

**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**

MEMORIAL FOR THE RESPONDENT

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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

Discovery and Occupation of the Islands

On 6 December 1777, Captain Parrish of the Kingdom of Rydal (“Rydal”) first discovered the Windscale Islands (“the Islands”), a remote and uninhabited archipelago. A Rydalian flag was left behind and a rock inscription was made, declaring Rydalian sovereignty over the Islands.

In 1778, Lieutenant Ricoy of the Vice-Royalty of Aspatria (“Aspatria”) settled and claimed the Islands for the Kingdom of Plumbland (“Plumbland”), in spite of Rydal’s public display of sovereignty and abandoned the Islands after 21 years of sporadic presence on the Islands.

On 6 September 1813, Admiral Aikton of Rydal created a settlement of St.Bees on the Islands and explored the archipelago extensively in later years. In May 1815, a slave ship, *The Unthank*, drifted into the harbour at St.Bees. Admiral Aikton provided refuge for *The Unthank* slaves, declared them free according to Rydalian laws and together they swore allegiance to Queen Constance of Rydal. All of his administrative conduct on the Islands were embraced by the Queen in mid-1818.

Aspatrian Statehood

On the 2 November 1819, an independence movement in Aspatria led by Colonel Alejandro Diaz, a self-proclaimed commander, unilaterally declared Aspatria's independence from Plumbland. In response, King Piero of Plumbland was intent on punishing the usurpers for their treasonous crimes with the harshest of punishment. It was not until 1827 when Rydal recognised Aspatrian independence and only by 1841 through the Treaty of Woodside did Plumbland act likewise.

Treaty of Great Corby

In January 1814, a war broke out between Plumbland and Rydal with the former losing the war in mid-1821. Subsequently, the Treaty of Great Corby was signed on 22 September 1821, purporting to irrevocably cede sovereignty over the Islands from Plumbland to Rydal.

Governance of the Islands

Since 1777 till present, Rydal has governed the Islands with a steady succession of governors. On the Islands, there was a steady growth of population, farming and fishing were developed and it largely depended upon Rydal for its development. Rydal maintained exclusive authority over the defence of the Islands and granted it control over day-to-day governance.

Rydal designated the Islands as a non-self-governing territory in 1945, gave it a Constitution in 1947 and fulfilled all its State obligations under the United Nations, which included respecting the Islanders' desire for self-determination and independence. A plebiscite on 6 December 2008 was held where the Islanders indicated their disapproval towards Aspatrian unification and desire for independence.

Aspatria-Rydal BIT

Desiring to create favourable conditions for greater economic cooperation, and recognizing the benefit of promotion and reciprocal protection of investment, Rydal and Aspatria signed a Treaty Concerning the Encouragement and Reciprocal Protection of Investment ("the Aspatria-Rydal BIT") in 1985, which entered into force in the same year.

Corporate Entities: ROCO, ALEC and MDR

The Rydalian Oil Company ("ROCO") was incorporated in Rydal. It had a worldwide gross revenue of more than US\$150 billion in 2007. It owns 80% of the shares in the A&L Exploration Corporation ("ALEC"), which was incorporated in Aspatria. The remaining 20% of ALEC's shares are owned by more than 5,000 shareholders of various nationalities.

MDR Limited (“MDR”) is an Aspatrian corporation specializing in extracting and processing oil.

Its owner, Felix Monte de Rosa, is the fifth largest landowner in Rydal.

Rights to Exploit Oil Reserves in the Islands

In 1997, oil was discovered in the basin around the Islands. In December 2006, with the Rydalian Government’s approval, the Island’s Assembly announced its plan to invite bids for the rights to exploit the oil reserves within the exclusive economic zone of the Islands.

First Minister Craven announced that the bidding process would be “open, transparent and competitive”. To qualify for the bid, bidding companies had to be incorporated or have a registered office in Rydal. The Assembly received two bids, one from ROCO, the other by MDR through its local registered office in Rydal.

ROCO’s bid promised 45% of the net proceeds to the Islands and stated that ALEC’s resources in Aspatrian territory would be used. MDR’s bid 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 Assembly first approved MDR's bid. Governor Black, after consultation with Rydalian Prime Minister Abbott, withheld her assent and invited the Assembly to reconsider its recommendation on 1 November 2007. She publicly declared that the future of the Islands would lie with Rydal, which shares a common history, culture and values. She was of the view that although the offer from MDR was appealing in the short-term, it was necessary to safeguard the long-term viability of the territory and its people. The Assembly eventually approved ROCO's bid on 14 November 2007, and Governor Black signed the recommendation.

Charges against ALEC

Aspatria's Natural Resources Act ("NRA") restricts licenses for the exploitation of energy resources in Aspatria to locally incorporated corporations, and makes it a criminal offence for an Aspatrian company to take action inconsistent with such a license.

On 16 November 2007, the Public Prosecutor filed criminal charges against ALEC under the NRA, for materially participating in ROCO's bid, thereby circumventing an Aspatrian license and claiming access to the same oil reserves that are the subject of the license. The criminal case has not reached final decision. Reports from several independent international NGOs suggest that most criminal cases in Aspatrian courts take between four to six years to conclude, with another

two to three years for appeals.

Seizure of ALEC's Assets

In connection with the criminal case, the Aspatrian Prosecutor filed an administrative petition to seek the court's authorization to seize all ALEC's assets. The court granted the application, and Aspatria seized all ALEC's assets within Aspatria, valued at US\$80 million. Those assets are held by the administrative court until the conclusion of the criminal case.

ALEC promptly petitioned the Supreme Administrative Court of Aspatria to cancel the seizure order. The petition was denied, and no further appeal from the order is possible under Aspatrian law.

QUESTIONS PRESENTED

Rydal, as Respondent, respectfully requests this Court to adjudge:

- I. Whether Rydal is permitted under international law to take steps giving effect to independence for the 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;

- II. Whether Rydal's rejection of the MDR bid violated the Aspatria-Rydal BIT; and

- III. Whether Rydal has standing to invoke the Aspatria-Rydal BIT to protect the assets of a Rydalian enterprise in Aspatria and whether the seizure of such assets was a violation of the Aspatria-Rydal BIT.

SUMMARY OF PLEADINGS

Declaration I

Rydal has the legal title to the Islands by the creation of an inchoate title through discovery which was perfected through effective occupation via symbolic annexation and a public display of its sovereignty when it was uninhabited. Alternatively, the title was later perfected through effective human occupation in due and reasonable time. Subsequently, Rydal continued and maintained its title to territory after its creation to the present day.

In the alternative, had the title to the Islands belonged to Plumbland, it was irrevocably ceded to Rydal through the Treaty of Great Corby (1821), when Aspatria was still part of Plumbland. The principle of *uti possidetis juris* cannot be invoked to Aspatria's favour because it had not attained statehood before 1821 and in any event, the Islands were never part of its administrative governance. Even in the improbable instance of Aspatria having the title to territory, it would have been effectively acquiesced during its 30 years silence over Rydal's intense political efforts over the Islands in 1880-1910. Conversely, Rydal exercised and maintained state conduct, *titre de souverain*, for a prolonged period of time compared to Aspatria's sporadic efforts, hence amounting to a better title.

Rydal's assistance to the Islanders' realization of independence through their right to self-determination is within the former's exercise of its lawful right of sovereignty over the Islands. The Islanders are entitled to self-determination by virtue of its non-self-governing status as established by Rydal. Even if it were under Aspatría, the Islanders distinctive differences from the former would still entitle it a non-self-governing status *in effect*, allowing for self-determination to accrue.

Declaration II

The Islands are a territory of disputed sovereignty between Aspatría and Rydal. Consequently, the Aspatría-Rydal BIT is not applicable to the Islands through Rydal's clear and unequivocal interpretative declaration.

Further, the Aspatría-Rydal BIT aims to fulfill a positive investment and trading environment between the two States. However, the contention of sovereignty of the Islands contradicts this purpose.

The Islanders have also invoked their right to self-determination, a principle recognized as a *jus cogens* norm. The doctrine of permanent sovereignty over natural resources is an aspect of the

right to self-determination. Self-determination of the Islands takes precedence over the Aspatria-Rydal BIT.

