

**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 RESPONDENT

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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, as both parties have agreed to have this dispute adjudicated by this Court under its ad hoc jurisdiction, and pursuant to Article XIII of the Treaty Concerning the Encouragement and Reciprocal Protection of Investment. 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. Does sovereignty over the Windscale Islands belong to Rydal, enabling it to take steps giving effect to their independence?
2. Do the Islanders have a right to independence based on the principle of self-determination?
3. Does the rejection of MDR's bid constitute a violation of the Aspatria-Rydal BIT?
4. Does Rydal have standing to invoke the Aspatria-Rydal BIT to protect the assets of a Rydalian enterprise in Aspatria? If so, did the seizure by Aspatria of the assets of a Rydalian enterprise violate the Aspatria-Rydal BIT?

STATEMENT OF THE FACTS

The Windscale Islands (“Islands”), an archipelago, were first discovered in 1777 by Captain Parrish while on a voyage commissioned by the King of Rydal. Before departing, Parrish planted a Rydalian flag on the Islands with a stone declaration asserting Rydal’s sovereignty.

In 1778 a ship from Plumbland happened upon the Islands. Shortly thereafter, Lieutenant Ricoy was dispatched from Plumbland’s colony of Aspatria to settle the Islands on behalf of Plumbland. Ricoy established Fort Salkeld on one island. During his stay, pirates, slave ships and other seafarers used the Islands. After twenty-one years, Ricoy and his men left the Islands never to return, leaving Plumbland’s flag and a written declaration.

In 1813, a Rydalian ship, *HMS Applethwaite*, wrecked on the Islands. Commander Aikton’s maps indicated that the Islands belonged to Rydal. He and other survivors built the settlement of St. Bees. In 1815, the *Unthank*, a slave ship from Sodor carrying 176 individuals, arrived at St. Bees. The Rydalian informed them that the Islands were Rydalian territory, freed the slaves in accordance with Rydalian law, and had the *Unthank* crew and slaves swear loyalty to Rydal.

By 1816, Aikton’s men had explored most of the archipelago, and began cultivating the land. In 1817, the *Grizedale*, dispatched by Plumbland’s Aspatrian Viceroy to establish a penal colony, was forcibly repelled by the Islanders.

Rydal’s Queen adopted Aikton’s actions in 1819 and re-affirmed Rydal’s sovereignty over the Islands. In 1819 Rydal appointed a governor of the Islands. The inhabitants were offered the opportunity to return to Rydal, but most remained.

War broke out between Plumbland and Rydal in 1814. In October 1819, Plumbland’s Aspatrian garrison was slaughtered in a raid led by Colonel Diaz, who drafted a declaration of independence. Plumbland’s king declared Diaz a traitor. Diaz held a Constitutional Convention

in January 1820, declaring a Republic of Aspatria, which claimed to include the Islands.

Plumbland sought peace with Rydal in 1821 and signed the Treaty of Great Corby, through which Plumbland irrevocably transferred any sovereignty claims it possessed over the Islands to Rydal. Plumbland did not recognize the independence of Aspatria at that time. In 1826, Diaz sent a force to attempt to seize the Islands but withdrew after several unsuccessful attempts.

In 1827 Rydal recognized Aspatria. During meetings with Aspatria's Ambassador, Rydal's Foreign Minister rejected Aspatria's sovereignty claims over the Islands, noting that Rydal had discovered the Islands and rejecting Aspatria's claim of *uti possidetis juris*.

In 1839 Plumbland signed the Treaty of Woodside, recognizing Aspatria's independence and sovereignty over the former administrative unit of Aspatria, excluding the Islands. Aspatria insisted on a clause acknowledging its claim.

Over later decades Rydalian governors exercised control over the entirety of the Islands, whose population included descendants of the *Applethwaite*, *Braithwaite* and *Unthank*, supplemented by immigrants from Rydal. In 1903 the Governor established a consultative Assembly.

In 1945 Rydal joined the United Nations. It designated the Islands a non-self-governing territory, mindful of its obligations under Article 73. Rydal gave the Islands a constitution, guaranteed universal suffrage, and granted the Islanders substantial control over day-to-day affairs. Over Aspatria's objections, a delegation from the Islands regularly made presentations before the U.N. Special Committee, expressing its desire to remain part of Rydal.

In 1985, Aspatria and Rydal signed a bilateral investment treaty ("BIT"). In 1991, Aspatria passed the Natural Resources Act ("NRA"), declaring a criminal penalty for an

Aspatrian company taking any action inconsistent with an exclusive government license concerning natural resources. The NRA restricts licenses in Aspatria's energy sector to locally incorporated companies. After enactment of the NRA, the Rydalian Oil Company ("ROCO"), a Rydalian corporation, has channeled its Aspatrian business through the A & L Exploration Corporation ("ALEC"), an 80%-owned Aspatrian subsidiary. Aspatria granted ALEC a license to exploit oil in northeast Aspatria, which has generated substantial revenue for ROCO.

In 1997, Rydal contracted with ROCO to explore the oil reserves near the Islands; ROCO found substantial reserves within 200 miles of the Islands. This discovery ignited a growing independence movement, increasing support for the political party Islanders Longing for Sovereignty and Autonomy ("ILSA").

Aspatrian company MDR Limited ("MDR"), wholly-owned by Felix Monte de Rosa, petitioned Aspatria for a license to extract the Islands' oil, despite a Rydalian warning that any Aspatrian license would be worthless. Monte de Rosa expressed his belief that the Islands and the oil belonged to Aspatria. Aspatria's President approved MDR's petition, which Rydal immediately protested. Monte de Rosa refrained from taking any steps to extract the oil.

In 2006 the Islanders opened bidding for the right to extract their oil. The invitation included a description of bid requirements and the process for choosing a bid. The Islands received conforming bids from ROCO and MDR. The bidding process required ROCO to list corporate resources it planned to commit to the project; ROCO included equipment and personnel of ALEC. It is unclear whether ALEC itself participated in the formulation of the ROCO bid.

The final decision regarding bids would be made by a majority vote of the Assembly after recommendation by a committee, subject to assent of the Governor. After a close vote, the

full Assembly approved MDR's bid. Some members felt that MDR's bid was economically superior, while others, particularly ILSA members, expressed distrust of that bid. After consulting with the Prime Minister, Governor Black announced that she was withholding her signature, and invited the Assembly to consider its decision in light of the "long-term viability of the territory." The Assembly subsequently approved ROCO's bid, noting its merits.

Two days after the Assembly approved ROCO's bid, the Public Prosecutor of Aspatia filed criminal charges against ALEC under the NRA, alleging material participation in ROCO's bid. The Prosecutor filed a contemporaneous petition, pursuant to Aspatian criminal law, to seize all ALEC assets within Aspatia, including references to vessels and drilling equipment.

The court granted the application, and police immediately seized ALEC's assets, including bank accounts and an oil tanker worth US\$80 million. Any relationship between the value of seized assets and the maximum criminal penalty is uncertain. ALEC's lawyers promptly filed a petition to cancel the seizure, but the Supreme Administrative Court denied relief in *ALEC v. Langdale Administrative Court*, from which no appeal is available.

The criminal case of *Prosecutor v. ALEC* will presumably take 4-9 years to conclude. ALEC's counsel protested the seizure, noting damage imposed by the length of the Aspatian proceedings. The administrative court will hold ALEC's assets until the criminal case concludes.

First Minister Craven called a meeting of the Island Assembly which declared the Islands' right to self-determination, and decided to hold a plebiscite, calling upon Rydal to assist the progression toward independence.

On 6 December 2008, a plebiscite was held, offering three options: full independence, negotiating possible unification with Aspatia, or remaining a part of Rydal. The Assembly

announced that 76% of the Islanders voted for independence, 18% for remaining with Rydal, and only 6% for unification with Aspatria. Voter turnout was 93%. Following the plebiscite, the Assembly met to consider steps necessary to give effect to the Islanders' vote. Rydal endorsed the plebiscite and pledged its full support in assisting the Islanders' transition to independence. Aspatria rejected the plebiscite.

