TEAM 241A

THE 2010 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

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

Case Concerning the Windscale Islands

THE REPUBLIC OF ASPATRIA
APPLICANT

v.

THE KINGDOM OF RYDAL
RESPONDENT

SPRING TERM 2010

On Submission to the International Court of Justice

MEMORIAL FOR THE APPLICANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

ICJ/PCIJ Cases

Other International Cases

Municipal Cases

International Agreements

UN Documents

Municipal Laws

Books and Treatises

Articles and Speeches

Other Documents

STATEMENT OF JURISDICTION

The Republic of Aspatria and the Kingdom of Rydal appear before the International Court of Justice in accordance with Article 40(1) of its Statute by submitting a special agreement for resolution of all the differences between them concerning the Windscale Islands. This Court has jurisdiction over this dispute pursuant to Article 36(1) of its Statute and Article XIII of the Treaty Concerning the Encouragement and Reciprocal Protection of Investment, as both parties have agreed to have this dispute adjudicated by this Court under its ad hoc jurisdiction. The parties concluded this special agreement and Compromis on September 10, 2009, in Chicago, Illinois, U.S.A., and jointly notified this Court of their special agreement on September 16, 2009.

QUESTIONS PRESENTED

1. Can Rydal lawfully take steps giving effect to the independence of the Windscale Islands and should it cede administration of the Islands to Aspatria?
    a. Does sovereignty over the Islands belong to Aspatria?
    b. Are the Islanders entitled to independence based on the principle of self determination?
2. Does Rydal's rejection of MDR's bid constitute a violation of the Aspatria-Rydal BIT?
3. Does Rydal have standing to invoke the Aspatria-Rydal BIT to protect the assets of ALEC, an Aspatrian company? Did Aspatria violate the Aspatria-Rydal BIT?

STATEMENT OF THE FACTS

The Windscale Islands ("the Islands") are an archipelago located 500 miles from Aspatria and 7,500 miles from Rydal, a former colonial power. Aspatria was a colony of Plumbland from 1610 until its independence.

Captain Parrish, the leader of a naturalist expedition commissioned by Rydal, landed on the Islands in 1777. Before departing, Parrish left behind a Rydalian flag and a stone carved with an inscription. Plumbland discovered the Islands months later when one of its naval ships, *The Salkeld*, came across them. Shortly afterwards, the Viceroy of Aspatria sent an expedition led by Lt. Ricoy to settle the Islands in the name of Plumbland. Ricoy established Fort Salkeld on the Islands. After twenty-one years of continuous occupation, Ricoy returned to the mainland of Aspatria to quell an internal disturbance but left the flag of Plumbland flying over the fort, along with a notice of Plumbland's sovereignty over the Islands. Contemporary Plumblandic and Aspatrian maps showed the Islands belonging to Plumbland.

In 1813, a Rydalian ship crashed on one of the smaller Islands. The commander, Admiral Aikton, built what he intended to be a temporary settlement. In 1814, war broke out between Plumbland and Rydal. In 1815, a slave ship from Sodor drifted into Aikton's settlement. By 1816, Aikton's men had discovered the fort at Salkeld. In 1817, the Viceroy of Aspatria sent *The Grizedale* to the Islands to establish a colony. After encountering Aikton's men, the ship returned to Aspatria, though not before protesting the presence of Rydalians on the Islands. King Piero of Plumbland sent a letter to the Queen of Rydal protesting Rydal's occupation. The Queen's response indicated that she was not aware of Aikton's settlement, but adopted his actions after the fact and appointed a Governor of the Islands.

In October 1819, the Aspatrians revolted. Shortly thereafter, they declared their independence and established the Republic of Aspatria, which included the Windscale Islands.

In July of 1820, Colonel Diaz was elected President of Aspatria. Plumbland sued for peace with Rydal in 1821 and signed the Treaty of Great Corby, ceding their claim over the Islands to Rydal.

In 1826, President Diaz of Aspatria sent a force to take the Islands, but it was defeated. The following year, Diaz sent an ambassador to Rydal. The Queen of Rydal recognized Aspatria's independence but refused to countenance Aspatria's claim to the Islands. In 1841, King Piero signed the Treaty of Woodside, which recognized Aspatria's independence and its claim of sovereignty over the former territory of the Viceroyalty of Aspatria with the exception of the Islands; however, the parties did include a clause acknowledging Aspatria's claim to the Islands. Between 1845 and 1880, Aspatria continually reiterated its claim to the Islands. Between 1880 and 1910, Aspatria experienced domestic unrest and did not assert any claims over the Islands. In 1910, Aspatria's claims resumed.

Restrictions imposed by Rydal limited foreign commercial activity on the Islands. Though there was a regular trading link between the Islands and Aspatria, its scope was limited, and Rydal levied duties on goods coming from outside the Islands. The Islands remained poor by international standards. Since its independence, Aspatria has treated Islanders as citizens of Aspatria. Persons born on the Islands do need a passport to enter Aspatria, and Aspatria does not impose import duties on goods coming from the Islands.

In 1945, Rydal joined the United Nations and designated the Islands a non-self-governing territory. In 1947, Rydal allowed the Islands a constitution which gave control over day-to-day governance, including the exploitation of natural resources, to the Assembly of the Islands, subject to approval by the Governor appointed by Rydal. Rydal maintained exclusive control over defense and foreign relations. Aspatria joined the U.N. in 1949; its Ambassador sent a note

to the Secretary-General asserting Aspatria's sovereignty over the Islands. Eighteen states regularly support its claim to the Islands in the General Assembly.

In 1985, Aspatria and Rydal signed the Aspatria-Rydal BIT ("the BIT"). In 1991, Aspatria passed the Natural Resources Act ("NRA"), which makes it a criminal offense for an Aspatrian company to take action "inconsistent with an exclusive government license or patent concerning natural resources." The NRA also restricts licenses for the exploitation of energy resources in Aspatria to locally-incorporated companies.

The Rydalian Oil Corporation ("ROCO") responded to the NRA by channeling its business in Aspatria's energy sector through the A & L Exploration Corporation ("ALEC"). ALEC is incorporated in Aspatria, although ROCO owns 80% of its shares. In 1997, oil was discovered in the basin around the Islands. In 2003, the Aspatrian Parliament granted an exclusive license to extract the oil to MDR Limited, an Aspatrian corporation.

In December 2006, the First Minister of the Assembly, issued a public call for bids to exploit the oil in the basin. He declared that the bidding process would be "open, transparent, and competitive." A committee of the Assembly would evaluate the bids and make a recommendation to the full Assembly; a final decision would be made my majority vote, subject to the Governor's assent. President Lavin of Aspatria protested the bidding process.

The Assembly received bids from ROCO and from MDR Limited. ROCO's bid promised 45% of the net proceeds to the Islands and listed the existing equipment, personnel, and assets of ALEC as resources. MDR's bid included an up-front payment of US$500 million upon the signing of a final agreement and a promise to pay 50% of the net proceeds to the Islands.

In October 2007, the committee of the Assembly recommended that MDR's bid be

approved. The Assembly endorsed the committee's recommendation by a vote of 20 to 15, as MDR's bid was "without question the more economically attractive to the people of the Islands." After a week of consultation with Rydal's Prime Minister, Governor Black withheld her signature, stating: "the future of the Windscale Islands lies with that community of States, led by Rydal, which shares a common history, culture, and values."

In November, the Assembly and the Governor approved the ROCO bid. Later that month, an Aspatrian prosecutor filed criminal charges against ALEC under the NRA. The Prosecutor alleged that ALEC interfered with MDR's license by participating in ROCO's bid. The Prosecutor filed a petition asking the court to seize all of ALEC's assets within Aspatria. The criminal code authorizes the seizure of assets if they "might be used to further, to promote, or to conceal criminal conduct." The court granted the petition, and Aspatrian police seized all ALEC's assets in Aspatrian territory.

ALEC filed a petition with the Supreme Administrative Court of Aspatria asking that the order be cancelled. The Court denied ALEC's petition in *ALEC v. Langdale Administrative Court*. The underlying criminal case, *Prosecutor v. ALEC*, has not been resolved. On 3 December 2007, MDR filed a challenge to the results of the bidding process in Rydalian court, but the case was dismissed for lack of standing. The appeals failed.