The Aspatria-Rydal BIT does not protect MDR as it is not a foreign investor and would not be entitled to claim diplomatic protection. MDR should instead resolve its contractual claims under Rydalian local laws.

Rydal's rejection of MDR's bid did not breach Article IV and Article V of the Aspatria-Rydal BIT. Perceived differences in national treatment were justified by the *jus cogens* right of self-determination. The bidding process was also administered in a fair and transparent manner, which did not violate minimum treatment standards under customary international law.

Declaration III

Notwithstanding the customary law rule that only the State of incorporation can exercise diplomatic protection, Rydal has standing to invoke the Aspatria-Rydal BIT to protect the assets of ALEC. First, the Aspatria-Rydal BIT itself provides Rydal with standing by displacing the customary law rule. Second, it was Aspatria that inflicted injuries upon ALEC, so the exception to the customary law rule applies.

The rule on exhaustion of local remedies is not applicable in this case, as Rydal is directly injured by Aspatria's violation of the Aspatria-Rydal BIT. In any event, ALEC has exhausted local remedies because no further appeal from the seizure order is possible. Even if there are further remedies available, ALEC need not exhaust them, since there would be undue delay in the remedial process, and it would be unreasonable to require ALEC to exhaust them.

Aspatria's seizure of ALEC's assets deprives ROCO's use and benefit of its investment in Aspatria. This amounts to indirect expropriation. It is not justified, and is a violation of Article VI of the Aspatria-Rydal BIT. Further, the expropriation strips ALEC of financial means to defend against its criminal charges. ALEC is denied access to justice, hence denied fair and equitable treatment, by Aspatria. This is a violation of Article V of the Aspatria-Rydal BIT.

PLEADINGS

I. RYDAL IS PERMITTED UNDER INTERNATIONAL LAW TO TAKE STEPS GIVING EFFECT TO INDEPENDENCE FOR THE WINDSCALE ISLANDS AS (I) SOVEREIGNTY OVER THE ISLANDS BELONGS TO RYDAL AND/OR (II) THE ISLANDERS ARE ENTITLED TO INDEPENDENCE AS AN EXERCISE OF THEIR RIGHT TO SELF-DETERMINATION.

A. Rydal’s state conduct after any determined critical date must be fully assessed for it was a normal continuation of its previous conduct

This Court may be minded, in ascertaining sovereignty, to fix the legal point of dispute at a certain date when the dispute crystallised,¹ deeming all subsequent conduct, irrelevant.² The first dispute over sovereignty arose in mid-1818 when King Piero diplomatically protested Rydal’s sovereignty over the Islands.³ Even if that was the critical date, subsequent Rydalian conduct must still be considered for they were a “normal continuation” of prior acts, done without an intention to

¹ *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, General List No 130 [2008] ICJ 32; Malcolm N. Shaw *International Law* (6th edn CUP, UK 2008) 509.

² *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, General List No 120 [2007] ICJ ¶117.

³ *Compromis*, ¶15.

buttress its legal position.⁴

Firstly, prior to 1818, Rydalian laws had been applied in the freeing of the slaves on the Islands⁵ and allegiance was pledged to Queen Constance of Rydal in 1815.⁶ Upon the Queen's knowledge of inhabitants on the Islands, it is a "normal continuation" and a fulfillment of Rydal's state responsibility to appoint a Governor for formal administration of the colony.⁷ This is an administrative necessity for effective maintenance of order, rather than a self-serving act to buttress its sovereignty over the Islands.⁸

Secondly, Aspatria despite having a competing claim did not protest against all of Rydal's state conduct after mid-1818. By remaining silent, it connotes that Rydalian conduct did not serve to strengthen their territorial claims, or it would have triggered Aspatrian protest. For instance,

⁴ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)* (Judgment) [2002] ICJ Rep 682 ¶135; *The Caribbean Sea Case* (n 2); Shaw (n 1).

⁵ *Compromis*, ¶12.

⁶ *Ibid.*

⁷ *Ibid* ¶16.

⁸ Friedrich August Freiherr von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law' (1935) 29 AJIL 448, 463.

Aspatria voiced no objection towards the appointment of Governor Wilkinson in 1819 and there was an absence of any protests till 1845.⁹

However, in the event that the critical date is indeed set in mid-1818, Rydal can still contend that its conduct before then would suffice to establish the title to territory over the Islands.

Legal Consequences flowing from the period of 1777 to middle of 1818

B. Rydal has acquired title to the Islands by first and effective occupation

As a matter of international law since the mid-18th century, discovery only generates an inchoate title that must be perfected by effective occupation within a reasonable time.¹⁰

(1) Effective occupation in terms of a publicized symbolic annexation would suffice in uninhabited territories.

i. Uninhabited nature of the Islands only requires symbolic annexation

⁹ *Compromis*, ¶27.

¹⁰ *Island of Palmas Case (or Miangas)* (1928) 2 RIAA 829, 845-846.

The degree of state conduct necessary to create title to territory is dependent on the nature of the territory concerned.¹¹ Where the territory is uninhabited such as that of *Clipperton Island*, “effective occupation” would not require human occupation of the territory but symbolic annexation and actual notice through publication would suffice.¹² Captain Parrish of Rydal noted in his log book in 1777 that there was “no signs of human habitation” and that the islands were “remote and windswept”.¹³ Hence, his planting of the Rydalian flag and a stone carving declaring the sovereignty of Rydal over the Islands would suffice as there was no human habitation in need of governance.¹⁴

- ii. Rydal perfected its title to territory by making its title over the Islands, public in 1777 and latest by 1813

State sovereignty over a territory is only completed when it is made public.¹⁵ However, no

¹¹ *France v. Mexico (Clipperton Island case)* (1932), 26 AJIL 390, 394.

¹² Heydte (n 8).

¹³ *Compromis*, ¶5.

¹⁴ *Minquiers and Ecrehos Case (France v United Kingdom)* (Judgment) [1953] ICJ Rep 47; *Clipperton Island Case* (n 11).

¹⁵ Shaw (n 1).

formal notification in terms of a specific need to communicate it to other States is required.¹⁶

Rydalian efforts to publicise its sovereignty was established in 1777 by planting the Rydalian flag on a large island, making it possible for passing ships to take note of it easily, and declaring Rydalian sovereignty through a rock inscription, making it imperishable.¹⁷ At the latest, its publication of the Islands as Rydalian territory in their own nautical charts in 1813 would have sufficed.¹⁸ Given the lack of telecommunications in the mid-19th century, the efforts of Rydal were sufficient.

Furthermore, given that the Rydalian declaration was made on a large island, it would have been noticed by Lieutenant Ricoy of Aspatria, had he made reasonable efforts to explore the archipelago.¹⁹ Such has been debunked by this Court as an absence of sovereignty, or in Aspatria's case, the lack of state conduct.²⁰

¹⁶ I.C. MacGibbon, *'The Scope of Acquiescence in International Law'* (1954) 31 British Ybk Intl L 143, 176; *Clipperton Island Case* (n 11).

¹⁷ *Compromis*, ¶5.

¹⁸ *Ibid* ¶10.

¹⁹ *Ibid* ¶6.

²⁰ *Minquiers and Ecrehos Case* (n 14).

iii. Rydal's title to the Islands in 1777 negates Aspatria's subsequent *terra nullius* claims in 1778

Aspatria's contention of "first occupation" in 1778 would fail because the Islands were no longer *terra nullius*,²¹ due to Rydal's established sovereignty in 1777. *Terra nullius* refers to territory belonging to no one, allowing States to declare sovereignty over it through first effective occupation. However, Aspatria's claim fails in light of Rydal's earlier title.

(2) In the alternative, Rydal's inchoate title was perfected through timely physical occupation and effective state conduct

i. Inchoate title perfected in due and reasonable time by 1813-1816

As a matter of international law, there is no definite timeframe for the perfection of inchoate title in "due and reasonable" time, this is dependent on the nature of the territory.²² As the Islands

²¹*Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.