SUMMARY OF THE PLEADINGS

Rydal is permitted to give effect to independence for the Windscale Islands because the Islands belong to Rydal. As first to discover and legally occupy the uninhabited islands, Rydal obtained sovereign title. Rydal completed its settlement through the founding of St. Bees. Plumbland's presence with Fort Salkeld constituted an illegal occupation that did not amount to prescription. Even if Plumbland had a claim, it was either lost through conquest by Rydal or obtained through cession in the Treaty of Great Corby. Aspatria may not claim title because it was not independent prior to the Treaty of Great Corby. Even if it were, the principle of *uti possidetis juris* was not the customary law during the period when Plumbland ceded the Islands. This court must apply the doctrine of intertemporal law.

Additionally, Rydal is permitted to give effect to independence for the Windscale Islands because Rydal is under an *erga omnes* obligation to respect the Islanders' right to independence based on self-determination. Regardless of which country holds sovereignty over the Islands, they are designated as a non-self-governing territory, thereby entitled to independence. Even if title to the Islands belongs to Aspatria, it may not unilaterally revoke their status. As a separate and distinct people, the Islanders are entitled to external self-determination, independent of their status as a non-self-governing territory.

Rydal has not violated its obligations under the Aspatria-Rydal BIT through the bidding process and award of a license to exploit oil in the Windscale Islands. MDR's preparation of a bid is not a protected investment, and any grant from Aspatria is not an investment Rydal is obligated to protect. Further, if the Islands were Aspatrian, ROCO's BIT obligations would not extend to that territory.

MDR received no less favorable treatment than ROCO. The fact that a domestic investor was awarded a competitive bid cannot evidence discrimination. The Islanders had broad

discretion to select a contractor and ultimately selected ROCO's bid for valid reasons and in accordance with the pre-announced. Requiring the Governor's assent is a valid procedural safeguard, and the Governor was entitled to consider Monte de Rosa's prior statements in light of the importance of oil to the Islands. Rydal has violated no legitimate expectations of MDR, and did not treat MDR in any way that violates the threshold of fair and equitable treatment set by customary international law.

Rydal has standing to represent ROCO's injuries before this Court because the BIT protects ROCO's investments in ALEC, which is an enterprise of ROCO. In the alternative, Rydal may represent ALEC through diplomatic protection by substitution. The BIT waives the requirement of exhaustion of local remedies, and moreover ROCO has exhausted its claim regarding the seizure of ALEC's assets through *ALEC v. Langdale Administrative Court*.

Aspatria's seizure of ALEC's assets deprives ROCO of the benefit of its investment in ALEC and constitutes expropriation. The seizure effectively deprives ROCO of the fundamental rights of ownership, and of revenues derived from ALEC's concession rights. Moreover, the seizure is of significant duration and will cause irrevocable harm to ALEC and ROCO. The fact that the value of the assets seized bears no proportion to the aims Aspatria seeks to achieve is evidence of bad faith, and itself constitutes a violation of fair and equitable treatment. Finally, ALEC has suffered a denial of justice through punitive and retributive measures.

PLEADINGS

I. RYDAL MAY TAKE STEPS GIVING EFFECT TO INDEPENDENCE FOR THE WINDSCALE ISLANDS BECAUSE RYDAL HOLDS SOVEREIGNTY OVER THE ISLANDS

Rydal was first to lawfully occupy the Windscale Islands (“Islands”), and its sovereignty was confirmed in 1821 with the relinquishment of Plumbland’s claim in the Treaty of Great Corby (“Corby”). For Aspatria to challenge the validity of the Treaty and claim sovereignty over the Islands, it must show that 1) Plumbland held full legal title over the Islands, 2) Aspatria attained sovereign independence prior to Corby, 3) the principle of *uti possidetis juris* governed at the time, and 4) the Islands were under Aspatrian administration within Plumbland. Since Aspatria cannot prove all of these requirements, its challenge to Rydal’s sovereignty fails and Rydal is free to give effect to the independence of the Islands.

A. The Court must apply intertemporal law

The well-settled principle in this Court of intertemporal law requires the application of law contemporaneous to the historical elements of the dispute and not the retroactive application of modern law.¹ Thus, “the judicial evaluation of title...should be made on the basis of the international law in force at the time when such title ostensibly arose.”²

B. Rydal has maintained a continuous claim over the Islands, while Plumbland never gained legal title

A State can acquire original title over territory that is *terra nullius* through discovery and

¹ Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928) [hereinafter *Palmas*], 843; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT], art.28.

² Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. 40 (Mar. 16) [hereinafter *Qatar*], (sep. op. Bernárdez), ¶¶429-30; Clipperton Islands Arbitration (Fr. v. Mex.) (1931), reprinted in 26 AM. J. INT’L L. 390 (1932) [hereinafter *Clipperton*], 394; Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47 (Nov.17) [hereinafter *Minquiers*], 56.

occupation.³ Under 19th century law, discovery created “inchoate” title, which must be completed within a reasonable period.⁴ Acquisition of sovereignty through occupation must be established, open and public, and involve a continuous, peaceful display of State authority over a lengthy period of time.⁵ In cases of unsettled territory, very little in the way of actual exercise of sovereignty is required.⁶ Title to a remote, uninhabited territory is complete upon discovery regardless of notification or the exercise of authority.⁷

1. The Islands are one unit under international law

They are an archipelago in close proximity to each other and proportionally distant from other land.⁸ As such, they are an intrinsic geographical, economic and political entity.⁹

2. The Islands were terra nullius when Parrish arrived

All available evidence indicates that the Islands were unclaimed and uninhabited before Captain Parrish’s discovery.¹⁰ Thus, they were *terra nullius*.¹¹ By raising the flag and inscribing

³ *Palmas*, *supra* note 1, 843-44; Legal Status of Eastern Greenland (Nor. v. Den.), 1933 P.C.I.J. (ser.A/B) No. 53 (Apr. 5) [hereinafter *Greenland*], 46; *Clipperton*, *supra* note 2, 393.

⁴ *Palmas*, *supra* note 1, 846.

⁵ *Palmas*, *supra* note 1, 867-68.

⁶ Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./ Malay.), 2002 I.C.J. 625, 645 (Dec. 17) [hereinafter *Ligitan*], ¶134; *Greenland*, *supra* note 3, 45-46.

⁷ *Clipperton*, *supra* note 2, 394.

⁸ Compromis, ¶¶1,2, Annex II.

⁹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], art.46(b).

¹⁰ Compromis, ¶5.

¹¹ Western Sahara, (Advisory Opinion), 1975 I.C.J. 12 [hereinafter *Sahara*], ¶79-80; *Greenland*, *supra* note 3, 44, 63; Sovereignty Over Pedra Branca/Pulau Bau Puteh, Middle Rocks and South Ledge (Malay. v. Sing.) 2003 I.C.J. 146, ¶¶40-43.

a declaration in 1777, Parrish was first to establish legal claim for Rydal.¹²

3. Rydal completed occupation

By asserting sovereignty, Parrish, commissioned by the King, indicated Rydal's intent to establish control over the territory.¹³ Given the remote location of the Islands, the fact that Rydal did not return before Ricoy landed shortly afterward does not nullify Rydal's claim.¹⁴

In 1813, Rydalian settlers under Adm. Aikton established St. Bees as a settlement of Rydal.¹⁵ With maps indicating the Islands belonged to Rydal,¹⁶ the settlers believed they were on Rydalian territory, followed Rydalian laws and customs in freeing the slaves, and had the members of the *Unthank* swear allegiance to Rydal.¹⁷ By maintaining allegiance to Rydal, cultivating the land, and defending the islands from the attempted *Grizedale* invasion, Aikton's actions continued Rydal's sovereignty over the islands and were given legal force through subsequent adoption by Rydal.¹⁸

C. Fort Salkeld did not establish title through occupation or prescription

Plumbland had no legal right to establish title through occupation since Rydal had already claimed the Islands¹⁹ which were no longer *terra nullius*. To claim prescription,

¹² Compromis, ¶5.

¹³ Int'l L. Comm., Commentaries on the Draft Articles on State Responsibility, in Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 202, U.N. Doc. A/56/10 (2001) [hereinafter ASR], art.8.