The controversy surrounding Governor Black's rejection of the Assembly's acceptance of MDR's bid sparked protests across the Islands. The Assembly passed a resolution calling for a plebiscite. The plebiscite was held in December 2008. The majority of the Islanders voted for independence. President Lavin declared the plebiscite illegal.

SUMMARY OF THE PLEADINGS

Rydal may not lawfully take steps giving effect to independence of the Windscale Islands. Rydal must cede administration over the Islands to Aspatria because sovereignty over the Islands belongs to Aspatria, and the Islanders are not entitled to independence based on the principle of self-determination.

Plumbland gained sovereignty over the Islands by establishing Salkeld and maintaining effective control over the Islands from 1778-1799. During that period, the Islands shared an administrative boundary with the Aspatrian mainland. The settlers did not intend to abandon sovereignty when they left Salkeld in 1799, so Plumbland maintained sovereignty until 1820. Upon Aspatria's independence in 1820, the Islands devolved to Aspatria through the doctrine of *uti possidetis juris*, which mandates that the borders of newly independent states conform to their pre-independence administrative boundaries. As Plumbland did not have sovereignty over the Islands when the Treaty of Great Corby was signed in 1821, the Treaty's purported cession of the Islands to Rydal had no legal effect. Rydal has not acquired sovereignty over the Islands through prescription because Aspatria has routinely protested Rydal's possession.

The Islanders are not entitled to independence based on the principle of self-determination, because the Islanders do not quality as a "people" entitled to self-determination. Even if the Islanders have that right, it does not entitle them to unilaterally form an independent state, because neither treaty law nor customary law recognizes a right to secession. The Islanders would only gain a right to independence if Aspatria violated their self-determination by depriving them of equal political representation. Because Aspatria has not done so, the Islanders are not entitled to independence. Furthermore, because the Islands are not an Aspatrian colony, they should not be considered a non-self-governing territory and should not gain a right to

independence based on their current designation as non-self-governing.

Rydal violated MDR Limited's ("MDR") rights under the Aspatria-Rydal BIT ("BIT"). MDR is a protected investor under the BIT, and its exclusive license to extract the oil in the Windscale Islands is an investment under the BIT. In the alternative, MDR's attempt to gain a license from Rydal by participating in the bidding process was an investment.

The BIT requires Rydal to grant investors no-less favorable treatment than that accorded to its own investors. The statement of the First Minister of the Assembly of the Islands lauding MDR's bid, the explicitly discriminatory statement of the Governor, and the outcome of the bidding process combine to create a *prima facie* case of less favorable treatment.

MDR's extraction license and its attempt to gain a license from Rydal are investments. Rydal is obligated to accord MDR's investments fair and equitable treatment, full protection and security, and non-discrimination. Rydal breached its obligation by evaluating the bids through an opaque and arbitrary process, failing to exercise due diligence, and intentionally discriminating against MDR because it is an Aspatrian entity.

Rydal cannot represent the A & L Exploration Corporation ("ALEC") under the terms of the BIT since ALEC is an Aspatrian entity. Even if Rydal met the requirement under the BIT, the diplomatic protection standard presents an insurmountable barrier to gaining standing at the Court. Since states are only allowed to appear on behalf of injured nationals, Rydal cannot represent ALEC at this forum. Though it is authorized to represent Rydalian shareholders in ALEC for direct injuries to their rights, this authority does not extend to representing ALEC by substitution.

Even if this Court finds that Rydal has standing on behalf of ALEC, Aspatria did not violate the BIT, since ALEC operates within the Aspatrian oil and gas sector, an area carved out

from BIT protection. If, however, the court finds that ALEC should be granted BIT protections, Aspatria's temporary seizure of ALEC's assets to prevent the commission of a crime does not constitute a violation of its duty to accord all investors non-discriminatory, fair and equitable treatment with full protection and security.

PLEADINGS

I. 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 Windscale Islands belongs to Aspatria.

In 1820, Aspatria gained its independence and inherited Plumbland's claim to the Windscale Islands ("the Islands"). Plumbland established this claim by occupying the Islands from 1778 to 1799 and governing them through the then-Viceroyalty of Aspatria. Rydal's unlawful possession of the Islands did not defeat Plumbland's title prior to Aspatrian independence, nor does it alter Aspatria's claim.

1. Plumbland gained sovereignty over the Islands through occupation.

The duration and geographic extent of the activities sufficient for effective occupation must be assessed on a case-by-case basis.[1] This Court recognized that custom in the 18th and 19th centuries[2] allowed for "[m]anifestations of territorial sovereignty, [to] assume...different forms according to conditions of time and place."[3]

i. The land was terra nullius before Plumbland established a settlement on the Islands.

Territory is *terra nullius* when no state has sovereignty over it.[4] Although the Islands

---

[1] Island of Palmas (U.S./Netherlands) (1928), 2 RIAA 829 [hereinafter *Palmas*], at 840; Legal Status of Eastern Greenland (Denmark/Norway) 1932 P.C.I.J., Series A/B, No. 53 [hereinafter *Greenland*], ¶45; V. Prescott & G. Triggs, INTERNATIONAL FRONTIERS AND BOUNDARIES (2008) [hereinafter Prescott], 161.

[2] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) 2005 I.C.J. 3 [hereinafter *Malaysia/Singapore*], ¶67.

[3] *Palmas*, *supra* note 1 at 840.

[4] Western Sahara (Requests for Advisory Opinion) 1975 I.C.J. 3 [hereinafter *Western Sahara*], ¶80; J. Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW (2nd ed. 2006) [hereinafter Crawford], 197.

were *terra nullius* when Rydal discovered them in 1777,[5] discovery must be followed by effective occupation to create title to territory.[6] Acquisition of sovereignty through effective occupation requires an open, continuous, and peaceful display of state activities over a lengthy period of time.[7] Courts considering historical claims to sovereignty apply the principle of intertemporal law.[8] Based on international law in the 18th and 19th centuries, the requirements for activities that sufficed for occupation of remote, uninhabited islands were less demanding than the activities required for occupation of closer, inhabited territory.[9]

Rydal did not meet this standard prior to 1778; Plumbland's occupation was the first state action to alter the Islands' *terra nullius* status. Rydal's placement of a flag on the Islands[10] did not constitute activity sufficient for effective occupation in the late 18th century.[11] Generally, the kinds of state activities that constituted effective occupation were administrative activities such as the establishment of settlements.[12] Because Rydal did not create a settlement or otherwise exercise administrative control, it did not effectively occupy the Islands. Thus, the Islands were *terra nullius* when Plumbland established Salkeld.

---

[5] Compromis ¶5.

[6] *Palmas*, *supra* note 1 at 840; *Greenland*, *supra* note 1 at ¶44; Crawford, *supra* note 4 at 258.

[7] *Western Sahara*, *supra* note 4, ¶92; *Palmas*, *supra* note 1 at 840.

[8] *Palmas*, *supra* note 1 at 845.

[9] *Palmas*, *supra* note 1 at 840; *Greenland*, *supra* note 1, ¶44.

[10] Compromis ¶5.

[11] E. Milano, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW (2006) [hereinafter Milano], 82.

[12] Minquiers and Ecrehos (France/U.K.) 1952 I.C.J. 2 [hereinafter *Minquiers and Ecrehos*], 85; Milano, *supra* note 11 at 82.

ii. Even if the land was not terra nullius when Plumbland arrived, Rydal had only an inchoate title.

Even if Rydal's placement of the flag created title to the Islands, that title was "inchoate"[13] and did not grant actual sovereignty. Inchoate title through a symbolic declaration of sovereignty had to be followed by effective occupation within a "reasonable period" to create sovereignty over territory.[14] As Rydal did not take any further actions to establish control over the Islands, its inchoate title did not mature into actual sovereignty.

iii. Plumbland, through the Viceroyalty of Aspatria, established effective occupation with the corresponding intent to possess the Islands.

During the period in question, establishment of a settlement was recognized as the type of state activity sufficient for effective occupation.[15] Plumbland established Salked in 1778 and administered it until 1799.[16] This occupation was continuous because there were no gaps in Plumbland's control. There is no indication that the settlers left Salkeld between 1778 to 1799 or that another state exercised control over the Islands. During the relevant time period, the length of occupation only needed to allow a "reasonable possibility" for other states to discover the occupation.[17] Plumbland's occupation between 1778 and 1799 provided Rydal with a 21-year opportunity to notice Salkeld. Plumbland's display of state activity was peaceful because its title to the Islands went uncontested during this period.[18]

---

[13] *Palmas, supra* note 1 at 846.