²² Heydte (n 8) 462; W. Fuglsang, *Der Amerikanisch-hollandische Streit um die Insel Palmas vor dem Standigen Schiedshof im Haag* (Berlin, 1931), 95.

were remote, uninhabited, 7500 miles away from Rydal and were not in immediate need of governance, 36 years (1777-1813) of perfection is not an unreasonable timeframe.²³

In order to perfect an inchoate title, the State must have exercised effective authority over a given territory.²⁴ From 1815 to 1818, Rydal demonstrated state authority through the application of Rydalian laws is “one of the most obvious forms of the exercise of sovereign power”.²⁵ The freeing of slaves on the Islands which is a direct application of Rydalian laws and the swearing of allegiance of the settlers to Queen Constance created legal ties of a sovereign nature.²⁶ Admiral Aikton’s declaration of sovereignty over the Islands in the initial absence of Her Majesty’s endorsement would suffice the moment the latter ratified in her later correspondence.²⁷ Even in the absence of ratification, Admiral Aikton, being an officer of Rydal, was acting with State authority.

²³ William E. Hall, *A Treatise on International Law*, (8th edn Clarendon Press, Oxford 1924), 126-127; Heydte (n 8).

²⁴ *Caribbean Sea Case* (n 2) ¶172.

²⁵ *Legal Status of Eastern Greenland* [1933] PCIJ Rep Series A/B, No.53, 45; *Pedra Branca Case* (n 1).

²⁶ *Ibid*; *Pedra Branca Case* (n 1).

²⁷ *Compromis*, ¶15.

ii. Rydal's overwhelming pattern of state conduct compared to Aspatria's sporadic presence

If this Court were to find the relative claims to “effective occupation” of the Islands as indeterminate, it would be compelled to judge on the basis of ‘better title’ in terms of state conduct.²⁸ This approach is consistently applied to territories that are remote, small and uninhabited.

In terms of physical possession over the Islands, it is necessary for the “principal parts” of the territory to be occupied and the state’s presence be felt throughout the territory.²⁹ It is not known whether Aspatria had explored the archipelago.³⁰ However, its failure to discover the flag of Rydal and the inscriptions asserting the latter’s sovereignty is evidence of its lack of intention to assert control over all of the Islands. Conversely, Admiral Aikton of Rydal explored most of the Islands³¹

²⁸ *Eastern Greenland Case* (n 25) 46.

²⁹ *Palmas Case* (n 10).

³⁰ *Compromis*, ¶8.

³¹ *Ibid* ¶13.

and discovered the abandoned settlement of Salkeld, including the flag of Plumbland.³² This is a demonstration of Rydal's efforts to exert control over all the Islands.

In terms of effective administration, it is an international legal norm for states to have a "reasonable level" of state activity in the territory.³³ During Aspatria's occupation from 1778 to 1799, pirates, slave-ships and other seafarers used the Island.³⁴ In *Singapore v Malaysia*, Singapore's efforts to investigate and report on the maritime hazards and shipwrecks gave significant support to Singapore's case.³⁵ The reasoning is that matters calling for response by the State such as that of shipwreck or pirates would not possibly be ignored by the State. If it is to be ignored, then, it would undermine their claims. Rydal, on the contrary, instituted Rydalian laws by freeing the slaves and leading the men together with *The Unthank* refugees, who swore allegiance to Rydal, to cultivate crops and perform economic functions.³⁶

³² Ibid.

³³ *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, [1999] ICJ Rep 1105, ¶ 98-99.

³⁴ *Compromis*, ¶8.

³⁵ *Pedra Branca case* (n 1) ¶231.

³⁶ *Compromis*, ¶12.

Therefore, Rydal displayed a greater intention and undertook more action to institute sovereignty.

iii. Aspatria violated Rydal's inchoate title for its occupation on the Islands was not continuous

An inchoate title cannot be infringed by another state if it was perfected in a “due and reasonable” time. Only if the other State had continuously and peacefully occupied and displayed State authority over the territory would the title lapse.³⁷ Aspatria was unable to satisfy these exceptions.

Aspatria's presence on the Islands was insufficient. Firstly, 21 years would be too short a time compared with precedents such as *Island of Palmas*, where it was from 1666 till 1906. Secondly, even if Aspatria had enjoyed sovereignty over the Islands, “abandonment” would result in a loss of title.³⁸ Such an intention to abandon has to be clear and can be ascertained from the circumstances

³⁷ W. Hall (n 23); *Palmas Case* (n 10)

³⁸ Ian Brownlie, *Principles of Public International Law* (7th edn OUP, New York 2008) 138.

of a State's departure.³⁹ In 1799, Aspatrian troops abandoned Salkeld, their base on the Island, and failed to return after the disturbances in Aspatria were quelled by Plumbland.⁴⁰ As Aspatria departed the Islands because of disturbances it was reasonable to expect Aspatria, after the end of the disturbances, to return to the Island with immediacy. However, they failed to do so.⁴¹

Legal consequences flowing from the period of 1819 till 1841

C. Even if sovereignty vested in Plumbland as of 1799, the Islands were effectively ceded to Rydal through the Treaty of Great Corby in 1821.

The Treaty of Great Corby in 1821 ceded the Islands to Rydal from Plumbland. Aspatria may contend that the treaty did not cede the Islands to Rydal as Aspatria attained independence from Plumbland prior to the Treaty of Corby's conclusion. Therefore, as a former colony attaining independence, the Islands became a part of Aspatria by operation of the principle of *uti possidetis juris*.

³⁹ Hackworth, *Digest of International Law*, vol.i (1940), 442; Brownlie (n 38) 139.

⁴⁰ *Compromis*, ¶7.

⁴¹ *Ibid*.

International law on statehood, in the 19th century, applicable to Aspatria's purported independence in 1819-1820, was one of “effectiveness”. This required scrutiny of the (1) stability of governance, (2) absence of any real likelihood of the previous sovereign reasserting its position⁴², (3) metropolitan recognition in the absence of effective independence⁴³.

(1) Aspatria was not governed with sufficient political stability

Sufficient stability requires that military conflicts between States to have ended and the reestablishment of order, which is supported by circumstantial evidence, including duration of stability and recognition by other states.⁴⁴

Firstly, the night raid, though successful, signified the beginning rather than the end of Aspatria’s military struggle against Plumbland.⁴⁵The reply to the Declaration of Independence

⁴² James Crawford, *The Creation of States in International Law* (2nd edn OUP, New York 2006) 382.

⁴³ *Ibid* 376.

⁴⁴ *The Aaland Islands Question (On Jurisdiction)*, Report of the International Committee of Jurists, League of Nations Official Journal, Special Supplement No. 3 (1920) 9.

⁴⁵ *Compromis*, ¶18.

issued by King Piero dated 2 November, 1819 expressed clearly Plumbland's persistence on its military campaign against Aspatria and was bent on punishing the instigators for their treasonous crimes.⁴⁶ Hence, Aspatrian forces could not possibly have created a government that was stable and free from military conflict with Plumbland, amounting to civil strife.⁴⁷

Secondly, statehood must be demonstrated over a considerable period of time to confirm its stability⁴⁸. Regardless of whether Aspatria claims statehood on the 2 November 1819 or 1 of July 1820, this would still fall short as the Treaty of Great Corby was signed on 22 September 1821. Hence, there was a lack of time to demonstrate its alleged statehood. Also, recognition from other states, such as Rydal did not accrue with immediacy upon Aspatria's declaration of independence and only came after 1826.⁴⁹ It was only by 1826 that Aspatria demonstrated sufficient statehood.

Thus the ambiguous nature of Aspatria's statehood prior to 1821, such as in the case of

⁴⁶ Ibid.

⁴⁷ *Aaland Islands* (n 44).

⁴⁸ Ibid.

⁴⁹ *Compromis*, ¶22.

*Aaland*⁵⁰ when its new administrators remained deep in civil strife, despite its attempts to establish a new government, compelled the League to decide that statehood had yet to be attained.

(2) Plumbland had not substantially abandoned the struggle for Aspatria

In order for a state to attain independence, it is necessary that “the Sovereign state must have virtually or substantially abandoned the struggle for supremacy altogether”.⁵¹ In 1819, King Piero upon notice of Aspatria’s Declaration of Independence, proclaimed on 20 March 1820 that the “traitors would receive the harshest of penalties befitting their treasonous crimes”⁵². The King had not relinquished the struggle for supremacy over the colony. He was only unable to “spare” forces to retake Aspatria at that time.⁵³ This implied that he had the military prowess but it was only a matter of military inconvenience that he could not withdraw his troops and defeat the insurgents at that point of time. Furthermore, the use of the term “treasonous” indicated that King Piero was still

⁵⁰ *Aaland Islands*(n 44).