¹⁴ Compromis, ¶¶5-6, *Clipperton*, *supra* note 2, 394.

¹⁵ Compromis, ¶10.

¹⁶ *Id.*

¹⁷ Compromis, ¶12.

¹⁸ ASR, *supra* note 13, art. 11; Compromis, ¶¶12-15.

¹⁹ Compromis, ¶¶6-7.

Plumbland must prove a peaceful and uninterrupted display of State authority that was public and for a long period of time.²⁰ Additionally, there must be some degree of acquiescence.²¹

1. Plumbland’s presence was not a continuous, peaceful display of State authority with acquiescence

During its presence, Plumbland was unable to effectively control the Islands—available evidence indicates their simultaneous use by pirates and slave-ships.²² Even if Plumbland had a colorable claim to the Islands through Fort Salkeld, it abandoned its claim prior to the founding of St. Bees.²³ Immediately upon notice, Queen Constance protested the illegal occupation.²⁴ The absence of effective control combined with Rydal’s non-acquiescence precludes Plumbland from demonstrating a continuous peaceful display of authority.

2. Plumbland’s presence at Fort Salkeld was of insufficient duration and was not public

Fort Salkeld was only inhabited for 21 years and then abandoned.²⁵ Even if Plumbland’s presence formed the basis of a claim, it was nullified by the subsequent 24-year abandonment—a period exceeding its presence. During this time, given available means of communication and transportation, Rydal had no public notice of Plumbland’s presence.²⁶ Ricoy’s flag is irrelevant since Plumbland ceased attempting to exercise State authority or effective control prior to the

²⁰ Kasikili/Sedudu Island (Botswana/Namibia), 1999 I.C.J.1045, ¶¶94.

²¹ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7th ed. 2008) [hereinafter BROWNLIE], 146-151.

²² Compromis, ¶8.

²³ Compromis, ¶¶7,10.

²⁴ Compromis, ¶15.

²⁵ Compromis, ¶7.

²⁶ Compromis, ¶15.

crystallization of the dispute. This Court has often considered effective control persuasive in cases where legal title is not clear.²⁷

D. Even if Plumbland had a valid claim to the Islands, it was lost through conquest

While acquisition of territory through conquest or peace treaty is unlawful today,²⁸ the Court must apply intertemporal law.²⁹ For a State to obtain territory by conquest, 19th Century law required the actual taking of territory during wartime with intent to occupy it.³⁰ Rydalian and Plumbland were at war from 1814 until 1821.³¹ With the establishment of St. Bees, Rydalian settlers occupied the uninhabited Islands. The intent to retain Rydalian sovereignty over the islands was evidenced by the Islanders' defense against the *Grizedale* in 1817³² and adopted by Queen Constance in 1818.³³ Furthermore, the intent to occupy was solidified in 1819, when the Islanders had the opportunity to leave but remained by choice.³⁴

E. Any remaining claim by Plumbland was relinquished in the Treaty of Great Corby

In 1821, King Piero “irrevocably transfer[red] any sovereignty” over the Islands to

²⁷ *Ligitan, supra* note 6, ¶¶126; Frontier Dispute (Burkina Faso/Republic of Mali), 1986 I.C.J. 579 [hereinafter *Frontier Dispute*], ¶63; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), 2002 I.C.J. 303, (Merits), ¶68.

²⁸ Kellogg-Briand Pact, Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat 2343, art.II; VCLT, *supra* note 1, art.52; S.C. Res. 242 U.N. Doc. S/RES/242 (Nov. 22, 1967), preamble, and ¶1(i); U.N. Charter, art. 2(4).

²⁹ *Palmas, supra* note 1, at 843;

³⁰ R.Y. Jennings, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW, (1963), 52.

³¹ Compromis, ¶¶11,20.

³² Compromis, ¶14.

³³ Compromis, ¶15.

³⁴ Compromis, ¶16.

Rydal.³⁵ Accordingly, unless Aspatria can conclusively demonstrate that Plumbland previously held sovereignty over the Islands, that Aspatria was independent prior to Corby, that *uti possidetis juris* controls, and that the Islands were clearly under their administration prior to independence, Rydal holds indisputable sovereignty over the Islands since at latest 1821.

F. Aspatria may not claim title to the Islands on the basis of *uti possidetis juris* because it was not yet independent, the principle did not apply, and the Islands were not administered by Aspatria

1. Aspatria was not independent prior to Corby

While Colonel Diaz started a revolt in 1819, Aspatria did not become a State before Corby. In the 19th century, a State became a subject of international law exclusively through recognition.³⁶ Even under the more liberal theory for Statehood articulated in the Montevideo Convention,³⁷ a State must have the “capacity to enter into relations with the other States.”³⁸ Under either theory, absent capacity to enter relations, a State is neither bound by, nor has rights under international law.

Plumbland refused to acknowledge Aspatrian independence until 1841,³⁹ and Rydal did not recognize or interact with Aspatria until 1827,⁴⁰ both well after Corby. There is no indication of any country recognizing or concluding relations with Aspatria before 1821. Without clear ability to enter into relations with other States, Aspatria lacked authority to claim the Islands.

³⁵ Compromis, ¶20.

³⁶ JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, (2005) [hereinafter CRAWFORD], 15-16.

³⁷ Montevideo Convention on the Rights and Duties of States, 49 Stat. 3097 (1933) [hereinafter Montevideo], art.3.

³⁸ *Id.*, art.1(d).

³⁹ Compromis, ¶21, clarification 1.

A State must also have a stable government able to assert its authority throughout its territory.⁴¹ For example, in determining when Finland became an independent State, the League of Nations found it certainly was not until “a stable political organization had been created and until the public authorities had become strong enough to assert themselves throughout the territories of the State.”⁴²

Diaz’s government was unable to assert itself on the Islands in 1821. The only attempt to do so was not until 1826 and was unsuccessful.⁴³ Without effective control over the Islands, Aspatria’s claim must rest on the principle of *uti possidetis juris*.

2. *Uti possidetis juris* was not applicable at the time of Corby

While *uti possidetis juris* emerged as a general principle of international law in the 20th Century,⁴⁴ it lacked both *opinio juris* and State practice outside Latin America in the 1800s: “*Uti possidetis juris* became a norm of international law of general application (that is, beyond the confines of relations between Spanish American Republics) only after the Second World War.”⁴⁵ Accordingly, the *Eritrea-Yemen* Award rejected application of the “doctrine of *uti possidetis*, at that time thought of as being essentially one applicable to Latin America” to the Middle East shortly after World War I.⁴⁶ Judge Bernárdez of this Court later criticized the notion that “the

⁴⁰ Compromis, ¶23.

⁴¹ BROWNLIE, *supra* note 21, 71; Montevideo, *supra* note 37, art. 1.

⁴² Commission of Jurists decision in The Aaland Island Case (Swed.v.Fin.), League of Nations, O.J. Spec. Supp. No.3 (1920), at 9.

⁴³ Compromis, ¶22.

⁴⁴ *Frontier Dispute*, *supra* note 27, ¶20.

⁴⁵ *Qatar*, *supra* note 2, (sep.op. Bernárdez), ¶428.

⁴⁶ *Qatar*, *supra* note 2, (sep.op. Al-Khasawneh), ¶10, & (sep.op. Bernárdez), ¶428;

contemporary generalization of the *uti possidetis juris* of the 1960s could retroactively deprive either of the Parties of any territorial rights.... *Non-retroactivity*... is a well-established principle of customary international law.”⁴⁷

At the time of Corby, *Uti possidetis juris* could only be considered *lex specialis*, particular to the former Spanish colonies of Latin America. States newly independent from Spain in the 1800s maintained boundaries of former colonial territories to keep unexplored territory from reverting to *terra nullius* and to prevent struggles between sister colonies.⁴⁸ However, the principle was applied only between former colonies of a single metropolitan State;⁴⁹ otherwise rather than reducing friction, applying *uti possidetis juris* would create tension between competing sovereigns. Brazil, for example, rejected the principle in treaties with its neighbors and applied *uti possidetis de facto*, under which territory devolved to whomever exhibited effective control.⁵⁰ Accordingly, Judge Kooijmans rejected *uti possidetis juris* unless it was between colonies of the same sovereign, writing that “[i]t would be nonsensical to apply the principle to a boundary separating the colonial territories of two different colonial powers.”⁵¹

Plumbland explicitly rejected Aspatria’s claim to the Islands in the Treaty of Woodside

Eritrea/Yemen Case. 22 R.I.A.A. 209 (Award of October 9, 1998) *available at* http://untreaty.un.org/cod/riaa/cases/vol_XXII/209-332.pdf, ¶99.