[14] *Palmas, supra* note 1 at 846.

[15] *Minquiers and Ecrehos, supra* note 12 at 65.

[16] Compromis ¶¶6-7.

[17] *Palmas*, *supra* note 1 at 867.

[18] *Malaysia/Singapore*, *supra* note 2, ¶68.

Aspatria's occupation of one of the Islands was enough to grant sovereignty over them. As a settlement was established on one of the Islands, Plumbland's exercise of control is sufficient to grant sovereignty over all of them through the principle of geographic contiguity.[19] This principle allows an exercise of control over one part of a single geographic unit, such as an archipelago, to constitute effective occupation of the entire unit.[20] The United Nations Convention on the Law of the Sea defines an archipelago as "a group of islands . . . which are so closely interrelated that such islands...form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."[21] It is undisputed that the Islands are an archipelago.[22] As an archipelago, the Islands form a single geographic unit, so Plumbland's establishment of Salkeld on one of the islands constitutes effective occupation over all of them.

iv. Plumbland did not abandon its sovereignty over the Islands in 1799.

Abandonment of sovereignty requires a failure to exercise authority over the territory and an intention to abandon it.[23] Plumbland did not intend to abandon the Islands in 1799. Lt. Ricoy left a flag and a declaration of sovereignty when he left Salkeld,[24] cementing the claim established through occupation. Maps produced in Plumbland and Aspatria after 1799 continued to identify the Islands as belonging to Plumbland,[25] further indication that Plumbland did not

---

[19] *Greenland*, *supra* note 1, ¶56; Milano, *supra* note 11 at 86.

[20] *Greenland*, *supra* note 1, ¶56; Milano, *supra* note 11 at 86.

[21] United Nations Convention on the Law of the Sea, art.46.

[22] Compromis ¶¶8, 28.

[23] Clipperton Islands Arbitration (France/Mexico) (1931), 26 AM. J. INT'L L. 390 (1932), 394.

[24] Compromis ¶7.

[25] Compromis ¶9.

intend to abandon the Islands.

2. Rydal has not acquired sovereignty over the Islands through prescription.

Acquisition of territory through prescription requires a peaceful exercise of sovereign authority over another state's territory for a prolonged period of time.[26] Rydal's possession of the Islands[27] has never been peaceful for a sufficient length of time to constitute valid prescriptive acquisition.

A peaceful exercise of sovereign authority requires the absence of protest from other states.[28] Plumbland formally objected to Rydal's possession of the Islands in 1818.[29] Upon gaining independence Aspatria formally raised its own objection to Rydal's involvement.[30] Aspatria continued to object to Rydal's possession of the Islands in the 1841 Treaty of Woodside,[31] which recognized Aspatria's continued claim to the Islands.[32] From 1845 to 1880, and from 1911 to the present day, Aspatria routinely protested Rydal's possession of the Islands.[33]

Although Aspatria lodged no objections to Rydal's possession of the Islands between

---

[26] *Palmas*, *supra* note 1 at 86; Chamizal Arbitration 1911, Reports of International Arbitral Awards, Volume XI, 21; T. Hillier, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW (1998), at 239.

[27] Compromis ¶10.

[28] *Malaysia/Singapore*, *supra* note 2, ¶68.

[29] Compromis ¶15.

[30] Compromis ¶24.

[31] Compromis (Clarifications) ¶1.

[32] Compromis ¶26.

[33] Compromis ¶¶27-30.

1880 and 1910,[34] a 30 year gap in objection is not long enough to constitute a sufficiently prolonged period for prescriptive acquisition given the decades of Aspatrian protest. Cases in which this Court has held that sovereignty belongs to one party on the basis of prescription involve hundreds of years of possession without protest.[35] Furthermore, political and economic turmoil in Aspatria from 1880 to 1910 prevented Aspatria from vocalizing its continued protest of Rydal's possession of the Islands.[36] Once Aspatria stabilized politically and was able to renew its protests, it did so.[37]

3. Sovereignty over the Islands passed from Plumbland to Aspatria in 1820.

According to *uti possidetis juris*, a state gains title to the territory within its pre-independence administrative boundaries at the time it becomes independent.[38] This principle was applied throughout the 1800s.[39] For sovereignty over the Islands to pass from Plumbland to Aspatria through the doctrine of *uti possidetis juris*, Aspatria must have gained independence before the purported cession of the Islands to Rydal, and the Islands must have been part of Aspatria's administrative boundaries at the time of independence.

---

[34] Compromis ¶30.

[35] *Malaysia/Singapore*, *supra* note 2, ¶275.

[36] Compromis ¶30.

[37] *Id.*

[38] Badinter Commission, Opinion No. 2, 31 ILM (1992), 171; Case Concerning the Frontier Dispute (Burkina Faso/Mali) 1986 I.C.J. 554 [hereinafter *Burkina Faso*], 568; A. Cassese, SELF-DETERMINATION OF PEOPLES (1995) [hereinafter Cassese], 190; Prescott, *supra* note 1 at 143.

[39] *Burkina Faso*, *supra* note 38, ¶568; S. Lalonde, DETERMINING BOUNDARIES IN A CONFLICTED WORLD, THE ROLE OF UTI POSSIDETIS (2002), 31.

i. Aspatria became independent in 1820.

According to state practice in the early 19th century, states gained independence when they were de facto independent from the former sovereign.[40] At that time there was no requirement that the independent state be formally recognized by its former metropolitan state or by a third state.[41] The independent state only needed to be "substantially capable of maintaining an independent existence, of carrying on a government of its own, of controlling its own military and naval forces, and of being responsible to other nations for the observance of international laws and the discharge of international duties."[42]

By 1 July 1820, the Republic of Aspatria had established the Aspatrian Constitution, a federal system of government, and had an elected president.[43] There is no indication that Plumbland was able to assert control over Aspatria after the Republic of Aspatria formed.[44] Because the Aspatrian government was able to function independently from Plumbland in 1820, and exerted control over its boundaries, Aspatria satisfied the 19th century requirements for status as an independent state.

ii. The Islands were within Aspatria's pre-independence administrative boundaries.

The Islands were within Aspatria's pre-independence administrative boundaries because the Viceroy of Aspatria administered the Islands on behalf of Plumbland. The Viceroy

---

[40] Crawford, *supra* note 4 at 378.

[41] *Id.* at 378.

[42] *Id.* at 382.

[43] Compromis ¶19.

[44] *Id.*

established the settlement of Salkeld,[45] and sent a ship to the Islands in 1817 to establish a colony,[46] indicating that the Viceroy exercised administrative control over the Islands. As Aspatria and the Islands were part of the same administrative unit, upon Aspatrian independence from Plumbland, the Islands became part of Aspatrian territory through the doctrine of *uti possidetis juris*.

4. Plumbland's purported cession of sovereignty over the Islands to Rydal is invalid.

A state can only cede territory over which it is sovereign.[47] Plumbland's claim to the Islands was based solely on occupation by Aspatrian control, and that claim devolved to Aspatria *in toto* upon its independence. Since Plumbland's sovereignty over the Islands ended upon Aspatria's independence, the Treaty of Great Corby's purported cession of sovereignty over the Islands had no legal effect.

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

1. The Islanders are not a "people" entitled to self-determination.

The right to self-determination under the United Nations Charter, International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") only extends to identifiably distinct "peoples."[48] There is no evidence that the Islanders have a common "racial or ethnic identity, cultural homogeneity,

---

[45] Compromis ¶6.

[46] Compromis ¶14.

[47] *Palmas*, *supra* note 1 at 842.

[48] U.N. Charter, art.1; International Covenant on Civil and Political Rights [hereinafter ICCPR], art. 1(1); International Covenant on Economic, Social, and Cultural Rights [hereinafter ICESCR], art. 1(1).

linguistic unity, religious or ideological affinity."[49]

2. Even if the Islanders are a distinct people with a right to self-determination, this right does not entitle them to independence.

i. International law does not recognize the right to independence on the basis of self-determination.