⁵¹ WV Harcourt, *Letters by Historicus on some Questions of International Law* (Macmillan, London and Cambridge 1863) 9; Crawford (n 42)382.

⁵² *Compromis*, ¶18.

⁵³ *Ibid.*

determined to punish the instigators for attempting to usurp his authority. By the year 1820, prior to the Treaty of Great Corby, the struggle for Aspatria was not concluded and therefore Aspatria did not enjoy statehood at that point in time.

(3) Recognition in the absence of “effective independence” had not been attained

As a matter of international law in the early 19th century governing secessionary acts, metropolitan recognition was a precondition for statehood when effective independence could not be achieved.⁵⁴ Therefore, the lack of metropolitan recognition from Plumbland before 1820 deprived Aspatria of statehood.

D. Even if Aspatria had attained statehood prior to 1821, *uti possidetis juris* would not include the Islands.

The principle of *uti possidetis juris* allows the pre-existing administrative boundaries of a

⁵⁴ FL Paxson, *The Independence of South American Republic. A Study in Recognition and Foreign Policy*(Ferris& Leach, Philadelphia 1903) 196-8.

newly emerged state to form its international boundaries upon independence.⁵⁵ For the principle to be invoked, the sovereign state must first have possession over the Islands before the decolonised state inherits it upon independence. As submitted Plumbland did not have sovereignty over the Islands. Therefore, Aspatria had nothing to inherit.⁵⁶

In any event, the Islands did not fall within Aspatria's administration prior to its attainment of statehood due to the absence of effective colonial administration.⁵⁷

There was no delegation of power by Plumbland to Aspatria to administer the Islands. This can be shown through the Treaty of Woodside (1841) where King Piero of Plumbland intentionally excluded the Islands from its recognition of Aspatria's territories upon independence.⁵⁸ This is further supported by the Treaty of Great Corby (1821) where Plumbland ceded the Islands to Rydal,

⁵⁵ *Frontier Dispute* (Judgment) [1986] ICJ Rep 3 ; Malcolm N. Shaw 'Peoples, Territorialism and Boundaries' 3 EJIL (1997) 478, 492.

⁵⁶ *Palmas Case* (n 10); *Compromis*, ¶25.

⁵⁷ *Frontier Dispute case* (n 55) 587 ; *Guatemala-Honduras Boundary Arbitration*(1933) 1 Int.Arb Awards 223, 1307 at 1322-1325; *Land, Island and Maritime Frontier Dispute*, [1992] ICJ Rep 395-401; Stephen R.Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', (1996) 90 AJIL 590, 607.

⁵⁸ *Compromis*, ¶26.

demonstrating Plumblaud's sole authority over the Islands.

Even if administrative control can be inferred from actual conduct alone, Aspatria did not have a 'semblance of administrative authority' during its 21 years of occupation.⁵⁹ Much of the Islands remained unexplored and subject to the vagrancies of pirates and seafarers as observed by historians.⁶⁰ The only credible evidence was Aspatria's occupation of a small fort at Salkeld.⁶¹ However, its presence failed to radiate from there to the "principal parts" of the island as there was no evidence of Lieutenant Ricoy's presence on the larger parts of the Island.⁶²

Legal consequences flowing from the period of 1841 to 10 September 2009

E. Rydal continuously exercised and maintained sovereignty since 1777 to the present

The maintenance of state authority over territory must be of a "reasonable level".⁶³ Rydal

⁵⁹ *The Honduras Borders Case*, (n 57) 1309, 1324.

⁶⁰ *Compromis*, ¶8.

⁶¹ *Compromis*, ¶6.

⁶² *Palmas Case* (n 10) 40; *Ibid* ¶20.

⁶³ *The Kasikili case* (n 33).

established a consultative Assembly to allow the Islanders to express their views to the Governor on matters of day-to-day administration in 1903.⁶⁴ Rydal by disallowing Aspatrians to enter the Islands without a passport, hence treating them as foreign nationals, was a demonstration of Rydal's sovereignty over the Islands.⁶⁵ Comparatively, Aspatria during its 21 years of occupation did not apply any form of legislation nor was there any form of primitive governance instituted. By contrast, Rydal fended off Aspatria's *Grizedale* warship from the Islands in 1816, transformed the Islands into a strategic harbour for their army by the 1890s⁶⁶ and reaffirmed control over the Island's defence and foreign affairs in 1947.⁶⁷ Rydal has maintained its sovereignty over the Islands.

F. Aspatria effectively abandoned its claim to sovereignty through acquiescence during the period 1880-1910

Acquiescence refers to the failure to respond in circumstances that demand a positive

⁶⁴ *Compromis*, ¶35.

⁶⁵ *Pedra Branca Case* ¶275.

⁶⁶ *Compromis*, ¶28.

⁶⁷ *Ibid* ¶35.

reaction.⁶⁸ Where there is silence when the occasion called for protests, acquiescence can be invoked, abandoning a State's previous claims to the territory.⁶⁹

There existed a 30 year period from 1880-1910 when Aspatria made no complaints to assert sovereignty over the Islands.⁷⁰ During then, Rydal made significant inroads in creating effective occupation over the Islands through the 1903 order to establish a consultative assembly in the Islands.⁷¹ Such creation of political institutions on the Islands, conferring a measure of democracy on the inhabitants, demanded protest by competing states.⁷² Aspatria may argue that the series of coups and counter-coups during 1880-1910 prevented them from protesting Rydal's occupation of the Islands. However, this does not incapacitate Aspatria from making protests, they could have been made in equal measure by a militia.

⁶⁸ MacGibbon (n 16).

⁶⁹ Anzilotti, *Cours de droit international* (Recuell Sirey, Paris 1929) (French Translation by Gidel,1929), 344.

⁷⁰ *Compromis*, ¶30.

⁷¹ *Compromis*, ¶29.

⁷² Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd Revised Edn Little Brown and Company, Boston 1945) v1, 390.

Legal consequences flowing from the period of 1945 to 10 September 2009

G. The Islanders are entitled to self-determination under decolonisation

(1) Self-determination is a jus cogens norm⁷³

The principle of self-determination in the colonial context, is enshrined in the UN Colonial Declaration and international customary law.⁷⁴ The principle binds all states *jus cogens*; it cannot be contracted out of by any State.⁷⁵ The Islands being a non-self-governing territory are entitled to independence on the basis of self-determination.⁷⁶ Rydal reaffirms its commitment in 1962 and 2008, endorsing the Islander's desire for independence and taking steps to assist in its transition.⁷⁷

⁷³ S.K.N. Blay 'Self-Determination versus Territorial Integrity in Decolonisation' (1986) 18 NYJILP 441 ,449.

⁷⁴ Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514(XV) (14 December 1960).

⁷⁵ David Raic, *Statehood and the law of self-determination*, (Kluwer Law International , Netherlands 2002) 219; Malcolm D. Evans (ed) *International Law* (2nd ed) New York: Oxford University Press 2006, 226; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) 1971 ICJ Rep 16 ,31.

⁷⁶ *Compromis*, ¶34.

⁷⁷ *Ibid* ¶37.

(2) Aspatria’s treatment of the Islands as its colony

Even if the Islanders were under Aspatrian sovereignty, the latter would be bound to respect the principle of self-determination in decolonisation due to its UN membership in 1949 and the colonial status of the Islands. In 1817, Commander Javier Crook by the orders of the Viceroy of Aspatria, led *The Grizedale* on a mission to establish the Islands as a “penal colony”.⁷⁸ Despite its failure to do so, Aspatria had never revoked its initial intention to make the Islands a colony, either expressly or impliedly.