⁴⁷ *Qatar*, *supra* note 2, (sep.op. Bernárdez), ¶429-30.

⁴⁸ *Frontier Dispute*, *supra* note 27, ¶20.

⁴⁹ *Id.*; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening) 1992 I.C.J. 51 [hereinafter *Honduras*], ¶342.

⁵⁰ SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD, THE ROLE OF *UTI POSSIDETIS* (2002), 32; Malcom Shaw, *Peoples, Territorialism and Boundaries*, 8 Eur. J. Int’l L. 478 (1997), 493.

⁵¹ *Qatar*, *supra* note 2, (sep.op Kooijmans), ¶22.

(“Woodside”).⁵² Since neither Plumbland nor Rydal exhibited any assent to the principle, and because this is not a dispute between former territories of a single power, *uti possidetis juris* is inapplicable.

3. The administrative boundary remains unclear

Uti possidetis juris boundaries are determined by the colonizing power.⁵³ It is unclear whether Plumbland considered the Islands within the Aspatrian administrative unit. Even if it did, the disputed title with Rydal undermines the application of *uti possidetis juris*. In applying *uti possidetis juris* reasoning to an 1821 boundary between in Central America, this Court considered effective control.⁵⁴ Because Rydal exhibited effective control over the Islands since 1818, Aspatria cannot claim title based on *uti possidetis juris*.⁵⁵

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

“All peoples have the right freely to determine, without external interference, their political status...and every State has the duty to respect this right.”⁵⁶ The Islanders have a right to independence based on self-determination which Rydal has an *erga omnes* obligation to

⁵² Compromis, ¶26.

⁵³ *Honduras*, *supra* note 49, ¶333; *Honduras Borders (Guatemala/Honduras)*, 2 R.I.A.A. 1307 (Perm. Ct. Arb. 1933), 1324.

⁵⁴ *Honduras*, *supra* note 49, ¶62, & (sep. op. Bernárdez), ¶23.

⁵⁵ *Ligitan*, *supra* note 6, ¶134.

⁵⁶ G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., 1883rd plen. mtg., U.N. Doc. A/RES/2625 (Oct. 24, 1970) [hereinafter Res. 2625], 123; U.N. Charter, art.1(2); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter ICCPR], art.1(1); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 [hereinafter ICESCR], art.1(1).

respect. Even if title to the Islands belonged to Aspatria, the Islanders either retain their status as a non-self-governing territory (“NSGT”) or have a right to external self-determination as a distinct people who were never been part of the Aspatrian State.

A. As an NSGT, the Islands are entitled to independence based on self-determination

Since its formation, the U.N. has designated the Islands as an NSGT under Rydalian sovereignty.⁵⁷ The principle of self-determination extends to all NSGTs, as embodied in General Assembly (“GA”) resolutions.⁵⁸ Self-determination requires “a free and genuine expression of the will of the peoples concerned.”⁵⁹ As an NSGT, under Aspatrian or Rydalian authority, the Islands enjoy a distinct status with the right to independence, as “freely determined by [the] people.”⁶⁰ Not only is the Administering State, but all States are required to give effect to the Islanders’ independence based on the referendum.⁶¹

1. The plebiscite is a valid, legally binding expression of the will of the people

Referenda on self-determination for NSGTs must honestly reflect the direct expression of the people themselves, with realistic and viable alternatives.⁶² The Island plebiscite was initiated

⁵⁷ Compromis, ¶34.

⁵⁸ *Sahara*, *supra* note 11, ¶¶54-59; Legal Consequences for States of the Continued Presence of South Africa in Namibia (Advisory Opinion), 1971 I.C.J. 16, ¶52; G.A. Res. 1514 (XV) (14 December 1960) [hereinafter Res. 1514], ¶¶2, 5; G.A. Res. 1541 (XV) (15 December 1960) [hereinafter Res. 1541]; Res. 2625, *supra* note 56, 123.

⁵⁹ *Sahara*, *supra* note 11, ¶55; Res. 1514, *supra* note 58, ¶¶2,5.

⁶⁰ *Sahara*, *supra* note 11, ¶¶57-58; Res. 1541, *supra* note 58, annex; Res. 2625, *supra* note 124.

⁶¹ East Timor (Port. v. Austl.), 1995 I.C.J. 90 [hereinafter *Timor*], ¶29; ASR, *supra* note 13, art.26 commentary ¶5, Chpt.III, commentary ¶3 and n.641, art.40 commentary ¶5; Res. 2625, *supra* note 56, 124; Res. 1514, *supra* note 58.

⁶² ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES (1995) [hereinafter CASSESE], 213-14;

by the people, offered three comprehensive options, attained a participation level of 93%, and produced conclusive results with more than three-quarters of the Islanders manifesting a clear desire for independence.⁶³

2. Rydal has an *erga omnes* obligation to give effect to the Islanders' independence regardless of title over the Islands

The right of peoples to self-determination, as evidenced in the Charter and practice, has an *erga omnes* character.⁶⁴ As such, it is an “obligation of a State toward the international community as a whole,”⁶⁵ and conveys a corresponding duty upon States “to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples.”⁶⁶ Therefore, Rydal is under an international legal obligation to promote and take steps giving effect to the Islanders' independence, regardless of whether it continues as the Administering State.

B. If sovereignty over the Islands belongs to Rydal, it is obligated take steps giving the Islanders independence

Rydal pledges to continue its obligation to assist the Islanders' transition to independence.⁶⁷ As the Administering State, Rydal must prioritize “the interests of the inhabitants of a dependent territory.”⁶⁸ This includes the obligation to develop self-government,

G.A. Res. 2353(XXII), (19 December 1967).

⁶³ Compromis, ¶¶62-63.

⁶⁴ *Timor*, *supra* note 61, ¶29; ASR, *supra* note 13, art.26, commentary, ¶5, chpt.III, commentary, ¶3, & n.641, art.40, commentary, ¶5.

⁶⁵ *Barcelona Traction Light and Power Company, Ltd, (Belg. v. Spain, Second Phase)*, 1970 I.C.J. 3, [hereinafter *Barcelona Traction*], ¶33.

⁶⁶ Res. 2625, *supra* note 56, 123-24.

⁶⁷ Compromis ¶64.

⁶⁸ U.N. Charter, art.73.

and assist in the development of free political institutions,⁶⁹ Even if Rydal were not sovereign over the Islands, the Islanders’ right to independence based on self-determination inheres in their continuing status as an NSGT and Rydal is obligated to take steps giving effect to their independence.⁷⁰ Such steps could include continuing their transition to self-governance and recognition of independent status upon their declaration.⁷¹

C. If Aspatria holds title over the Islands, the Islanders remain entitled to independence based on self-determination

1. Independent of the question of which State holds title over the Islands, they remain an NSGT

i. Determination of a dependent territory is reserved to the international community

The G.A. reserves to itself the right to determine which territories must be regarded as NSGTs⁷² and asserts its competence to determine whether a territory remains classified as a dependent territory under Chapter XI.⁷³ Therefore, even if sovereignty over the Islands does not belong to Rydal, they remain an NSGT until the international community determines otherwise.

ii. Aspatria may not unilaterally delist the Islands

Before any State can delist an NSGT, the territory must attain ‘full’ self-government by

⁶⁹ *Id.*, art.73(b).

⁷⁰ G.A. Res 2787 (XXVI), (6 December 1971), ¶¶3,7.

⁷¹ Compromis, ¶62.

⁷² *Timor*, *supra* note 61, ¶31; G.A. Res. 63/101 (LXIII), (5 December 2008) [hereinafter Res. 63/101], ¶1.

