution theory as a part of the custom.[167]

Therefore, Rydal is not able to initiate diplomatic protection in reliance on the theory of substitution, as it is without legal foundation.

7. The custom governing diplomatic protection is not readily displaced by the mere existence of a BIT

States are free to conclude treaties that modify international customs, aside from a *jus cogens* custom, that would otherwise be applicable to them.[168] However, a BIT, without clear language pointing to the contrary, is incapable of displacing the customary rule on diplomatic protection and does not confer a foreign investor, labouring under the cloth of a local incorporation in the host State, with any additional rights or privileges.[169]

In the event where the BIT intends to depart from the custom governing diplomatic protection and confer direct rights on the shareholder, who has the nationality of X, of a

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[166] *Ahmadou Sadio Diallo Case* (n 162) 89.

[167] *Ahmadou Sadio Diallo Case* (n 162) 90.

[168] VCLT (n 115) art 53

[169] *Electtronica Sicula SpA (ELSI) Cas*e (n 165).

corporation incorporated in State Y, the treaty should expressly prescribe clear words such as: A shareholder, with X nationality, who organizes,[170] participates,[171] or controls[172] a corporation incorporated in State Y shall enjoy the right of diplomatic protection extended by State X.[173]

The Aspatria-Rydal BIT confers the right of being diplomatically protected merely on a generic *investor*. The treaty does not expressly cater for the instant situation where a foreign investor has invested, organized, participated, or controlled its business in the host State via a local incorporation.[174] In other words, Rydal may contend that ROCO qualifies as an investor for the purpose of the Aspatria-Rydal BIT. However, at the same time ALEC may also be reasonably identified as the proper investor as well, since it is ALEC, the Aspatrian entity, that has actually made and owned all the investments in Aspatria.[175]

Therefore, the equivocal wording of the Aspatria-Rydal BIT is incapable of displacing the rules of custom governing diplomatic protection, namely that Rydal does not have the necessary standing in extending diplomatic protection on behalf of ROCO who is merely a shareholder of ALEC, an Aspatrian corporation.

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[170] Friendship, Commerce, and Navigation Between the United States of America and the Italian Republic (adopted 2 February 1948, entered into forced 2 March 1961) 79 UNTS 171 (FCN) art III(1).

[171] FCN (n 170) art III (1).

[172] FCN (n 170) art III (2).

[173] FCN (n 170) art V(3).; *Electtronica Sicula SpA (ELSI) Cas*e (n 165).

[174] *Compromis*, *Annex I*, Article XIII.

[175] *Compromis*, ¶41, ¶50.

B. In any event, Rydal cannot invoke diplomatic protection on behalf of ALEC since ALEC has not exhausted local remedies

1. International proceedings may not be commenced unless and until all local remedies have been exhausted

When a foreign national has been purportedly wronged, all municipal remedies available to that foreign national within the local, host State must have been pursued before the foreign national's own State may intervene and bring international proceedings.[176] This rule applies to both natural and legal persons.[177]

Since ALEC is a legal entity in the Aspatrian legal system,[178] before Rydal can invoke diplomatic protection on behalf of ALEC, ALEC must have exhausted all Aspatrian local remedies as a pre-condition.

2. Exhaustion of local remedies, as a rule of custom, remains in force, despite the existence of the Aspatria-Rydal BIT

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[176] *Interhandel Case (Switzerland v United States of America)* (Preliminary Objections) [1959] ICJ Rep 6, 46; Draft Articles on Diplomatic Protection (n 152) art 14.1 and Draft Articles on Responsibility of States (n) art 44(b).

[177] Draft Articles on Diplomatic Protection (n 152) art 14, commentary 2.

[178] *Compromis*, ¶40.

The operation of the custom regarding the exhaustion of local remedies cannot be "tacitly dispensed with, in the absence of any words making clear an intention to do so."[179]

The Aspatria-Rydal BIT is completely silent as to whether the purportedly injured party has to first exhaust local remedies before any international proceedings may be initiated. Therefore, the custom of local remedies exhaustion is presumed to be valid in this circumstance.

3. Local remedies mean all available administrative, as well as judicial, venues that are open to ALEC

Local remedies may involve executive bodies that are capable of delivering a binding decision.[180] More specifically, the exhaustion of local remedies rule entails that all factual and legal disputes must have been brought in front of the municipal legal system, as to allow the host State to exercise justice in its "own, ordinary way."[181]

While it is true that ALEC's petition within the administrative court system of Aspatria to overturn the seizure order has appeared to be unsuccessful,[182] it is also agreed by the Parties that the underlying criminal case, which ultimately led to the administrative court's decision of

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[179] *Electtronica Sicula SpA (ELSI) Cas*e (n 165) 50.