(3) Even if Aspatria does not treat the Islands as a colony, its distinctiveness is in effect non-self-governing in nature

Both Aspatria and Rydal as signatories of the UN Charter are legally bound by Article 73(Declaration Regarding Non-Self-Governing Territories), to respect a group’s right to

⁷⁸ *Compromis*, ¶14.

self-determination were it defined to be a non-self-governing territory by the UN.⁷⁹ So long as the territory in dispute fulfills the criteria set forth in General Assembly Resolution 1541,⁸⁰ namely being (i) geographically separate; (ii) ethnically or culturally distinct;⁸¹ (iii) arbitrarily subordinated to the metropolitan state, it would be afforded the right to self-determination as a non-self-governing territory. An example would be New Caledonia which, though lacking colonial recognition from France was granted such a status by the UN.⁸²

In terms of geographical separation, the Islands are isolated from Aspatria. With respect to the criteria of cultural distinctiveness, the early inhabitants of the Islands, over many years of Rydalian rule, intermarried with Rydaliens and produced offsprings with limited interaction with Aspatrians. Since 1903, the Islanders have enjoyed over a hundred years of extensive political autonomy, from a Consultative Assembly in 1903 a Constitution granting day-to-day

⁷⁹ UNGA Res 1467 (XIV)(12 December 1959); Higgins, *The Development of International Law through the Political Organs of the UN* (OUP, London 1963), 112-3; Oppenheim, *International Law* (8th edition, 1995), vol I, 240; Crawford (n 42) 608.

⁸⁰ UNGA Res 1541, Annex IV, V.

⁸¹ Robert A. Friedlander, 'Proposed Criteria For Testing The Validity of Self-Determination As it Applies to Disaffected Minorities', (1977) 25 Chitty's LJ 335, 336.

⁸² UNGA A/RES/42/79 (4th of December 1987).

governance.⁸³ Irreconcilable political differences with Aspatria are probable.⁸⁴ In terms of arbitrary subordination, the Islanders displayed disfavour towards unification with Aspatria in the plebiscite, where only 6% of voted in favour.⁸⁵

Therefore, even if Aspatria denies the Islands a non-self-governing status, it would still *in effect* be such.

H. Aspatria’s claims to historical title was not of a sovereign character, subsequently the Islander’s will for self-determination must be respected

This Court has held in *Western Sahara* that not all “legal ties” but only ties amounting to sovereignty would prevent self-determination.⁸⁶ “Legal ties” generating sovereignty was defined by this Court as meaning the effective exercise of state authority.⁸⁷ As established earlier, Aspatria

⁸³ Ibid ¶29.

⁸⁴ Ibid ¶35.

⁸⁵ *Compromis*, ¶63.

⁸⁶ *Western Sahara case* (n 21) ¶31-32.; Crawford (n 42) 640.

⁸⁷ Ibid 57 ¶130, 149, 162.

occupation in 1778 fell below the standard of state conduct. Hence, even if Aspatria had some form of “legal ties” with the Islands, it was not of a sovereign character. Therefore, the absence of sovereignty must allow self-determination to prevail through “the free and genuine expression of the will of the peoples of the Territory”.⁸⁸

Thus, should the Islanders by their own accord decide a certain form of governance, Aspatria’s claims to title would not negate “self-determination”. On the 6 December 2008, the plebiscite held in the Islands with a 93% voter turnout rate, indicated that 76% of them desired independence, whilst only 6% was in favour of possible unification with Aspatria.⁸⁹ This is a representative figure that would override Aspatria’s purported historical titles, if any.

⁸⁸ Ibid 31 ¶¶54-59, 162.

⁸⁹ *Compromis*, ¶63.

II. RYDAL'S REJECTION OF MDR'S BID DID NOT CONSTITUTE A VIOLATION OF THE ASPATRIA-RYDAL BIT

A. The Aspatria-Rydal BIT is not applicable to the Islands

(1) The Aspatria-Rydal BIT is not extended to the Islands as it is a territory of disputed sovereignty between Aspatria and Rydal

- i. The Islands cannot be considered within the Aspatria-Rydal BIT's defined term of "territory"

If the definition of "territory" is not unequivocal in a treaty provision, the typical approach of geographical application of territory would include maritime areas over which the contracting parties exercise sovereign rights or jurisdiction in accordance with international law, such as the continental shelf and the exclusive economic zone.⁹⁰

Territory is an essential term within bilateral investment treaties ("BIT") and ambiguity would render the treaty ineffective with regard to the disputed sovereignty of the Islands. Should

⁹⁰ UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (UN, New York 2007) 17.

either of the parties attempt to extend the treaty to the Islands by defining it as their territory, it would appear to the other party as an attempt of territorial acquisition via the treaty or a measure to impede the exercise by the Islanders of their right to self- determination.⁹¹

The territoriality clause is therefore inconclusive and merely restates the issues of sovereignty highlighted in Declaration I. This Court's evaluation of Declaration I would determine the territorial application of the Aspatia-Rydal BIT.

- ii. The Islands have been excluded from the Aspatia-Rydal BIT through Rydal's interpretative declaration

Reservations allow a state which is a party to the treaty to exclude or modify the legal effect of certain provisions of the treaty.⁹² The territory of the Islands has not been explicitly and formerly excluded from the Aspatia-Rydal BIT. However, unilateral interpretative declarations

⁹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 87-88.

⁹² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 331 UNTS 1155 (VCLT) arts 19-232(1)(d), 19, 23.

can also qualify what is to be attributed to the provisions of a treaty and silence from the other party amounts to agreement of the interpretative declaration.⁹³ In *Belios v Switzerland*,⁹⁴ the European Court of Human Rights concluded that in order to establish the interpretative declaration, the substantive content must be considered.⁹⁵

The public declaration by the Prime Minister of Rydal serves as evidence that Rydal and Aspatria continue to disagree over the status of the Islands and that the issue is to be placed aside in order to focus on other mutually beneficial matters.⁹⁶ Consequently, any affair involving the serious and sensitive issue of sovereignty of the Islands is inherently construed by both parties to be a reservation due to its substantive nature. Therefore the Islands do not fall within the treaty.

- iii. The contentious nature of the Islands does not satisfy the object and purpose of the treaty

⁹³ VCLT (n 92) art 20(5)

⁹⁴ *Belios v Switzerland* (App no 10328/83) (1988) 10 EHRR.

⁹⁵ Tim Hillier, *Sourcebook on Public International Law* (Cavendish Publishing Limited, GB 1998) 134.

⁹⁶ *Compromis*, ¶39.

A treaty shall be interpreted by reference to its object and purpose, as well as by the circumstances of its conclusion.⁹⁷ In international investment law, it is common practice for a treaty provision to be interpreted in a manner that is most conducive to fulfilling the objective of the BIT to protect investments and create conditions favourable to investments.⁹⁸

For Rydal and Aspatria, the object and purpose of the treaty was to “...increase prosperity in both States”⁹⁹ based on the principles of reciprocity, equality and mutual benefit. The Prime Minister of Rydal publicly made it known during the negotiations of the Aspatria-Rydal BIT that the issue of the Islands was to be resolved sometime in the future but that it was more important for the parties to concentrate upon matters of “mutual benefit”.¹⁰⁰ This statement as a *travaux preparatoires* illustrates the intention of Rydal in the course of adopting the treaty.¹⁰¹ The

⁹⁷ VCLT (n 92) arts 31-32; *Lauder (US) v Czech Republic*, (United States/Czech Republic BIT), UNCITRAL (Final Award) 2002.

⁹⁸ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID ARB/01/7 (Award) 2004 ¶104.

⁹⁹ *Compromis*, Annex I, Preamble, ¶2.

¹⁰⁰ *Compromis*, ¶39.

¹⁰¹ Stephen Hall, *International Law* (2nd edn LexisNexis Butterworths, London 2006) 95.

contentious nature of the Islands would raise substantive issues as to the territorial definition in the Aspatia-Rydal BIT. Such cause of discontent between the parties would not achieve the positive object and purpose of the treaty.

(2) The Aspatia-Rydal BIT is not extended to the Islands as the Islanders are undergoing the process of self-determination

Article 53 of the VCLT deems a treaty invalidated if it conflicts with a peremptory norm of international law. A peremptory norm or *jus cogens* is a fundamental principle of international law from which no derogation is permitted.¹⁰² Self-determination has been recognized and qualified as a *jus cogens* norm.¹⁰³

Jus cogens norms cannot be violated by any state “through international treaties or local or

¹⁰² Martin Dixon, *Textbook on International Law* (6th edn OUP, Oxford 2007) 77; *Case Concerning East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90.