⁷³ G.A. Res. 742 (VIII), (27 November 1953) [hereinafter Res. 742], ¶3; G.A. Res. 334 (IV), (2 December 1949); Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Advisory Opinion), 1962 I.C.J. 151, 168 U. Fastenrath, *Article 73, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (ed. Bruno Simma 2002), 1467.

the terms of U.N. Charter Article 73.⁷⁴ Only the GA has the competence to make this determination.⁷⁵ G.A. Resolution 2625 underscores the distinct status of an NSGT which “shall exist until the people...have exercised their right of self-determination in accordance with the Charter...”⁷⁶

iii. *Notwithstanding the Aspatrian claim, the Islands should retain their designation as an NSGT*

The GA has codified principles to determine the status of a territory: *prima facie*, a territory is presumed an NSGT if it is “geographically separate and is distinct ethnically and/or culturally from the country administering it.”⁷⁷ Additional elements to consider include administrative, political, juridical, economic, or historical factors that place the territory in a subordinate position.⁷⁸ These principles were applied in practice to determine that certain Spanish and Portuguese territories fell within Chapter XI.⁷⁹ The GA also exercised its power by unilaterally placing overseas possessions of Portugal, France, and the UK on the list of dependent territories.⁸⁰

⁷⁴ Res. 1541, *supra* note 58, principle II; Res. 2625, *supra* note 56, 124.

⁷⁵ Res. 63/101, *supra* note 12, ¶1; G.A. Res. 1970 (XVIII), (16 December 1963); G.A. Res. 1654 (XVI), (27 November 1961); *Timor*, *supra* note 61, ¶31.

⁷⁶ Res. 2625, *supra* note 56, 124.

⁷⁷ Res. 1541, *supra* note 58, principle IV; Res. 742, *supra* note 73.

⁷⁸ Res. 1541, *supra* note 58, principle V.

⁷⁹ G.A. Res. 1542 (XV), (15 December 1960).

⁸⁰ *Id.*, G.A. Res. 2069 (XX), (16 December 1965); G.A. Res. 2228 (XXI), (20 December 1966); G.A. Res. 3161 (XXVIII), (14 December 1973); G.A. Res. 42/79, (4 December 1987); G.A. Res. 41/41A, (2 December 1986); G.A. Res. 2073 (XX), (17 December 1965); G.A. Res. 1747 (XVI) (28 June 1962).

Separated by 500 miles of ocean, the archipelago is its own geographic unit,⁸¹ substantially distinct from Aspatria.⁸² Furthermore, the Islands are distinct both ethnically and culturally from Aspatria; all inhabitants are descendants from Rydal or Sodor, or immigrants mainly from Rydal.⁸³

Additional factors further support the presumption that the Islands remain an NSGT. Historically, there are no ties between the Islanders and Aspatria, nor any administrative or juridical relationship. The Islanders have grown accustomed to a significant degree of political and economic autonomy under Rydal, and have overwhelmingly expressed fear of a subordinate position through the plebiscite.⁸⁴ Delegations from the Islands to the Special Committee have routinely expressed their aversion to ties with Aspatria before the international community.⁸⁵

Whether administered by Rydal or Aspatria, the Islands meet the *prima facie* case for NSGT status, supported by the additional factors. Even if Aspatria has historical title over the Islands, the Islands should continue to be classified as an NSGT and therefore entitled to independence based on self-determination.

2. Even if the Islands would no longer be an NSGT under Aspatria, the people are still entitled to external self-determination

This Court should prioritize the status of the people of the territory over the status of the territory as such.⁸⁶ “It is for the people to determine the destiny of the territory and not the

⁸¹ UNCLOS, *supra* note 9, art.46(b).

⁸² Compromis, ¶1.

⁸³ Compromis, ¶28.

⁸⁴ Compromis, ¶63.

⁸⁵ Compromis, ¶38.

⁸⁶ CRAWFORD, *supra* note 36, at 611; CASSESE, *supra* note 62, 189.

territory the destiny of the people.”⁸⁷

i. The Islanders as a people have a right to self-determination

The right of self-determination binds Aspatria as party to the Human Rights Covenants of 1966 through common Article 1.⁸⁸ The practice of States indicates that self-determination is a rule of *jus cogens*.⁸⁹ The right to self-determination manifests in different ways: internal self-determination entails the right of a people to be represented within a sovereign State, while external self-determination allows for independent Statehood.⁹⁰

ii. Internal self-determination for the Islanders is insufficient

Internal self-determination would not satisfy the rights of the Islanders who are geographically separated, and ethnically and culturally distinct from Aspatria, and who have been moving toward self-governance and autonomy since 1945. The Islanders are entitled to the full benefit of external self-determination including independence as a result of the lawfully conducted plebiscite.

iii. Neither Aspatrian territorial integrity nor political unity are limitations on the Islanders’ external self-determination

This is not a case of secession or dismantling a pre-colonial State.⁹¹ Even if the Court finds that title to the Islands devolved from Plumland, the current settlement of the Islands pre-

⁸⁷ *Sahara*, *supra* note 11, (sep.op Dillard), 122.

⁸⁸ ICCPR, *supra* note 56, art.1; ICESCR, *supra* note 56, art.1(1); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION (1990), 41; CRAWFORD, *supra* note 36, 101.

⁸⁹ U.N. Comm’n Human Rights, Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency, U.N. Doc. E/CN.4/Sub.2/1995/20 (26 June 1995), ¶41; ASR, *supra* note 13, chpt.III, commentary, n.641.

⁹⁰ CASSESSE, *supra* note 62, 70-140.

⁹¹ CRAWFORD, *supra* note 36, 642.

dates the Aspatrian State.⁹² The Islanders must have had legal ties to the political body of Aspatria.⁹³ Even if Aspatria has a legitimate property claim to the Islands, self-determination imposes a “cardinal restraint” and can override territorial claims.⁹⁴

D. If title over the Islands remains unclear, the Court may give effect to the will of the people on the basis of self-determination

Self-determination includes a right to independence in situations where the existence and extension of territorial sovereignty is altogether uncertain.⁹⁵ In the case of uncertain sovereignty, this Court should defer to the people. As Judge Franck stated:

Under modern international law,...the infusion of the concept of the rights of a ‘people’ into [the] traditional legal scheme, notably the right of people to self-determination, fundamentally alters the significance of historic title to the determination of [sovereignty]....Modern international law does not recognize the survival of a right of sovereignty based solely on historic title; not, in any event, after an exercise of self-determination conducted in accordance with the requisites of international law....⁹⁶

The Islanders should not be deprived of their right to self-determination based on historical technicalities. Given that sovereignty over the Islands has been a contentious issue for nearly 200 years, this Court may be guided by the inalienable rights of the Islanders.

III. THE REJECTION OF MDR’S BID DID NOT CONSTITUTE A BREACH OF RYDAL’S OBLIGATIONS UNDER THE ASPATRIA-RYDAL BIT

MDR’s bid and alleged license are not protected by the BIT. Rydal has not violated its obligations of non-discrimination or fair and equitable treatment under Articles IV, or V. Finally, if sovereignty over the Islands belongs to Aspatria, Rydal has no obligations under the

⁹² Compromis, ¶¶10-23.

⁹³ *Sahara*, *supra* note 11, (sep.op Singh), 80-81.

⁹⁴ *Sahara*, *supra* note 11, (sep.op. Dillard), 120 n.1., 122.

⁹⁵ CASSESSE, *supra* note 62, 188.

BIT in that territory.

A. Neither MDR's bid nor alleged license are protected by the BIT

1. A bid is not an investment under the BIT

The BIT defines “investment” as every asset of an investor that has the characteristics of an investment.⁹⁷ An “asset” is an item that is owned and has value.⁹⁸ The BIT specifically includes enterprises, shares, and licenses as types of investments.⁹⁹ Each of these implicates actual property rights, tangible or intangible, rather than anticipation or preparation.

Rydal's interpretation of the BIT is consistent with the reasoning of investment tribunals interpreting the “characteristics of an investment” to require: regularity of profit and return, substantial commitment, duration, and assumption of risk.¹⁰⁰ Tribunals are reluctant to recognize an investment “until the contract has been signed or at least approved and acted upon.”¹⁰¹ In *Mihaly*, a tribunal found that pre-investment or preparatory expenditures were not investments.¹⁰²

The preparation of MDR's bid proposal is not, without a subsequent award, promise or contract, an investment. This case parallels the *F-W Oil* decision, where F-W Oil bid on a

⁹⁶ *Ligitan*, *supra* note 6, (sep.op Franck), ¶15.