[180] Draft Articles on Diplomatic Protection (n 152) art 14, commentary 5.

[181] *Finnish Ships Arbitration (Finland v United Kingdom)* (1934) 3 RIAA 1479, 1502.

[182] *Compromis*, ¶58.

sustaining the seizure order, is still ongoing.[183] Until this underlying criminal case reaches its finality, the local remedies will not have been exhausted according to Aspatria's own, ordinary way. This is so, since the Parties have agreed that if ALEC is vindicated in the criminal trial, all seized assets will be returned promptly to ALEC.[184]

C. The seizure of ALEC's assets does not constitute expropriation against Rydalian properties

1. The current situation does not satisfy the legal definition of expropriation

Expropriation means a permanent deprivation of ownership, in the form of a transfer of title, and thus a lasting removal of the owner's economic rights, with respect to the properties in question.[185]

The Aspatrian authority has assumed custody over the assets of ALEC in accordance with Aspatrian Criminal Code, only temporarily and only for as long as the duration of the underlying criminal trial.[186] These facts do not support the suggestion that there has been any sort of any permanent transfer of ownership, with respect to the assets seized, from ALEC to Aspatria.

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[183] *Compromis*, ¶59.

[184] *Clarifications to the Compromis, ¶*6.

[185] *S.D. Myers* (n 130) 280, 283.

[186] *Clarifications to the Compromis*, ¶6.

In additional to the absence of any direct asset transfers, Aspatria has not indirectly interfered with ALEC's management operations, as evidenced by ALEC's prompt management decision to file the administrative appeal within the Aspatrian judicial system.[187]

2. Temporary domestic regulations, resulting in missed business opportunities, are not qualified as expropriation

Rydal may contend that the seizure causes an economic loss to ROCO, and such a loss may constitute indirect expropriation.

However, missed profitability, due to a domestic regulation that is only interim in nature and a part of the government's function in conducting its business in public affairs, cannot be identified as expropriation.[188] In this respect, it is also common State practice, such as in the USA,[189] the UK,[190] Australia,[191] and New Zealand,[192] to seize assets of criminal defendants pending the outcome of criminal proceedings.

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[187] *Compromis*, ¶58; *Starrett Housing Corp v Iran* (Interlocutory Award) (1984) 4 Iran-USCTR 122 distinguished.

[188] *S.D. Myers* (n 130) 282.

[189] USA Comprehensive Crime Control Act 1984, section 853.

[190] United Kingdom Proceeds of Crimes Act 2002, section 6.

[191] New South Wales Confiscation of Proceeds of Crime Act 1989, section 42B

[192] New Zealand Proceeds of Crimes Act 1991, section 8

Implementation of the Aspatrian Criminal Code, enabling public authorities to seize the assets of a criminal defendant temporarily, is a vital element of Aspatrian public affairs. Therefore, even if ALEC experiences financial setbacks because of the seizure, these setbacks are not reimbursable.

Furthermore, the accusation that the justice system grinds slowly in Aspatria, as to make the seizure more than temporary, cannot be substantiated because the source of that accusation remains unidentified.[193] The Compromis offers no clear evidence that remotely suggests the actual expediency of the Aspatrian legal system. If anything, the facts show that the legal system in Aspatria is rather efficient in handling its cases, as evidenced by the short span of time, less than four months, the administrative court of Aspatria took in processing the petition for, as well as the appeal against, the seizure.[194]

Consequently, it is unlikely that the underlying criminal trial is going to last beyond the foreseeable future, which supports the case of only a temporary seizure. Therefore, the Rydalian claim of expropriation committed by Aspatria is both misconceived and pre-mature.

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[193] *Compromis*, ¶59.

[194] *Compromis*, ¶56, ¶58.

CONCLUSION AND PRAYER FOR RELIEF

Aspatria, as Applicant, respectfully requests this Court to declare that:

(1) Sovereignty over the Islands belongs to Aspatria;

(2) The Islanders are not entitled to independence based on the principle of self-determination;

(3) Rydal may not lawfully take steps giving effect to the independence of the Islands and must cede administration over the Islands to Aspatria;

(4) Rydal's rejection of MDR's bid constituted a violation of the Aspatria-Rydal BIT; and

(5) Rydal does not have standing to invoke the Aspatria-Rydal BIT to protect the assets of ALEC, and in any event, Aspatria did not violate the Aspatria-Rydal BIT.