¹⁰³ Raic (n 75) 218-219; Hector Gros Espiell, *The Right to Self Determination: Implementation of United Nations Resolutions*, E/CN.4/Sub.2/405/Rev1 1980) 12; *Palestinian Wall Case* (n 91).

special customs or even general customary rules not endowed with the same normative force”¹⁰⁴.

The treaty would therefore not extend to the Islands as the *jus cogens* right to self-determination is universally applicable.¹⁰⁵

The people of the Islands are manifestly advocating the move towards self-determination.¹⁰⁶

Therefore, as self-determination is regarded as a *jus cogens* norm,¹⁰⁷ Rydal is under an obligation to take measures designed to protect such rights and to ensure that the activities of foreign companies will not undermine such rights.¹⁰⁸

(3) The Aspatria-Rydal BIT is not extended to the Islands due to the principle of permanent sovereignty over natural resources

In the move towards self-determination, the Islands are also seeking to assert economic

¹⁰⁴ *Prosecutor v Furundzija* (Judgment) ICTY (2002) 121 ILR 213.

¹⁰⁵ Raic (n 75) 146.

¹⁰⁶ *Compromis*, ¶37.

¹⁰⁷ *The Caribbean Sea Case* (n 2), *Dixon* (n 102) 77.

¹⁰⁸ Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (OUP, Oxford 2008) 168.

independence. The economic sovereignty of states is a fundamental principle of international law.¹⁰⁹ The right to self-determination includes the free pursuit of economic, social and cultural development.¹¹⁰ Therefore, the principle of permanent sovereignty is intimately tied with and is an indivisible aspect of self-determination.¹¹¹ UN Resolution 3281 is currently the most updated resolution on the matter of permanent sovereignty and economic rights. According to this resolution, the Islands' sovereignty over natural resources would supersede any treaty obligation.¹¹²

Therefore as an aspect of self-determination, agreements contrary to the principle of the permanent sovereignty, are *jus cogens* violations and should be void *ab initio*.¹¹³

(4) The local affiliate of MDR is not a foreign investor and therefore not protected by the Aspatria-Rydal BIT

¹⁰⁹ Subedi (n 108)170.

¹¹⁰ UNGA Res 1514(XV) (n 74).

¹¹¹ Umozurike Oji UmoZurike, *Self-Determination in International Law* (Archon Books, Hamdon, CT 1972).

¹¹² UNGA Res 3281 (1974) GAOR 29th Session Supp 31.

¹¹³ Kamrul Hossain, 'Jus Cogens and Obligations Under the UN Charter' (2005) 3 SCJIL 84.

Under the rule of corporate nationality locally incorporated affiliate of the foreign parent would not be entitled to claim diplomatic protection as a foreign investor¹¹⁴. The Aspatia-Rydal BIT is silent on the treatment of local subsidiaries controlled by foreign enterprises and consequently will fall back on the default position of customary international law.

MDR's claim is in fact governed under the domestic law of Rydal where the proper remedy is found in contract. MDR's bid was submitted by its local registered office in Rydal¹¹⁵ although it is an Aspatian incorporated company. Rydal, in accepting the bid of MDR recognized the lawful incorporation of MDR in Rydal as a local company. Therefore, Rydal could not have breached the treaty as this does not protect the local affiliate of MDR.

B. Rydal's rejection of MDR's bid does not breach any material terms of the Aspatia-Rydal BIT

¹¹⁴ *Barcelona Traction Light and Power Company Limited (Belgium v Spain)* (Judgment) 1970 ICJ Rep 3.

¹¹⁵ *Compromis*, ¶51.

Even if the Aspatia-Rydal BIT is found to be applicable to the Islands, there has been no material breach of the treaty by Rydal. Under Article IV of the Aspatia-Rydal BIT, Rydal is exempted from complying with the national treatment standard as it had a legitimate justification for doing so. Under Article V of the Aspatia-Rydal BIT, Rydal did not violate the minimum treatment standard espoused by customary international law.

(1) Rydal had justifiable reasons in the perceived differences in national treatment claimed by Aspatia

The principle of national treatment in international investment treaties is generally considered on three main grounds. The first two grounds regarding whether the foreign and national investor are in like circumstances and whether one received less favourable treatment is irrelevant in this instance. It is only relevant to determine the third ground on whether there are legitimate reasons to justify any differences in treatment.

According to custom, countries have the right to regulate the admission of foreign investors

and their investments in their territories.¹¹⁶ Access limitations imposed on foreign investment have been justified on economic, social, political or national security grounds and there is also no obligation on the host State to eliminate discriminatory legislation affecting the establishment of foreign investment.¹¹⁷ Rydal's rejection of the bid is justified on the grounds that it aims to protect the Islands and "safeguard the long-term viability of the territory and its people",¹¹⁸ in pursuit of the *jus cogens* norm of self-determination as submitted.

A degree of discrimination in the treatment of aliens as compared with national is, generally, permissible as a matter of customary international law.¹¹⁹ There are exceptions to the national treatment standard in a number of circumstances. A contracting party can reserve the right to differentiate between domestic and foreign investors under its laws and regulations.¹²⁰ This includes those related to specific industries or activities for reasons of national economic and

¹¹⁶ United Nations Conference on Trade and Development, UNCTAD 1999b (23 June 2000) UN Doc TD/B/COM.1/EM.11/2.

¹¹⁷ UNCTAD Bilateral Investment Treaties 1995-2006 (n 90).

¹¹⁸ *Compromis*, ¶53.

¹¹⁹ R. Jennings and A. Watts (eds), *Oppenheim's International Law* (9th edn OUP, Oxford 1996) 932.

¹²⁰ Rudolf Dolzer & Margrete Stevens, *International Centre for Settlement of Investment Disputes: Bilateral Investment Treaties*, (Kluwer Law International, The Hague 1995).

social policy and international human rights principles.¹²¹

Additionally, territorial integrity and sovereignty were important issues which Rydal was obliged to consider before accepting an investment. Accepting the bid of MDR would place the strategic natural resources of the Islands directly under the control of a foreign-owned local company. This could threaten the Islands' attainment of self-determination and sovereignty over natural resources.

(2) Rydal's rejection of MDR's bid does not violate the minimum treatment standard accorded under Article V of the Aspatia-Rydal BIT

Generally, states only fail to meet the minimum standard of fair and equitable treatment if their acts amounted to an outrage, bad faith, or an insufficiency of governmental action so far short of international standards that every reasonable and impartial person would readily recognize its

¹²¹ F. Garcia, 'The Global Market and Human Rights: Trading Away the Human Rights Principle', 25 Brooklyn Journal of International Law (1999) 73-27.

insufficiency.¹²² There are no facts in the case which evidence that Rydal has failed to meet such standards.

In the *Elettronica Sicula Case*¹²³, this Court held that the requirement of ‘constant protection and security’¹²⁴ must be interpreted in light of the international minimum standard, as ‘supplemented by the criteria of national treatment and most-favoured-nation treatment’.¹²⁵ Arbitrariness was further defined as requiring “wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”.¹²⁶

The manner in which the bidding process was conducted by the Assembly was clearly set out

¹²² *International Thunderbird Gaming Corporation v The United Mexican States (Thunderbird v Mexico)* NAFTA (Award) 2006; North American Free Trade Agreement (NAFTA) (entered into force 1 January 1994) Art 1101.

¹²³ *Case concerning Elettronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15.

¹²⁴ Treaty of Friendship, Commerce and Navigation between the United States and the Italian Republic (signed in Rome 2 February 1948) art V ¶1

¹²⁵ *Elettronica Sicula Case* (n 123) ¶111

¹²⁶ *Ibid* ¶128

to be “open, transparent and competitive”¹²⁷ None of the acts carried out by Rydal amounted to a breach of the minimum standard and the rejection of MDR’s bid was not decided in an unjust nor arbitrary manner. The process was vetted both by the Committee of the Islands and Rydal in an open and transparent manner through a recommendation and approval process.¹²⁸

¹²⁷ *Compromis*, ¶49

¹²⁸ *Compromis*, ¶49-52

III. 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

A. Rydal has standing to invoke the Aspatria-Rydal BIT

The right of diplomatic protection of a corporation is attributed to “the State under whose laws of which it is incorporated and in whose territory it has its registered office”.¹²⁹ Article 3(1) of the Draft Articles on Diplomatic Protection¹³⁰ stipulates that “the State entitled to exercise diplomatic protection is the State of nationality”.