⁹⁷ Annex I, Definitions.

⁹⁸ Black's Law Dictionary (8th ed. 2004) (Westlaw); *Romak v. Uzbekistan*, (PCA Case No.AA280, UNCITRAL), Award, 26 Nov.2009 [hereinafter *Romak*], ¶177.

⁹⁹ Annex I, Definitions.

¹⁰⁰ *Romak*, *supra* note 98, ¶207; *Salini v. Morocco* (ICSID Case No.ARB/00/4), Jurisdiction, 23 July 2001, ¶52; *Mytilineos v. The State Union of Serbia & Montenegro and Republic of Serbia*, (UNCITRAL), Partial Award on Jurisdiction, 8 September 2006, ¶115.

¹⁰¹ *SGS v. The Philippines*, (ICSID Case No.ARB/02/6), Jurisdiction, 29 January 2004, ¶132.

¹⁰² *Mihaly v. Sri Lanka*, (ICSID Case No.ARB/00/2), Award, 15 March 2002, ¶¶60-61.

contract to exploit oil, but negotiations over a final contract broke down.¹⁰³ Ruling that the investor had been prevented from acquiring a future investment, but had no existing legal rights, the tribunal dismissed the case.¹⁰⁴ The tribunal concluded that an invitation to bid is not an offer, and a response has no contractual effect.¹⁰⁵

2. MDR’s claimed concession from Aspatria is not a protected investment

Aspatria’s alleged license to MDR has no legal weight in Rydal. The BIT only applies to “licenses, authorizations, permits, and similar rights *conferred pursuant to applicable domestic law.*”¹⁰⁶ Investments generally must be in accordance with the law of the host State.¹⁰⁷ Thus, Rydal’s laws govern investments in the Islands, and MDR’s Aspatrian license was not in accordance with those laws. Rydal directly informed MDR that it did not recognize the concession’s validity.¹⁰⁸ Therefore, MDR had no legitimate expectation of protection for that concession.

B. The Rejection of MDR’s bid did not violate the National Treatment Standard

1. Aspatria must provide evidence of less favorable treatment

This Court’s jurisprudence upholds the principle of *actori incumbit onus probandi*: the party seeking to establish a claim has the burden of proving it.¹⁰⁹ Arbitral tribunals interpreting

¹⁰³ F-W Oil Interests v. Trinidad and Tobago, (ICSID Case No.ARB/01/14), Award, 3 March 2006 [hereinafter *F-W*].

¹⁰⁴ *Id.* ¶¶125, 213.

¹⁰⁵ *Id.* ¶168.

¹⁰⁶ Annex I, Definitions.

¹⁰⁷ Saluka v. Czech Republic, (UNCITRAL), Partial Award, 17 March 2006, ¶204.

¹⁰⁸ Compromis ¶¶46, 48.

¹⁰⁹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S., Jurisdiction)

the national treatment requirement have routinely found the burden of proof remains with the claimant, who must provide actual evidence of discrimination.¹¹⁰

2. MDR received no less favorable treatment than ROCO

Determining whether an investor received less favorable treatment requires identifying the relevant subjects of comparison, considering the relevant treatment of each subject, and considering whether any factors justify deviation.¹¹¹

The measurement of the treatment MDR and ROCO received should not be determined by which company was awarded the contract, but by the process and criteria used to evaluate the bids. In a competitive bidding process, by definition, one bidder will win and others will lose. The Islands only intended to award one license; the fact that it went to a domestic investor cannot alone demonstrate differential treatment.

i. The bid-selection process did not favor domestic investors

First Minister Craven announced the bid-selection process, including the requirement of the Governor's assent, before bidders applied.¹¹² Moreover, coordination with the Governor is

1984 I.C.J. 392, ¶101; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 67, ¶204.

¹¹⁰ ADF v. United States, (ICSID Case No.ARB(AF)/00/1, NAFTA), Award, 9 January 2003 [hereinafter *ADF*], ¶156-157; Thunderbird Gaming Corporation v. Mexico, (UNCITRAL, NAFTA), Arbitral Award, 26 January 2006 [hereinafter *Thunderbird*], ¶175-176; RUDOLF DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008) [hereinafter *DOLZER*], 184.

¹¹¹ Pope & Talbot Inc. v. The Government of Canada, (UNCITRAL, NAFTA), Award on the Merits of Phase 2, 10 April 2001 [hereinafter *Pope*]; Todd Grierson-Weiler and Ian Laird, *Standards of Treatment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Muchlinski et al. eds., 2008), 291.

¹¹² *Compromis*, ¶49.

consistent with the Islands' Constitution.¹¹³ The possibility that Governor Black might withhold her assent existed for any bidding party. That she chose to exercise her prerogative based on her assessment of the Islands' long-term interests is a valid exercise of her role, and not proof of discrimination.

Moreover, the Assembly retained the final decision.¹¹⁴ While Black chose not to ratify MDR's bid, she did not express unconditional unwillingness, but rather invited the Assembly to reconsider its original decision.¹¹⁵

ii. The Islands retained discretion to evaluate the bids based on a variety of criteria

Although Craven did not specify the exact standards that would be used to judge the proposals, criteria for evaluating bids often include comparative economics, including costs and expenses, relevant experience, and social considerations.¹¹⁶ A State inviting bids retains some subjective discretion in evaluation.¹¹⁷ While an inviting State is obligated to consider all conforming bids fairly, the basis of consideration may vary based on the nature of the contract and the local practices of the inviting State.¹¹⁸

iii. The Governor and the Islanders had valid reasons for preferring ROCO's bid

Absent specific evidence of the economics of the two bids, discrimination is not indicated

¹¹³ Compromis, ¶35.

¹¹⁴ Compromis, ¶¶ 26, 54.

¹¹⁵ Compromis, ¶53.

¹¹⁶ FRANK SADER, ATTRACTING FOREIGN INVESTMENT INTO INFRASTRUCTURE: WHY IS IT SO DIFFICULT? (2000), 115-116.

¹¹⁷ *F-W*, *supra* note 103, ¶169-170.

¹¹⁸ *Id.*

here.¹¹⁹ While one Assemblyman suggested the MDR bid was economically superior,¹²⁰ others indicated that they preferred ROCO's on its merits.¹²¹ The percent of net proceeds promised by each bid cannot establish economic superiority without knowledge of whether the parties would incur similar costs and extract similar quantities of oil. ROCO had already mapped and explored the oil reserves,¹²² which may lower its costs of production.

Other factors beyond purely economic comparison indicate that ROCO's bid may be more desirable. Rydal had previously contracted with ROCO,¹²³ so the parties may be more confident of ROCO's reliability as a contracting partner. By contrast, some Assembly members apparently question the reliability of MDR's bid.¹²⁴

3. Any consideration of MDR's nationality in the bidding process is justified by public interests

The BIT conditions the requirement to accord no-less-favorable treatment on the existence of "like circumstances."¹²⁵ The North American Free Trade Agreement ("NAFTA") employs identical language.¹²⁶ NAFTA jurisprudence interprets "like circumstances" as leaving room for differential governmental treatment based upon legitimate host State public interests.¹²⁷

¹¹⁹ *ADF*, *supra* note 110, ¶157.

¹²⁰ *Compromis*, ¶52.

¹²¹ *Compromis*, ¶54.

¹²² *Compromis*, ¶42.

¹²³ *Id.*

¹²⁴ *Compromis*, ¶52.

¹²⁵ Annex I, art.IV.

¹²⁶ North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art.1102, 32 I.L.M. 605, 639, art.1102.