The principle of self-determination allows a people to "freely determine their political status and freely pursue their economic, social and cultural development."[50] However, none of the conventions establishing the principle of self-determination recognizes a people's right to independence as a part of self-determination. The United Nations Charter affirms the principle of self-determination,[51] but only describes an entitlement to independence within the context of the trusteeship system;[52] it does not mention or otherwise recognize independence in connection with the principle of self-determination. Likewise, neither the ICCPR nor the ICESCR provides for any entitlement to form an independent state as a part of self-determination.[53] In practice, this right has not encompassed a right to unilaterally form an independent state.[54] Thus, even if the Islanders are a distinct people entitled to self-determination, this does not entitle them to independence.

---

[49] UNESCO Meeting of Experts on Further Study of the Rights of Peoples (Paris, February 1990).

[50] ICCPR, *supra,* note 48 art.1(1); ICESCR, *supra* note 48, art1(1).

[51] U.N. Charter, art1(2).

[52] U.N. Charter, art.76.

[53] J. Summers, PEOPLES AND INTERNATIONAL LAW (2007) [hereinafter Summers], 154.

[54] B. Conforti, LAW AND PRACTICE OF THE UNITED NATIONS (2005) [hereinafter Conforti], 264; D. Archibugi, A CRITICAL ANALYSIS OF THE SELF-DETERMINATION OF PEOPLE: A COSMOPOLITAN PERSPECTIVE, (2003), 492.

ii. The Islanders' right to self-determination must be consistent with Aspatria's territorial integrity.

Because Aspatria has sovereignty over the Islands, the Islanders' unilateral formation of an independent state without Aspatria's consent would constitute secession,[55] which violates Aspatria's territorial integrity. International law recognizes territorial integrity as a fundamental limitation on the principle of self-determination.[56] General Assembly Resolution 1514, which this court has relied upon when applying the principle of self-determination,[57] states that "[a]ny attempt aimed at the partial or total disruption of . . . the territorial integrity of a country is incompatible with the purposes and the principles of the Charter of the United Nations."[58]

In addition, customary international law rejects the right of a people to unilaterally form an independent state.[59] This Court explicitly stated in *Bosnia and Herzegovina v. Yugoslavia* that customary international law has "accepted that self-determination . . . does not include the

---

[55] Case Concerning Arrest Warrant of 11 April 2000, (D.R.C./Belguim) 2002 I.C.J. 3 (Separate Opinion, Bula Bula, J.) , 105; Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon/Nigeria) 2002 I.C.J. 303 (Separate Opinion, Mbaye, J.), ¶91.

[56] U.N. Charter art.2(1); Declaration of Friendly Relations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., 1883rd plen. mtg., U.N. Doc. A/RES/2625 (Oct. 24, 1970) [hereinafter G.A. Res. 2625], 124; Declaration Granting Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV) (1960) [hereinafter GA. Res. 1514], ¶6; Cassese, supra note 38 at 88; H. Hannum, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION (1990) [hereinafter Hannum Autonomy] at 48; R. Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in THE RIGHTS OF PEOPLES (ed. J. Crawford 1992) at 25-26.

[57]Legal Consequences for the Continued Presence of South Africa Notwithstanding Security Council Resolution 276, (Advisory Opinion) 1971 I.C.J. 16, ¶52; Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) 2002 I.C.J. 625 (Separate Opinion, Franck, J.), ¶12 Cassese, supra note 38 at 89; Hannum, Autonomy, supra note 56 at 46.

[58] G.A. Res. 1514, *supra* note 56, ¶6.

[59] Case Concerning Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosnia/Yugoslavia) 1996 I.C.J. 595 [hereinafter, Bosnia/Yugoslavia], ¶74.

right of secession from an existing State."[60] Since this Court's evaluation of custom in that case, neither widespread state practice nor corresponding *opinio juris* has developed recognizing a right to secession on the basis of self-determination.[61] Furthermore, multiple decisions have affirmed the continued rejection of a right to secession.[62]

iii. Aspatria has not violated the Islanders' right to self-determination.

The Declaration on Friendly Relations, which this Court has relied upon when analyzing the right to self-determination,[63] states that the right does not authorize actions that would violate the territorial integrity of states "conducting themselves in compliance with . . . self-determination . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color."[64] Thus, actions that violate Aspatria's territorial integrity, such as the Islanders' unilateral move toward independence, would only be permitted by international law if Aspatria has violated the Islanders' right to self-determination by denying the Islanders full representation in its government.[65]

Aspatria has not violated the Islanders' right to self-determination. Rydal's unlawful occupation of the Islands since 1813[66] has prevented Aspatria from integrating the Islanders into

---

[60] *Id.*

[61] Cassese, *supra* note 38 at 122.

[62] Re Secession of Quebec (1998) 2 S.C.R. 217 [hereinafter *Quebec*], ¶138; Christian Education South Africa v. Minister of Education, CCT/400, Const. Court, South Africa (2000), at 22.

[63] Bosnia/Yugoslavia, *supra* note 59, ¶73.

[64] G.A. Res. 2625, *supra* note 56.

[65] Bosnia/Yugoslavia, *supra* note 59, ¶73; Aaland Island Case (Sweden v. Finland) League of Nations O.J. Spec. Supp. (1920) [hereinafter Aaland], 28.

[66] Compromis ¶10.

the Aspatrian government. Upon the return of the Islands to Aspatrian control, there is every indication that the Islanders will be fully represented in the Aspatrian government. Aspatria already considers persons born on the Islands as full Aspatrian citizens.[67] Thus, every right that accrues to an Aspatrian citizen already accrues with equal force to the Islanders.

Furthermore, Aspatria has not prevented the Islanders from pursuing their economic, social, or cultural development. The Islanders can freely enroll in Aspatrian schools and work for Aspatrian businesses.[68] Many Islanders have already entered Aspatria for these purposes.[69] Moreover, Aspatria does not impose import duties on goods from the Islands,[70] thus encouraging economic activity.

iv. The Islanders are not entitled to independence on the basis of the plebiscite.

While a plebiscite may function as a means to determine the will of a people,[71] peoples are not entitled to independence merely through vocalizing this wish.[72] Such a right would be equivalent to a right to secession, which is not recognized by international law.[73] Instead, peoples are entitled to independence only when their right to self-determination has been

---

[67] Compromis ¶31.

[68] Compromis ¶33.

[69] *Id.*

[70] Compromis ¶31.

[71] Crawford, *supra* note 4 at 620.

[72] Aaland, *supra* note 65 at 28; *Quebec*, *supra* note 62, ¶138; A. Cassese, INTERNATIONAL LAW (2nd ed. 2005) [hereinafter Cassese, International], 68; Conforti, supra note 54 at 263.

[73] Bosnia/Yugoslavia, *supra* note 59, ¶74.

violated,[74] a condition that has not occurred in this case.[75]

The Islanders' plebiscite was not a valid expression of their will because it was not conducted in accordance with commonly observed requirements for valid plebiscites.[76] There is no indication that the Islanders were fully informed about the options presented by the plebiscite in accordance with General Assembly Resolution 1541.[77] In addition, there is no evidence that a third body, such as the UN, oversaw the plebiscite to make sure Rydal did not improperly influence the vote. The lack of such oversight calls into question the legitimacy of the plebiscite as free, informed expression of the Islanders' will.[78]

3. The UN system of non-self-governing territories ("NSGT") does not apply to the Islands.

i. The Islands should not be a non-self-governing territory.

Chapter XI of the UN Charter sets forth the non-self-governing territory system for territories "known to be of a colonial type" in 1945.[79] Subsequent practice of states confirmed the system of non-self-governing territories as a process of decolonization.[80]

The Islanders are not a colonized people. They are a non-indigenous population

---

[74] *Quebec*, *supra* note 62, ¶138.

[75] See *supra* notes 63-70 and accompanying text.

[76] Y. Beigbeder, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA, AND NATIONAL ELECTIONS (1994) [hereinafter Beigbeder], at 87.

[77] G.A. Res. 1541 (XV), Annex, [hereinafter GA. Res. 1541, Annex], at principle IX.

[78] Beigbeder, *supra* note 76 at 90.

[79] GA. Res. 1541, *supra* note 77, principle I.

[80] U. Fastenrath, "Article 73" in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (ed. Bruno Simma 2002), at 1089; Summers, *supra* note 53 at 208.

descended from settlers from Rydal and Sodor.[81] Thus, the Islanders are properly characterized as immigrants living on Aspatrian territory, rather than a people colonized by Aspatria. In this respect, the Islanders are similar to the residents of Gibraltar, who, as non-indigenous descendants of British immigrants,[82] have not been recognized as a colonized people.[83]

ii. The Islands would not qualify as a non-self-governing territory under the criteria listed in GA. Res. 1541.