The Draft Articles contains no progress development,¹³¹ and reflects and largely codifies customary international law.¹³² This Court refers to it in its judgments, the latest one being the

¹²⁹ *Barcelona Traction Case* (n 114) ¶70.

¹³⁰ ILC, Draft Articles on Diplomatic Protection (2006) Supplement No. 10 (A/61/10)

¹³¹ ILC, ‘Summary record of the 2869th meeting’ UN Doc. A/CN.4/SR.2869

¹³² Annemarieke Vermeer-Kunzli, ‘As If: The Legal Fiction in Diplomatic Protection’, (2007) 18 EJIL 37, 37-38; James L. Kateka, ‘John Dugard’s Contribution to the Topic of Diplomatic Protection’, (2007) 20 LJIL 921, 929.

*Case Concerning Ahmadou Sadio Diallo.*¹³³

ALEC was incorporated in Aspatria.¹³⁴ Nevertheless, Rydal has standing to protect ALEC diplomatically because (1) the Aspatria-Rydal BIT provides Rydal with standing; further and alternatively (2) Rydal is the state of nationality of shareholders of ALEC.

(1) Aspatria-Rydal BIT provides Rydal with standing

The customary law rule on diplomatic protection can be displaced by treaty.¹³⁵ Some treaties, particularly those on protection of foreign investment, contain rules on settlement of disputes, which exclude or depart substantially from the rules governing diplomatic protection.¹³⁶

Rydal's standing to protect ALEC's assets arises expressly in the Aspatria-Rydal BIT¹³⁷.

¹³³ *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Preliminary Objections) ICJ Rep 63.

¹³⁴ *Compromis*, ¶40.

¹³⁵ *Barcelona Traction Case* (n 114) ¶90.

¹³⁶ Draft Articles on Diplomatic Protection (n 130), art 17.

¹³⁷ *Compromis*, Annex I.

Article XIII provides that in the event of a dispute, the party of the investor’s nationality may bring the claim before this Court. “Investor” includes an enterprise of a Party that has made an investment in the territory of the other Party. “Investment” includes shares in an enterprise. In such a case, shareholding in a corporation is considered investment.¹³⁸ The history of the inclusion of “shares” in BITs suggests that it was done to get over the customary law rule.¹³⁹

ROCO was incorporated in Rydal;¹⁴⁰ it was an investor of Rydal. ROCO owned 80% of the shares in ALEC,¹⁴¹ so ROCO has made investment in Aspatria. The ordinary meaning of the Aspatria-Rydal BIT supports Rydal’s standing.

The object and purpose of the Aspatria-Rydal BIT also support Rydal’s standing. In the preamble, Rydal and Aspatria stated that they desire “to create favourable conditions for greater economic cooperation between the Parties”. They recognise that “reciprocal protection of

¹³⁸ *American Manufacturing & Trading, INC. v Republic of Zaire*, ICSID Case No. ARB/93/1 (Award) 1997.

¹³⁹ M. Sornarajah, *The International Law on Foreign Investment* (2nd edn CUP, Cambridge 2004) 229.

¹⁴⁰ *Compromis*, ¶40.

¹⁴¹ *Ibid.*

investments...will be conducive to stimulating entrepreneurship and increasing prosperity in both States”. If only the host state, being the state of incorporation, can exercise diplomatic protection, the state of which the foreign investor is a national cannot exercise protection if the host state inflicts injury on the foreign investor. Aspatria’s NRA restricts licenses for the exploitation of energy resources in Aspatria to locally incorporated companies.¹⁴² To afford protection to Rydal’s investment in Aspatria’s energy sector and to foster cooperation between them, the two parties therefore intended the Aspatria-Rydal BIT to depart from customary law, and to provide Rydal with standing to protect its nationals’ investment in an Aspatria-incorporated corporation.

(2) Rydal as the State of nationality of shareholders is entitled to diplomatic protection

i. Exception under customary international law

Further and alternatively, there are exceptions to the customary law rule. The state of nationality of shareholders may exercise diplomatic protection on their behalf, when the state of

¹⁴² *Compromis*, ¶41.

incorporation was responsible for inflicting injury on the corporation.¹⁴³

Aspatria inflicted injuries upon ALEC by unlawfully seizing its assets.¹⁴⁴ Rydal, as the State of nationality of ROCO, could rely on the exception to exercise diplomatic protection.

ii. A narrower formulation of the exception

Article 11 of the Draft Articles limits the exception to the situation where incorporation in the state causing the injury was required by it as a precondition for doing business there. The precondition need not be by law; other forms of compulsion suffice¹⁴⁵.

This formulation may not reflect customary law.¹⁴⁶ In any event, ALEC satisfied this rule.

¹⁴³ *Barcelona Traction Case* (n 114) ¶92 and separate opinion of Judges Fitzmaurice, Tanaka, and Jessup; Draft Articles on Diplomatic Protection (n 130), art 11, commentary 12.

¹⁴⁴ *Compromis*, ¶57.

¹⁴⁵ Draft Articles on Diplomatic Protection (n 130), art 11, commentary 12.

¹⁴⁶ Chittharanjan Felix Amerasinghe, *Diplomatic Protection* (Oxford Monographs in International Law, OUP, Oxford 2008) 137; *Barcelona Traction Case* (n 114) (separate opinion of Judges Fitzmaurice and Jessup); *Case Concerning Ahmadou Sadio Diallo* (n 133), ¶92-93.

Although there is no suggestion that Aspatrian law requires incorporation in Aspatria for doing business there generally, its NRA restricted licenses for the exploitation of energy resources in Aspatria to locally incorporated companies. ROCO had to channel its Aspatrian business through ALEC.¹⁴⁷

iii. The possibility of multiplicity of claims is not relevant

20% of ALEC's shares were owned by more than 5,000 shareholders of various nationalities.¹⁴⁸ Aspatria may contend, as a matter of policy, that if the state of nationality of shareholders is permitted to exercise diplomatic protection, there may be multiplicity of claims by different states, which is not desirable.

This Court in the *Barcelona Traction Case* was guided by such a consideration, but it was countered by Judges Fitzmaurice¹⁴⁹ and Tanaka.¹⁵⁰ The International Law Commission has also

¹⁴⁷ *Compromis*, ¶41.

¹⁴⁸ *Ibid* ¶40.

¹⁴⁹ *Barcelona Traction Case* (n 114) 77.

¹⁵⁰ *Ibid* 133-139.

envisaged this situation, and suggests that in such a case several states may be able to exercise diplomatic protection.¹⁵¹ The possibility of multiplicity of claims should not, therefore, invalidate the exception.

B. The rule on exhaustion of local remedies is either inapplicable or has been satisfied

A state may not present an international claim on behalf of an injured national before they have exhausted local remedies.¹⁵² It is submitted that (1) the rule is not applicable in this case, or alternatively, (2) its requirements have been satisfied.

(1) The rule of exhaustion of local remedies is not applicable

The rule applies only to cases where the claimant state has been injured “indirectly” through its national; it does not apply if the claimant state is directly injured by the wrongful act of another State.¹⁵³

¹⁵¹ Draft Articles on Diplomatic Protection (n 130), art 11, commentary 3.

¹⁵² Ibid art 14(1).

¹⁵³ Ibid art 14(3).

The objects and interests underlying the claim determine whether the injury is direct.¹⁵⁴ The test is a “but for” test,¹⁵⁵ which asks whether the claim would have been brought, were it not for the claim on behalf of the injured national.

Significant oil reserves were located within 200 nautical miles of the Island’s baselines and the Islands’ Assembly approved ROCO’s bid to exploit them.¹⁵⁶ With ALEC’s assets being seized, ROCO could not exploit the oil reserves.¹⁵⁷ Aspatria’s unlawful expropriation injured Rydal directly, in terms of loss of the possible significant oil revenue, as 45% of the net proceeds generated from the exploitation would go to the Islands.¹⁵⁸

(2) Alternatively, ALEC has exhausted local remedies or the need to exhaust further remedies has been excepted

¹⁵⁴ Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (Cambridge Studies in International and Comparative Law, 2nd edn CUP, Cambridge 2004) 165.