¹²⁷ U.N. CONFERENCE ON TRADE AND DEVELOPMENT, INVESTOR-STATE DISPUTES ARISING FROM

As the administering State of an NSGT,¹²⁸ Rydal has a duty to protect the interests of the Islands. This duty includes an obligation to respect the permanent sovereignty of the Islanders over their natural resources, a “basic constituent of the right to self-determination.”¹²⁹ Permanent sovereignty may outweigh the interests of investors in natural resource cases.¹³⁰

MDR is wholly-owned by Monte de Rosa, who declared: “the Islands belong to Aspatria, and the oil belongs to Aspatria.”¹³¹ Given that he does not purport to recognize the self-determination of the Islands, Monte de Rosa is unlikely to respect the Islands’ permanent sovereignty over natural resources. Oil is the primary resource on the Islands, and will be crucial to their subsistence if they become independent;¹³² Rydal has an obligation to ensure they are not deprived of that means of subsistence, and is justified in considering whether Monte de Rosa’s patriotism might interfere with that goal.¹³³

INVESTMENT TREATIES: A REVIEW (2005). *available at* <http://www.unctad.org/Templates/Download.asp?docid=6968&lang=1&intItemID=2310> [hereinafter UNCTAD, REVIEW], 34; U.N. CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING (2007) *available at* www.unctad.org/en/docs/iteiia20065_en.pdf [hereinafter UNCTAD, TRENDS], 37; *Pope, supra* note 111, ¶¶73-82; *S.D. Myers, v. Canada, (UNCITRAL, NAFTA), Partial Award*, 13 November 2000, ¶249.

¹²⁸ *Compromis*, ¶34; U.N. Charter, art.73.

¹²⁹ G.A. Res. 1803 (XVII), (14 December 1962), preamble.

¹³⁰ M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* (2000) [hereinafter SORNARAJAH], 330.

¹³¹ *Compromis*, ¶46.

¹³² *Compromis*, ¶43.

¹³³ ICESCR, *supra* note 56, art.1.

C. The rejection of MDR’s bid did not violate Article V’s standard of treatment.

1. Article V only protects investments

Article V of the BIT applies only to “investments” and not “investors.” Under customary international law, fair and equitable treatment (FET) applies not to individual investors but only to “investments of investors.”¹³⁴ Since MDR’s bid is not an investment, Article V is not implicated.

2. Rydal has not violated the customary standard of fair and equitable treatment

Even if MDR made an investment protected by Article V, MDR has received fair treatment. Article V provides no protection beyond that accorded by customary international law,¹³⁵ consistent with the interpretation of similarly-worded provisions.¹³⁶

Custom delineates a minimum standard of treatment of aliens. The traditional definition of this standard, defines violation as treatment that is outrageous or in bad faith.¹³⁷ Though custom has evolved, the threshold for a violation of FET is still high.¹³⁸ Tribunals interpreting the customary standard refer to conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic,

¹³⁴ Lluís Paradell, *The BIT Experience of the Fair and Equitable Treatment Standard*, in INVESTMENT TREATY LAW: CURRENT ISSUES II (Ortino et al eds., 2007) [hereinafter PARADELL], 128.

¹³⁵ Annex I, art.V.

¹³⁶ Statement of the NAFTA Free Trade Commission, 31 July 2001 *available at* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en> (last modified 2009-01-05).

¹³⁷ USA (L.F. Neer) v. Mexico (1926), 4 R.I.A.A. 60 (Gen. Cl. Comm’n 1926) [hereinafter *Neer*]; BROWNLIE, *supra* note 21, 525.

¹³⁸ *Biwater Gauff v. Tanzania* (ICSID Case No.ARB/05/22), Award, 24 July 2008, ¶¶596-599; *ADF*, *supra* note 110, ¶¶124-125,178-186; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW (2004), *available at* www.oecd.org/dataoecd/22/53/33776498.pdf, 11.

is discriminatory... or involves a lack of due process.”¹³⁹ The facts do not suggest any treatment of MDR that meets this threshold.

1. Rydal has not violated the legitimate expectations of MDR

FET is frequently discussed in connection with an investor’s legitimate government-induced expectations.¹⁴⁰ MDR could reasonably expect the bidding process to be open, transparent, competitive, and in accordance with the procedures outlined by Craven.¹⁴¹ The *Compromis* indicates that the promised process was followed, votes were open and public, and relevant parties openly expressed their views and concerns.¹⁴² Neither the Islanders nor Rydal made any additional promises upon which MDR could reasonably rely, regardless of MDR’s own speculations or conclusions. Only a “breach of representations made by the host State” is relevant to FET expectation-based analysis.¹⁴³

D. If the islands were Aspatrian territory, the BIT would be inapplicable

Unless specified, a treaty is binding on a party throughout its territory.¹⁴⁴ Territory is the area over which a party exercises sovereignty.¹⁴⁵ On its face, the BIT does not impose extraterritorial obligations. The BIT defines its scope in terms of territory, referencing

¹³⁹ *Waste Management. v. Mexico* (ICSID Case No.ARB(AF)/00/3, NAFTA), Award, 30 April 2004 [hereinafter *Waste Management*], ¶98;

¹⁴⁰ PARADELL, *supra* note 134, ¶127.

¹⁴¹ *Compromis*, ¶49.

¹⁴² *Compromis*, ¶52-54.

¹⁴³ *Waste Management*, *supra* note 139, ¶ 98.

¹⁴⁴ VCLT, *supra* note 1, art.29; ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* (2nd ed. 2007), 200.

¹⁴⁵ MARK VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* (2009), 392.

“investments... in the territory of the other Party,”¹⁴⁶ and defining “investor” through territory. If Aspatria were sovereign over the Islands, the BIT would not bind Rydal in matters relating to the Islands. In that case, MDR is not an investor of another party, and any license it holds is an Aspatrian domestic matter.

IV. ASPATRIA VIOLATED THE BIT BY SEIZING THE ASSETS OF A RYDALIAN ENTERPRISE IN ASPATRIA

Rydal has standing to protect the investments of its national, ROCO, under the BIT. Alternatively, Rydal has standing to protect ALEC through diplomatic protection by substitution. Rydal may present these claims without exhausting further remedies. Aspatria has violated its BIT obligations by expropriating ROCO’s investments and failing to accord them fair and equitable treatment.

A. Rydal has standing to protect ROCO’s Aspatrian investments

1. The BIT itself confers standing

i. ROCO’s participation in ALEC is a protected investment

An “investor of a party” includes any national or enterprise that has made an investment in the territory of the other party.¹⁴⁷ As a Rydalian corporation invested in an Aspatrian enterprise, ROCO is an investor.¹⁴⁸ Thus, Rydal may appear before this Court on ROCO’s behalf.¹⁴⁹

ROCO’s subsidiary, ALEC, is protected as an enterprise of ROCO.¹⁵⁰ As an 80% owner

¹⁴⁶ Annex I, Preamble.

¹⁴⁷ Annex I, Definitions.

¹⁴⁸ Annex I, Definitions.

¹⁴⁹ Annex I, art.XIII.

¹⁵⁰ *Id.*

of ALEC,¹⁵¹ ROCO both owns and controls ALEC.¹⁵² Tribunals do not require 100% ownership to find that a corporation is a protected enterprise.¹⁵³

Even if ALEC were not a ROCO enterprise, ROCO's shares in ALEC are independently protected by the BIT.¹⁵⁴ Inclusion of shareholders as investors under an investment treaty regime, regardless of control, allows them to protect corporate assets against adverse action by the host State.¹⁵⁵ For example, U.S. corporation GAMI owned 14.18% of GAM, but was entitled to seek remedy for Mexico's expropriation of GAM's property, arguing that its investment was indirectly expropriated.

ii. *Investment treaties expand protection beyond customary diplomatic protection*

The BIT expands the protections of customary international law with regard to standing. In response to this Court's decision in *Barcelona Traction*, many States opted into investment treaty regimes that extend shareholder protections.¹⁵⁶

This Court recognized that a treaty may confer standing where diplomatic protection otherwise does not. In *Elettronica Sicula* ("ELSF"), the United States was able to bring claims

¹⁵¹ Compromis, ¶40.

¹⁵² UNCTAD TRENDS, *supra* note 127, 131; General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1125, art.XXVIII(n).

¹⁵³ American Manufacturing and Trading, Inc. v. Zaire, (ICSID Case No.ARB/93/1), Award, 21 February 1997, ¶15.5.