Even if territories outside the traditional colonial context could be recognized as non-self-governing, the Islanders would not be geographically distinct from Aspatria, a required component to establish a *prima facie* case that the Islands are a non-self-governing territory.[84] With only 500 miles between them, Aspatria is the closest country to the Islands.[85] All of the currently listed non-self-governing territories are at least 900 miles from their administering states.[86]

Furthermore, the administrative, economic and historical factors show that the Islands would not be placed in an arbitrarily subordinate position. Aspatria already treats the Islanders as full citizens,[87] places no import duties on their goods,[88] and allows them to enter the country

---

[81] Compromis ¶¶12, 28.

[82] Crawford, *supra* note 4 at 637.

[83] Cassese, *supra* note 38 at 267; Crawford, supra note 4 at 637.

[84] G.A. Res. 1541, *supra* note 77, principle IV.

[85] Compromis ¶¶1-2.

[86] List of Non-Self-Governing Territories, UNGA (2002) available at http://www.un.org/Depts/dpi/decolonization/trust3.htm

[87] Compromis ¶33.

[88] Compromis ¶31.

freely for educational or business purposes.[89]

Because the Islanders are not a colonized people and are not placed in an arbitrarily subordinate position to Aspatria, they do not gain a right to self-determination or independence through the non-self-governing territory system.

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

MDR Limited ("MDR"), an investor, made an investment in Rydal-controlled territory. Under the terms of the Aspatria-Rydal Bilateral Investment Treaty ("BIT"), Rydal owes MDR no-less favorable treatment, fair and equitable treatment, full protection and security, and non-discriminatory treatment.

A. MDR and its investment are protected under the BIT

1. MDR is an investor as defined by the BIT

The BIT defines "investor of a party" as an entity "that attempts to make, is making, or has made an investment in the territory of the other party."[90] MDR is an Aspatrian company; incorporated in Aspatria and wholly owned by an Aspatrian national.[91] The bid to obtain a license from Rydal to exploit the oil in the Islands' basin, though not successful, was an investment in territory controlled by Rydal. Had the bid been accepted, MDR would have had an investment in the form of authorization to exploit the oil. Apart from the bidding process, MDR established itself as an investor by virtue of its possession of "a diverse portfolio of securities and other investment assets in Rydalian companies."[92] As an investor, MDR had the right to no-less

---

[89] Compromis ¶33.

[90] Compromis, Annex I, Definitions.

[91] Compromis, Clarification, 3.

[92] Compromis ¶45.

favorable treatment while operating in Rydal-controlled territory.

2. MDR made an investment protected by the BIT

i. MDR's bid was an investment.

The BIT applies to the rejection of MDR's bid, as the concession bid is an investment. Extending the guarantees afforded by a BIT to the "establishment and acquisition" of investments is common practice.[93]

BITs which do not contain provisions explicitly extending or denying protection to pre-establishment proceedings should be construed as providing that protection. The definition of investment is generally left to the consent of the parties.[94] In this case, the parties have not reached an agreement on the definition of "investment," and the text of the BIT does not indicate whether it extends to cover pre-establishment proceedings. Since the parties to a BIT may specify the boundaries of an investment, courts cannot create a requirement for the definition of "investment" not expressly stated in the BIT."[95] If parties wish to limit their obligations under a BIT, they may do so; if they do not, no additional requirements may be implied.[96] Tribunals have adopted a similar approach, noting that "the definition of investment should be broadly

---

[93] U.S. Model BIT (2004), available at http://ustraderep.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf [hereinafter U.S. Model BIT], art.3(2); Canadian Model FIPA (2004), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf [hereinafter Canadian Model FIPA], art.3(2); Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership Agreement, Japan-Sing., Jan. 13, 2002, art73.

[94] Fedax v.Venezuela (ICSID Case No.ARB/96/3), Jurisdiction, 11 July 1997 [hereinafter *Fedax*], ¶21.

[95] Tokios Tokeles v. Ukraine (ICSID Case No.ARB/02/18), Jurisdiction, 29 April 2004, ¶77.

[96] Waste Management, Inc. v. United Mexican States (ICSID Case No.ARB(AF)/00/3), Award, 30 April 2004 [hereinafter *Waste Management*], ¶85.

construed,"[97] and that "every asset" is a broad category.[98] As part of this broad definition, denying access to a market allows a BIT to be invoked.[99] In the absence of language excluding pre-establishment proceedings, these proceedings are protected by the BIT.

ii. MDR's license granting it the exclusive right to exploit the oil in the Islands' basin is an investment protected by the BIT.

The license granted by Aspatria, and ignored by Rydal, is an "investment" as defined by the BIT. For the purposes of the BIT, "licences, authorisations, permits, and similar rights," are investments.[100] Though contracting parties and tribunals have generally found licenses to be investments,[101] few prior disputes arising under BITs have dealt with an investment in disputed territory.

Sovereignty over the Islands belongs to Aspatria. Aspatria has the inalienable right, common to all states, "freely to dispose of [its] natural wealth and resources in accordance with [its] national interests."[102] Aspatria determined that its national interests were best served by

---

[97] *Fedax*, *supra* note 94, ¶22.

[98] Biwater Gauff (Tanzania) v. United Republic of Tanzania (ICSID Case No.ARB/05/22), Award, 24 July 2008 [hereinafter *Biwater*], 307.

[99] Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 128 (2003-2004) [hereinafter Lowenfeld], 128.

[100] Compromis, Annex I, Definitions.

[101] Libyan American Oil Company (LIAMCO) v. The Libyan American Republic, *Ad Hoc* Tribunal, Award of 12 April 1977 ¶104; Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 341 (1994), 341.

[102]Case Concerning the Continental Shelf (Tunis/Libya), 1982 I.C.J. 18 [hereinafter *Continental Shelf*], ¶104; ICESCR, *supra* note 48, art.1(2); Permanent Sovereignty Over Natural Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/5217 (Dec., 14 1962) [hereinafter Res. 1803].

granting a license to MDR.[103] Generally, the area controlled by a party to a BIT and the party's territory are coterminous. However, the Islands, though the sovereign territory of Aspatria, were under the control of Rydal throughout the bidding process. As Rydal effectively controlled the Islands, it was the only state capable of protecting – or jeopardizing – this license.

BITs are designed to provide stability and predictability to foreign investors;[104] the state guarantees to accord investments and investors under its control treatment conforming to a stipulated standard. Interpreting the BIT "in light of its object and purpose,"[105] increasing economic cooperation between parties, leads to the conclusion that it should apply in all territory a party effectively controls.

B. Rydal's treatment of MDR and its investment violated the BIT

1. Rydal violated Article IV of the BIT by treating MDR less favorably than a Rydalian corporation.

The key measure of no-less favorable treatment is whether the same treatment is given to nationals and non-nationals in "like" or "similar" circumstances,[106] even during the pre-establishment phase of an investment.[107] Circumstances are sufficiently "like" where investors are in the same, commercially-competitive sector.[108] MDR and a Rydalian company submitted

---

[103] Compromis ¶47.

[104] R. Dolzer & C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008) [hereinafter Dolzer], 22.

[105] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art.31.

[106] U.N. Conference on Trade and Development, Investor-State Disputes Arising from Investment Treaties: A Review (2005) available at http://www.unctad.org/Templates/Download.asp?docid=6968&lang=1&intItemID=2310, 32.

[107] *Id.*

[108] S.D. Myers v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000 [hereinafter *Myers*], ¶251.

bids to the Assembly of the Islands ("Assembly") for the same license. It was a like circumstance, as both companies had the same aims and offered to perform the same service.

The zero-sum nature of the bidding process does not change the assessment of like circumstances. Even if less favorable treatment is limited to a single instance involving one foreign investor and one national investor, differential treatment is the result of the investor's nationality, "in the absence of any evidence to the contrary."[109] The presumption of differential treatment is strengthened by the manner in which MDR's bid was rejected. The Assembly voted to accept MDR's bid because, as First Minister Craven explained, it "'was without question the more economically attractive to the people of the Islands.'"[110] Craven sent the Assembly's recommendation to the Governor; after a "week of consultation"[111] with the Rydalian Prime Minister, the Governor announced that "The future of the Windscale Islands lies with the community of States led by Rydal"[112] and withheld her signature. Far from there being evidence to the contrary, the process by which MDR's bid was rejected and the Governor's explicitly discriminatory explanation of that rejection demonstrate that MDR was treated less favorably than a Rydalian corporation.