¹⁵⁵ Draft Articles on Diplomatic Protection (n 130), art 14, commentary 11.

¹⁵⁶ *Compromis*, ¶54.

¹⁵⁷ *Ibid* ¶66.

¹⁵⁸ *Ibid* ¶50.

i. ALEC has exhausted local remedies

In any event, local remedies have been exhausted by ALEC. “Local remedies” means legal remedies open to the injured person before judicial or administrative courts or bodies, of the State alleged to have caused the injury.¹⁵⁹ If appeal is permitted, it must be brought to secure a final decision.¹⁶⁰

The present dispute concerns the seizure order, not the criminal punishment that may be imposed on ALEC under the NRA. The relevant case is therefore *ALEC v Langdale Administrative Court*. No further direct or indirect appeal from the order was possible.¹⁶¹

Even if ALEC is eventually acquitted in the criminal case *Prosecutor v ALEC*, and its seized assets are returned, the fact that the assets have been expropriated and injury has been caused to

¹⁵⁹ Draft Articles on Diplomatic Protection (n 130), art 14(2).

¹⁶⁰ Ibid art 14, commentary 4.

¹⁶¹ *Compromis*, ¶58.

ALEC will not change. Hence, whether the criminal case has reached final decision is irrelevant.¹⁶²

ii. The need to further exhaust local remedies has been excepted

Even if this Court were to find that the case *Prosecutor v ALEC* would be relevant, the need to further exhaust local remedies has been excepted, because there is undue delay in the remedial process, and the requirement of exhaustion of remedies has been rendered unreasonable.

Undue delay in the remedial process obviates the need to exhaust local remedies.¹⁶³ It is difficult to give an objective meaning to “undue delay”.¹⁶⁴ In the *El Oro Mining and Railway Co Case*,¹⁶⁵ a court’s delay in taking action for nine years was held to be sufficient to make it an ineffective remedy. In the *Chattin Claim*,¹⁶⁶ the fact that Chattin was not heard in court until more than one hundred days after formal proceedings commenced was considered as convincing

¹⁶² Ibid ¶59.

¹⁶³ Draft Articles on Diplomatic Protection (n 130), art 15(b).

¹⁶⁴ Ibid, art 15, commentary 5.

¹⁶⁵ *El Oro Mining and Railway Co Case (GB v Mexico)* (1931) 5 RIAA 191.

¹⁶⁶ *Chattin Claim (US v Mexico)* (1927) 4 RIAA 282.

evidence of undue delay.

Statistics in other jurisdictions provide reference on the length of proceedings. In 2008, the District Courts in the United States of America tried 91,390 criminal defendants. Of the 428 defendants who went through bench trials, the median amount of time from filing to disposition was 7.2 months. The median for the 2,720 jury-tried defendants was 14.4 months.¹⁶⁷

Most criminal cases in Aspatrian courts take between four and six years to conclude, with another two or three years for appeals.¹⁶⁸ Such a slow pace resembles closely the undue delay in the *El Oro Mining and Railway Co Case*.

Besides, there are cases which state that the duty to exhaust local remedies must be reasonable.¹⁶⁹ ALEC's assets, valued at approximately US\$80 million, were seized by

¹⁶⁷ Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, 'Median amount of time from filing to disposition of criminal defendants in U.S. District Courts, by method of disposition, and circuit and district, fiscal year 2008' in Sourcebook of Criminal Justice Statistics, <<http://www.albany.edu/sourcebook/>>.

¹⁶⁸ *Compromis*, ¶59.

¹⁶⁹ Amerasinghe (n 154) 179.

Aspatria.¹⁷⁰ By the time the criminal case goes through the Aspatrian courts, ALEC will have lost millions of dollars in revenue.¹⁷¹ This constitutes undue hardship to ALEC.

C. Aspatria has violated Articles V and VI of the Aspatria-Rydal BIT

It is submitted that (1) Aspatria's seizure of ALEC's assets amounts to expropriation and is a violation of Article VI of the Aspatria-Rydal BIT; and (2) the expropriation subjects ALEC to unfair and inequitable treatment, which is a violation of Article V of the Aspatria-Rydal BIT.

(1) Aspatria's seizure of ALEC's assets amounts to expropriation and is a violation of Article VI of the Aspatria-Rydal BIT

Article VI of the Aspatria-Rydal BIT provided that neither party may expropriate an investment, except for a public purpose and in accordance with due process of law. Customary

¹⁷⁰ *Compromis*, ¶57.

¹⁷¹ *Ibid* ¶59.

law forbids a state to take an alien's property for purely extraneous political reasons.¹⁷² Article VI (a) of the Aspatia-Rydal BIT covers indirect expropriation. Indirect expropriation refers to measures taken by a state to deprive the investor of the use and benefit of his investment, even though he may retain nominal ownership of it.¹⁷³

By October 2007 when the Assembly of Islands endorsed MDR's bid,¹⁷⁴ Aspatia must have been aware of ROCO's bid, especially when previously it had publicly protested the bidding process.¹⁷⁵ However, Aspatia did not file criminal charges against ALEC until 16 November 2007,¹⁷⁶ two days after the Assembly re-voted on the bids.¹⁷⁷ It is reasonable to construe such criminal charges as motivated by the success of MDR's bid. With ALEC's assets being seized, ROCO's use and benefit of its investment in ALEC were deprived of. It would now be impossible

¹⁷² *British Petroleum Exploration Company (Libya) Ltd v Libyan Arab Republic* (1974) 53 ILR 329.

¹⁷³ *Middle Eastern Shipping and Handling Co. v. Egypt*, ICSID No. ARB/99/6 (Award) 2002, ¶107; *Lauder v. Czech Republic* (n 97) ¶54.

¹⁷⁴ *Compromis*, ¶52.

¹⁷⁵ *Ibid* ¶49.

¹⁷⁶ *Ibid* ¶56.

¹⁷⁷ *Ibid* ¶54.

for ROCO to exploit the oil resources in the Islands.¹⁷⁸

Aspatria may contend that the seizure, conducted in accordance with its criminal code and NRA, was valid under the Aspatria-Rydal BIT. However, Aspatria did not possess sovereignty over the Islands. Hence, ALEC's involvement in ROCO's bid in exploiting the Islands's oil resources could not be a contravention against the NRA. Aspatria could not rely on it to expropriate ALEC's assets.

(2) Aspatria failed to accord fair and equitable treatment to ROCO's investment

Article V of the Aspatria-Rydal BIT required each party to accord to investments treatment akin to that found in customary international law, including fair and equitable treatment. This encompasses protection against denials of justice.¹⁷⁹ Denial of justice is understood as denial of

¹⁷⁸ Ibid ¶66.

¹⁷⁹ Jan Paulsson, *Denial of Justice in International Law* (Hersch Lauterpacht Memorial Lectures, CUP, Cambridge 2005) 6.

fair and equitable treatment.¹⁸⁰ Such denial exists when there is gross deficiency in the administration of judicial process.¹⁸¹ Financial obstacles may constitute denial of justice.¹⁸²

All ALEC's assets in Aspatrian territory were seized. ALEC would be financially strained to conduct its defence in the case *Prosecutor v ALEC*, especially when it may last for four to six years. As Aspatria's expropriation put ALEC under severe economic duress, the trial would inevitably be grossly deficient and cannot be fair.

¹⁸⁰ Francesco Francioni, 'The Right of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (The Collected Courses of the Academy of European Law, OUP, Oxford 2007) 10.

¹⁸¹ Brownlie (n 38) 529; Draft Convention on the Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners, Harvard Law School, Research in International Law, II, Responsibility of States (Cambridge, Massachusetts, 1929), (1929) 23 AJIL 133 (Special Supplement).

¹⁸² Francioni (n 180) 13.

CONCLUSION AND PRAYER FOR RELIEF

Rydal, as Respondent, respectfully requests this Court to adjudge and declare as follows:

- I. That Rydal is permitted under international law to grant independence for the 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;

- II. That the rejection of MDR's bid did not constitute a breach of Rydal's obligations under the Aspatia-Rydal BIT;

- III. That Rydal has standing to invoke the Aspatia-Rydal BIT to protect the assets of a Rydalian enterprise in Aspatia and the seizure of such assets was a violation of the Aspatia-Rydal BIT.