2. Rydal's rejection of MDR's bid was a violation of the "fair and equitable treatment" standard guaranteed by the BIT.

Fair and equitable treatment ("FET") can be violated by conduct that defies the legitimate

---

[109] Marvin Roy Feldman Karpa v. Mexico (ICSID Case No.ARB(AF)/99/1), Award, 16 December 2002, ¶181.

[110] Compromis ¶52.

[111] Compromis ¶53.

[112] *Id.*

expectations of the party making the investment.[113] FET requires transparency so that a party "may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives."[114] Unfair and inequitable treatment need not be outrageous or egregious.[115] Though the process by which MDR's bid was rejected seems indicative of bad faith, bad faith is not a necessary component of unfair or inequitable treatment.[116]

In applying this standard, it is "relevant that treatment is in breach of representations made by the host state."[117] First Minister of the Islands assured all investors that "the bidding process would be open, transparent, and competitive."[118] Each company was instructed to submit a series of components illustrating the economic contours of its plan; MDR could legitimately expect its bid to be judged on the merits of these components. The final decision was to "be made by a majority vote of the Assembly, subject to the assent of the Governor of the Islands."[119] MDR could reasonably expect that any political decision about the merits of the bids was to be made by the Assembly. The Islands' Constitution creates a clear distinction between defense and foreign relations, which are the province of Rydal, and "day-to-day governance,

---

[113] *Waste Management*, *supra* note 96 at ¶98.

[114] Tecnicas Medioambientales TECMED. v. Mexico (ICSID Case No.ARB (AF)/00/2), Award, 29 May 2003 [hereinafter *Tecmed*], ¶154; Biwater, *supra* note 98 at ¶602.

[115] Mondev International v. U.S. (ICSID Case No.ARB(AF)/99/2), Award, 11 October 2002 [hereinafter *Mondev*], ¶116.

[116] *Id.*

[117] *Waste Management*, *supra* note 96 at ¶98.

[118] Compromis ¶49.

[119] *Id.*

including the exploitation of natural resources."[120]

In addition, the manner in which the Governor rejected MDR's bid was not transparent. After the Governor received the Assembly's recommendation, she spent a week in private consultation with the Prime Minister of Rydal.[121] There is no evidence about the content of their discussion, or its bearing on the decision-making process, other than the statement she issued after rejecting MDR's bid. The absence of evidence, combined with the disconnect between the evaluation of the bids, the representations made by the First Minister, and the structure of the Islands' Constitution, indicates that Rydal's rejection of the bid violated the FET standard guaranteed by the BIT.[122]

3. Rydal's rejection of MDR's bid was a violation of the "full protection and security" clause of the BIT.

If the Court finds that Rydal violated the FET standard, then it should also find that Rydal violated the BIT provision promising full protection and security ("FPS"). A violation of the former inherently entails a violation of the latter.[123] Even if Rydal did not violate the FET standard, the Court should find that Rydal violated the clause guaranteeing "full protection and security."[124]

To accord investments full protection and security, a state must exercise due diligence

---

[120] Compromis ¶35.

[121] Compromis ¶53.

[122] Compromis, Annex I, Art.V.

[123] Occidental Exploration and Production Company v. Ecuador, UNCITRAL, Award, 1 July 2004, ¶187.

[124] Compromis, Annex I, Art.V.

and vigilance.[125] The state must do more than refrain from harming an investment; FPS entails a positive duty. Inaction in the face of a threat violates the duty imposed.[126] Though FPS is most often invoked in cases of physical damage, "it is not only a matter of physical security; the stability afforded by a secure environment is as important from an investor's point of view."[127]

The FPS clause precludes a Rydalian claim that the rejection of MDR's bid is attributable to the Islanders. Because Rydal committed to accord foreign investments FPS, it is left with no such defense.

4. Rydal's rejection of MDR's bid was a violation of the "non-discrimination" clause of the BIT.

In the investment context, discriminatory conduct can be characterized by an inequitable distinction between national investors and investments and those from other states[128] or by adverse policies and practices directed at investors and investments from a specific foreign state. In either case, "the intention of the government" is dispositive.[129] Historically, Rydal discriminated against Aspatrians and other foreign investors to the detriment of the Islanders; "Foreign commercial activity on the Islands, especially by Aspatrian companies, was limited because of restrictions imposed by Rydal…The Islands did not have a self-sustainable economy and remained poor by international standards."[130] Rydal should have heeded the non-

---

[125] American Manufacturing and Trading, v. Zaire, (ICSID Case No.ARB/93/1, Award, 21 February 1997 [hereinafter *AMT*], ¶6.05.

[126] Wena Hotels v. Egypt (ICSID Case No.ARB/98/4), Award, 8 December 2000, ¶84.

[127] Azurix Corp. v. Argentina (ICSID Case No.ARB/01/12), Award, 14 July 2006, ¶408.

[128] *Tecmed*, *supra* note 114 at ¶181.

[129] Genin v. Estonia (ICSID Case No.ARB/99/2), Award, 25 June 2001, ¶369.

[130] Compromis ¶32.

discrimination clause[131] and assisted the Islanders by forestalling further discrimination against Aspatrian investments. It did not.

Rydal's rejection of MDR's bid violated the provision of the BIT that guarantees foreign investments non-discriminatory treatment. Though MDR's bid was the most economically advantageous and the most generous towards the Islanders, the Governor rejected it on grounds that were explicitly discriminatory. In her words: "The future of the Windscale Islands lies with that community of States, led by Rydal, which share a common history, culture, and values."[132] Favoring one investment over another because of the national origin of the investors constitutes discrimination and violates the BIT.

III. RYDAL DOES NOT HAVE STANDING TO INVOKE THE BIT ON ALEC'S BEHALF, AND IN ANY EVENT, ASPATRIA DID NOT VIOLATE THE BIT.

A. Rydal lacks standing to protest injury to ALEC under both the BIT and customary international law.

The A&L Exploration Corporation ("ALEC") is an Aspatrian entity whose interests are protected by Aspatria. Neither the BIT nor diplomatic protection under customary international law give Rydal standing before this Court.

1. Rydal is not entitled to protect ALEC under the BIT.

The BIT provides that the state of the injured investor may bring a claim before the ICJ.[133] In cases of arbitration based on BITs, the host state must be a party to the BIT and the injured investor must be a national of the other party.[134] To the extent that ALEC has suffered an

---

[131] Compromis Annex I, Art.V.

[132] Compromis ¶53.

[133] Compromis Annex 1, art.XIII.

[134] Dolzer, *supra* note 104 at 237.

injury, Rydal does not have standing on its behalf because ALEC is incorporated in Aspatria.[135]

2. Even if the BIT allows Rydal to protect ALEC, Rydal's interest does not meet the diplomatic protection standard necessary to gain standing before this Court.

i. Since the parties are availing themselves of the option to bring a claim before this Court, Rydal must meet the standard for diplomatic protection.

Since the state parties selected this Court as their forum, they must meet the standard of diplomatic protection.[136] Because international law considers injury to a citizen as an injury to the state itself, state parties must demonstrate that the injured party is one of their nationals in order to exercise diplomatic protection.[137]

ii. Rydal fails to meet the standard for diplomatic protection over ALEC.

ALEC is an Aspatrian entity because it is incorporated in Aspatria.[138] This Court first articulated the place of incorporation as the test of nationality of a corporate entity in *Barcelona Traction*.[139] In 2003, the International Law Commission's Report on Diplomatic Protection concluded that *Barcelona Traction* remains an accurate reflection of customary international

---

[135] Compromis, ¶40.

[136]Statute of the International Court of Justice art. 38, para. 1(b), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 [hereinafter ICJ Statute], art.34; P.M. Dupuy, *Article 34*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 545 (A. Zimmermann et al., eds., 2006), 549; I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7th ed. 2008) [hereinafter Brownlie], 475; Cassese, International, *supra* note 72 at 121.

[137] LaGrand (F.R.G/U.S.), 2001 I.C.J. 516, ¶77; Mavrommatis, Palestine Concessions, Judgment No. 2, 1924 P.C.I.J, ¶12; Draft Articles on Diplomatic Protection, with commentaries, Yearbook of the International Law Commission, 2006, vol II, (Part Two) [hereinafter Diplomatic], art.3; Diplomatic Protection, G.A. Res. 62/67, U.N. Doc. A/RES/62/67 (Dec., 6, 2007); C. Amerasinghe, DIPLOMATIC PROTECTION (2008) [hereinafter Amerasinghe], 91.

[138] Compromis, ¶40; Diplomatic, *supra* note 137 at art.9; Amerasinghe, *supra* note 137 at 122.

[139] Case Concerning the Barcelona Traction Light and Power Company Limited (Belgium/Spain), Second Phase, Judgment, 1970 I.C.J. 3 [hereinafter *Barcelona Traction*], 71.

law.[140] *Diallo* reaffirmed the validity of this test in 2006.[141]

The foreign control test suggested by the International Center for the Settlement of Investment Disputes ("ICSID") to determine nationality is not custom. Though arbitral tribunals' rulings interpreting the substance of provisions commonly found in BITs may reflect custom,[142] this Court has explicitly rejected the use of ICSID decisions as customary international law on nationality, distinguishing them as *lex specialis*.[143]

The scope of ICSID's jurisdiction differs significantly from ICJ jurisdiction, making an application of ICSID's foreign control test inappropriate to a question of nationality pending before the ICJ. First, ICSID allows private-party corporations to bring claims against an offending state directly; their home state need not be involved and thus need not satisfy the requirements of diplomatic protection.[144] Second, jurisdiction in ICSID arbitrations does not rely on traditional diplomatic protection and the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("Washington Convention") forbids state parties from giving diplomatic protection to their nationals with respect to submitted disputes.[145]

---

[140] John Dugard, Fourth Report on Diplomatic Protection, 55th session, UN Doc. A/CN. 4/530 (2003), 11.

[141]Case Concerning Ahmadou Sadio Diallo (Guinea/D.R.C) (2007), Preliminary Objections, 23 May 2008 2007 [hereinafter *Diallo*], ¶39.

[142] Lowenfeld, *supra* note 99 at 129; Stephen Schwebel, *Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L. L. PROC. 27 (2004), 27.

[143] *Diallo*, *supra* note 141, ¶90.

[144] Washington Convention on the Settlements of Disputes Between States and Nationals of other States, 524, 575 U.N.T.S. 159 (1966) [hereinafter ICSID], art.25(1); Dolzer, *supra* note 104 at 223.

[145] ICSID, *supra* note 144 at art. 27(1); CMS Gas Transmission v. Argentina (ICSID Case No.ARB/01/8), Award, 12 May 2005, ¶69; Banro American Resources, and Société Aurifère du

Third, ICSID arbitrations are governed by the terms of a specific treaty involving two particular parties and their choice of laws.[146] Finally, ICSID relies on the Washington Convention for jurisdiction,[147] but neither Rydal nor Aspatria is party to the convention so the special rules that ICSID relies upon do not automatically apply to their BIT. [148]

iii. The alleged injuries to Rydalian shareholders of ALEC do not suffice for Rydal to assert diplomatic protection.

Rydal may claim the right to protect Rydalian shareholders in ALEC. However, this right is restricted to direct injuries to their rights as shareholders conferred by municipal law.[149] This Court has repeatedly held that such indirect injuries to shareholders must be pursued in the name of the company by the state of its nationality.[150] The seizure of ALEC's assets is not a direct injury to its shareholders' rights. None of the shareholder rights listed in *Barcelona Traction*, including the right to a declared dividend and the right to attend and vote at meetings have been impacted by the seizure.[151] Although the value of shares in ALEC may have decreased, a mere drop in the value of share is insufficient to sustain a claim of direct injury.

This Court has not acknowledged diplomatic protection by substitution as custom.[152] *Diallo* distinguishes the decisions of arbitral tribunals that have permitted the application of this

---

Kivu et du Maniema v. D.R.C (ICSID Case No.ARB/98/7), Award,1 September 2000, ¶¶13, 24.

[146] ICSID, *supra* note 144 at art.42(1).

[147] Dolzer, *supra* note 104 at 237.

[148]Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later*, 42 STAN. J. INT'L L. 237 (2006), 251; Compromis ¶69.

[149] *Barcelona Traction*, *supra* note 139, ¶¶42, 46-47.

[150] *Id.*; *Diallo, supra* note 141, ¶87.

[151] *Barcelona Traction, supra* note 139, ¶47; Diplomatic, *supra* note 137 at art.12 comment 3.

[152] *Diallo*, *supra* note 141, ¶90.

standard as *lex specialis.*[153] Though the Chamber of the Court in *ELSI* allowed America to make a claim on behalf of American corporations with subsidiaries in Italy, the Court clarified in *Diallo* that those claims were entertained on the basis of the *lex specialis* of the US-Italy Friendship Commerce and Navigation Treaty ("FCN").[154] The BIT's treatment of the terms "investor" and "investment" are distinguishable from the FCN making an application of the *ELSI* standard by analogy improper.[155] While the FCN specifically protects the rights of parent companies from one state with subsidiaries organized under the laws of the other, the BIT only covers "shares" as investments.[156]

3. Rydal lacks standing because it has failed to exhaust domestic remedies.

Since *Prosecutor v. ALEC* is still pending before Aspatrian courts, Rydal lacks standing to bring the issue before this Court.

i. ALEC has not exhausted local remedies.

This Court routinely describes the exhaustion of local remedies as a "well-established rule of customary international law"[157] Every "available and effective remedy" be exhausted before the responsibility of the state can be invoked.[158] Since ALEC's assets were seized in

---

[153] *Id.*

[154] Case Concerning Elettronica Sicula (U.S./Italy) 1989 I.C.J 15. [hereinafter *ELSI*]; *Diallo, supra* note 141, ¶87.

[155] Compromis, Annex 1, at Definitions; Treaty of Friendship, Commerce and Navigation between the United States and Italy, U.S.-Italy, Feb. 2, 1948, 63 Stat 2255 [hereinafter U.S.-Italy], art.III(2).

[156] Compromis, Annex 1, at Definitions; US-Italy, *supra* note 155 at art.III(2).

[157] Interhandel (Switzerland/U.S.), Preliminary Objections,1959 I.C.J. 6. [hereinafter *Interhandel*], 27; ELSI, *supra* note 154, ¶50.

[158] Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law

order to prevent the commission of a crime, their release is inextricably linked to the charges in *Prosecutor v. ALEC*. Local remedies will not be exhausted until the Aspatrian judicial system issues its final verdict.

ii. None of the exceptions to the exhaustion requirement apply.

None of the exceptions to the principle of exhaustion of local remedies recognized under customary international law apply in this case. First, effective relief is available as a "matter of reasonable possibility"[159] through the Aspatrian legal system. Similarly, there is no evidence that ALEC is "manifestly precluded"[160] from pursuing a remedy by Aspatrian law. To meet these exceptions, Rydal must conclusively show that the Aspatrian judicial system will "refuse a remedy" to ALEC or that pursuing the case is "obviously futile".[161] *Prosecutor v. ALEC* is under active consideration and there is no indication that the Aspatrian legal system is not according ALEC full due process rights. Further, there is a clear connection between the alleged injury to ALEC and Aspatria, the forum where the remedy is still being sought.[162] The requirement for exhaustion of remedies has not been waived.[163] The BIT does not explicitly waive the exhaustion of local remedies principle,[164] and this Court's decision in *ELSI* emphasizes that such

---

Commission, 2001, vol. II (Part Two), art.44.

[159] Case of Certain Norwegian Loans (France/Norway), 157 I.C.J. 9 (Separate Opinion, Lauterpacht, J.), 39; Diplomatic, *supra* note 137 at art.15(a).

[160] Diplomatic, *supra* note 137, art.15(d).

[161] Amerisinghe, *supra* note 137 at 152.

[162] *Id.* at 153; Diplomatic, *supra* note 137, art.15(c).

[163] Diplomatic, *supra* note 137, art.15(e); Amerasinghe, *supra* note 137 at 161.

[164] Compromis, Annex 1, art.XIII.

an important provision of custom cannot be tacitly disregarded.[165] Finally, the proceedings have not been "unduly delayed."[166] In *Interhandel*, this Court ruled that 10 years was not an undue delay.[167] *Prosecutor v. ALEC* was pending for less than fifteen months before Rydal sought to bring the issue before the Court.[168]

B. Even if Rydal has standing on behalf of ALEC, Aspatria did not violate the BIT.

1. Corporations doing business in the Aspatrian oil and gas sector are not protected as "investors" under the BIT.

The 1991 Natural Resources Act ("NRA") prohibits non-Aspatrian entities from operating in its oil and gas sector.[169] In order to comply with the NRA, the Rydalian Oil Company ("ROCO") channeled its activities in Aspatria through ALEC, an Aspatrian entity ineligible for BIT protection.[170] Since Aspatria chose to carve out the oil and gas sector and the BIT does not extend to parties in their home countries, the operations of locally incorporated companies, like ALEC, fall under Aspatrian jurisdiction.[171]

i. The NRA's provisions carving out the oil and gas industry from foreign investment are consistent with international law.

States have customarily placed restrictions on foreign participation in certain sectors to

---

[165] ELSI, *supra* note 154, ¶42; Amerasinghe, *supra* note 137 at 189.

[166] Diplomatic, *supra* note 137, art.15(b).

[167] *Interhandel, supra* note 157 at 26; Amerasinghe, *supra* note 137 at 157.

[168] Compromis ¶¶56, 66.

[169] Compromis ¶41.

[170] *Id.*

[171] E. Schlemmer, Investment, *Investor, Nationality and Shareholders*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 58 (P. Muchlinski et al., eds., 2008), at 58; Brownlie, *supra* note 136 at 489-490; Compromis, Annex 1.

protect vital national interests.[172] American federal laws restrict foreign investment in a variety of sectors including coastal and internal shipping, minerals exploitation and atomic energy.[173] Nigeria, Mexico, Thailand and Iceland prohibit foreign ownership of companies involved in their energy sectors.[174] Finally, the US model Bilateral Investment Treaty and the Canadian model Foreign Investment Protection Act provide for the creation of negative lists identifying sectors in which foreign investment is prohibited.[175]

ii. The scope of the BIT is limited where its enforcement would lead to a threat to Aspatrian sovereignty over its natural resources.

The NRA's restriction on foreign participation in Aspatria's oil and gas sector is justified by the principle of permanent sovereignty of natural resources.[176] When read in conjunction with the general principle of inter-temporal international law, Aspatria's preexisting obligation to safeguard its peoples' right to freely dispose of their resources circumscribes its obligations under the BIT.[177]

---

[172] I. Gomez-Palacio & P. Muchlinski, *Admission and Establishment*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 227, 240 (P. Muchlinski et al., eds., 2008), 237.

[173] *Id.* at 236 n.31.

[174] *Id.* at 236-237; Nigerian Investment Protection Commission, Decree No. 16 (1995); Thai Foreign Business Act BE 2542 (1999), sec.5; "Foreign Direct Investment Restrictions in OECD Countries" available at http://www.oecd.org/dataoecd/24/35/2956455.pdf, 2.

[175] US Model BIT, *supra* note 93, art.14(2); Canadian FIPA, *supra* note 93, art.9(2).

[176] ICESCR, *supra* note 48 at art1 ¶2; GA Resolution 1803, *supra* note 102; *Continental Shelf*, *supra* note 102, ¶104.

[177] P.M. Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 45 (P.M. Dupuy et al., eds., 2009), 54.

2. In the event that Rydal is allowed to appear before the Court on behalf of ALEC, Aspatria did not violate Rydal's rights.

i. The judicial seizure of ALEC's assets is not expropriation under the BIT.

An expropriation carries the connotation of a taking with a view of transferring ownership of that property to another person,[178] so a mere deprivation of access to assets does not automatically meet the standard.[179] The Iran-US Claims Tribunal refused to find expropriation in *Houston Contracting Company* since the government did not acquire title to the property or derive benefit from the seizure and held that freezing accounts in *Houston Contracting* was insufficient to establish the type of government control necessary for direct expropriation.[180]

Aspatria seized ALEC's assets in order to prevent the commission of a crime.[181] If the Aspatrian authorities had not intervened, ALEC's assets would have been used to violate the NRA making the seizure a "legitimate regulatory measure."[182]

Finally, the judicial seizure of ALEC's assets was not an indirect expropriation. The seizure is an ephemeral measure that was designed to protect legitimate public welfare objectives as excepted in Article VI(b) of the BIT. Pursuant to Aspatrian law, the seized assets will be

---

[178] *Myers*, *supra* note 108, ¶88.

[179] A. Mouri, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL (1994), 88.

[180] Eastman Kodak Company v. Iran, 27 Iran-U.S. Cl. Trib. Rep. 269 (1991), ¶58; Houston Contracting Company v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 356 (1986), 362.

[181] Compromis ¶57.

[182] *Myers*, *supra* note 108 at ¶281; Sedco International, v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 248 (1985), 275; A. Reinisch & L. Malintoppi, *Methods of Dispute Resolution*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 691 (P. Muchlinski et al., eds., 2008), 433.

returned to ALEC unless they are used to satisfy a penalty imposed by the court.[183] These actions are consistent with the BIT, which provides that unless the adopted measures were so severe that they "cannot be reasonably viewed as having been adopted and applied in good faith," they are not an indirect expropriation if they were non-discriminatory and designed and applied to protect legitimate public welfare objectives.[184] In a similar case involving an administrative arrest of assets where legitimate public welfare interests were at stake and criminal charges were pending against the corporation protesting the seizure, ICSID found that the seizure did not amount to indirect expropriation since the allegedly injured party was unable to show a compensable injury.[185]

ii. The temporary seizure of ALEC's assets is fully consistent with Aspatrian law and does not violate Articles IV or V of the BIT.

The BIT requires that "investors" be granted no-less favorable treatment than nationals in "like" circumstances. ALEC is an Aspatrian entity and is being treated as such. Its assets were seized pursuant to Aspatrian law and its claim is now being heard in the Aspatrian courts.

Aspatria did not treat ALEC unfairly or inequitably. As discussed *supra,* FET focuses on the transparency, stability and protection of investors' legitimate expectations.[186] The NRA was passed in 1991, well before the bidding process, and Aspatria's decision to grant concession rights to MDR was publicly announced.[187] Aspatria never breached representations it made as the host state and continues to provide a stable and predictable regulatory framework to

---

[183] Compromis, Clarifications, ¶6.

[184] Compromis, Annex 1, art.VI(b).

[185] Tokios Tokeles v. Ukraine (ICSID Case No.ARB/02/18), Award, 26 July 2007, ¶121.

[186] See *supra* Part II(c).

[187] Compromis ¶¶ 41, 49.

investors.[188] The Aspatrian prosecutor's actions were "free from ambiguity" and firmly grounded in the Aspatrian criminal code and the NRA.[189]

Aspatria's conduct meets the "non-discrimination" provisions outlined in the BIT. The temporary seizure of ALEC's assets was not a denial of justice or a malicious misapplication of the law.[190] There is no evidence that Aspatria would not proceed in the same manner to protect its natural resources against the criminal actions of any other entity. Finally, Aspatria exercised due diligence by seizing ALEC's assets to prevent the commission of a crime and then keeping its judicial system available to it for appeal.[191]

---

[188] *Waste Management*, *supra* note 96 at ¶98 and *Biwater, supra* note 98 at ¶602.

[189] *Tecmed*, *supra* note 114 at ¶167; I. Tudor, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT (2008) [hereinafter Tudor], 163.

[190] Robert Azinian v. Mexico (ICSID Case No.ARB(AF)/97/2), Award, 39 ILM (1999) , 552; Tudor, *supra* note 189 at 158.

[191] Ronald S. Lauder v. Czech Republic (UNCITRAL), Award, 3 September 2001, ¶292; *AMT*, *supra* note 125 at ¶6.05.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons argued in this memorial, the Republic of Aspatria (Applicant) respectfully requests that this honorable Court:

1. **DECLARE** that Rydal may not lawfully take steps giving effect to the independence of the Windscale Islands and must cede administration over the Islands to Aspatria because:
    (a) sovereignty over the Islands belongs to Aspatria; and
    (b) the Islanders are not entitled to independence based on the principle of self-determination.
2. **DECLARE** that Rydal's rejection of MDR's bid constituted a violation of the Aspatria-Rydal BIT.
3. **DECLARE** that Rydal does not have standing to invoke the Aspatria-Rydal BIT to protect the assets of ALEC, an Aspatrian company, and in any event, Aspatria did not violate the Aspatria-Rydal BIT.

Respectfully submitted,

Team 241A