¹⁵⁴ Annex I, Definition of Investment.

¹⁵⁵ DOLZER, *supra* note 110, 59.

¹⁵⁶ UNCTAD TRENDS, *supra* note 127, 17; Robert Wisner, *Derivative Actions and Indirect Claims*, in INVESTMENT TREATY LAW: CURRENT ISSUES II (Ortino et al eds., 2007), 74; Sir Frank Berman QC, *The Relevance of the Law on Diplomatic Protection in Investment Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES II (Ortino et al eds., 2007), 69; SORNARAJAH, *supra* note 130, 329.

under a BIT-like treaty on behalf of its shareholders in Italian Corporations.¹⁵⁷ This Court has recently confirmed that the role of diplomatic protection has “faded” in light of the proliferation of investment treaties directly protecting shareholders.¹⁵⁸ The Draft Articles of Diplomatic Protection refer to investment treaties as a category removed from traditional diplomatic protection.¹⁵⁹

2. In the alternative, Rydal may protect ALEC through substitution

This Court has introduced an exception to traditional diplomatic protection when a State requires domestic incorporation as a prerequisite for business and inflicts harm on a company itself. In such cases the State of the shareholder’s nationality may exercise diplomatic protection by substitution.¹⁶⁰ This principle was codified in Article 11(b) of the Draft Articles of Diplomatic Protection,¹⁶¹ and referenced in *Diallo*, though inapplicable to that case.¹⁶² This exception applies to ALEC; the NRA explicitly requires companies seeking licenses in the Aspatrian energy sector to be incorporated in Aspatria, and Aspatria has itself caused ALEC’s injuries.¹⁶³

¹⁵⁷ *Elettronica Sicula S.p.A. (U.S.A./Italy)*, 1989 I.C.J. 15 [hereinafter *ELSI*]; Draft Articles on Diplomatic Protection with Commentaries, 58th sess., G.A. Supp. No. 10 (A/61/10) (2006) [hereinafter ADP], commentary to art.11.

¹⁵⁸ Case Concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo, Preliminary Objections) 24 May 2007, available at <http://www.icj-cij.org/docket/files/103/13856.pdf> [hereinafter *Diallo*], ¶88.

¹⁵⁹ ADP, *supra* note 157, art.17.

¹⁶⁰ *Barcelona Traction*, *supra* note 65, ¶92 ; ADP, *supra* note 157, commentary to art.11.

¹⁶¹ ADP, *supra* note 157, art.11(b).

¹⁶² *Diallo*, *supra* note 158, ¶93.

¹⁶³ *Compromis*, ¶41.

B. Neither Rydal nor its citizens need exhaust further remedies

1. The BIT waives exhaustion of remedies

Generally, exhaustion of local remedies is required unless waived by the parties.¹⁶⁴ Waiver is common in most investment arbitration contexts.¹⁶⁵ The BIT refers to possible arbitration, and also provides that neither party shall object to the personal and subject matter jurisdiction of the Court. Considering the practice of waiving the exhaustion rule in investment disputes, Article XIII of the BIT should be interpreted as an explicit waiver.

2. The substance of this claim has been litigated

Even if this Court considers the parties' waiver invalid, ROCO's claim has been substantively exhausted. Local remedies are exhausted if a claim has been brought as far as possible.¹⁶⁶ The substance of the US claim in *ELSI* was essentially the same that the American owners brought before Italian courts, and was thus admissible.¹⁶⁷ The substance of ROCO's claim before this court concerns, not ALEC's alleged violation of the NRA, but the seizure of ALEC's property. This claim was exhausted in *ALEC v. Langdale Administrative Court* without opportunity for further appeal.¹⁶⁸

3. ROCO will be unable to obtain relief through the *Prosecutor v. ALEC*

Remedies need not be exhausted if there are no reasonably available local remedies that

¹⁶⁴ *ELSI*, *supra* note 157, 42-44.

¹⁶⁵ Washington Convention on the Settlements of Disputes Between States and Nationals of other States, 524, 575 U.N.T.S. 159 (1966), art.25; CHITTHARANJAN AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW (2d ed. 2004), 168.

¹⁶⁶ *ELSI*, *supra* note 157, ¶59; ADP, *supra* note 157, Comment art.14.

¹⁶⁷ *ELSI*, *supra* note 157, ¶58.

¹⁶⁸ Compromis, ¶83.

can redress the injury.¹⁶⁹ The substance of ROCO’s injury under the BIT—the seizure of ALEC’s assets—differs substantially from the pending criminal case, which will not resolve the seizure of goods. If ALEC is not guilty, Aspatria will return ALEC’s assets at the conclusion of the criminal case, but the Aspatrian criminal code does not guarantee interest, lost profits, or compensation for harm to ROCO occasioned by the intermediate seizure.¹⁷⁰ The criminal proceeding cannot provide an adequate forum for treaty-based expropriation allegations.

C. Aspatria’s seizure of ALEC’s property is expropriation in violation of Article VI

Neither party to the BIT may expropriate an investment directly or indirectly, except for a public purpose, in accordance with due process of law and on prompt, adequate, and effective compensation.¹⁷¹ Even if Aspatria has not taken title to ALEC’s assets outright, their seizure constitutes expropriation.¹⁷²

1. Aspatria’s seizure is an indirect expropriation

Indirect expropriation is determined by the effect of government action on the investor, rather than the action’s purpose.¹⁷³ An action has expropriatory effect when it results in significant economic deprivation of the value of the investor’s assets, or of the reasonably-to-be-

¹⁶⁹ ADP, *supra* note 157, art.15(a).

¹⁷⁰ Compromis, clarification 6.

¹⁷¹ Annex I, art.VI(a).

¹⁷² *Tippetts v. TAMS-AFFA Consulting Engineers of Iran*, 6 Cl. Trib. 219 (1984) [hereinafter *Tippetts*].

¹⁷³ UNCTAD REVIEW, *supra* note 127, 45; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, “INDIRECT EXPROPRIATION” AND THE “RIGHT TO REGULATE” IN INTERNATIONAL INVESTMENT LAW (2004), available at www.oecd.org/dataoecd/22/54/33776546.pdf [hereinafter OECD EXPROPRIATION], 15; *Tecnicas Medioambientales TECMED. v. Mexico* (ICSID Case No.ARB(AF)/00/2), Award, 29 May 2003 [hereinafter *TECMED*], ¶116.

expected economic benefit of the investment.¹⁷⁴ Aspatria has seized *all* of ALEC's assets within Aspatria,¹⁷⁵ significantly depriving ALEC of "fundamental rights of ownership."¹⁷⁶ ALEC is rendered unable to conduct business at all in Aspatria, as if title had been taken outright.

The seizure further constitutes a *de facto* taking of ALEC's licenses to exploit oil in Northern Aspatria. In *Chorzów Factory*, seizure of a factory constituted an indirect taking of patents and contracts of the company's managers;¹⁷⁷ similarly, in *Middle East Cement*, the *de facto* revocation of a license qualified as creeping expropriation depriving the investor "of the use and benefit of his investment."¹⁷⁸ The seizure of ALEC's assets, including drilling equipment, prevents ALEC from profiting from its concessions, depriving ROCO of steady revenue streams.¹⁷⁹

2. The duration of the expropriation is substantial

Takings amount to expropriation if they are "not merely ephemeral."¹⁸⁰ In *Wena v. Egypt*, seizure and illegal possession for "nearly a year" was "more than an ephemeral interference in the use of the property."¹⁸¹ Here, ALEC faces the loss of its assets for 4-9

¹⁷⁴ UNCTAD REVIEW, *supra* note 127, 46; *Metalclad v. United Mexican States*, (ICSID - Additional Facility- Case No.ARB/AF/97/1), Award, August 30, 2000, ¶103; *Tokios Tokeles v. Ukraine* (ICSID Case No.ARB/02/18), Decision on Jurisdiction, 29 April 2004, ¶119.

¹⁷⁵ *Compromis*, ¶57.

¹⁷⁶ OECD EXPROPRIATION, *supra* note 173, 11; *Pope*, *supra* note 111, ¶87-88.

¹⁷⁷ *Chorzów Factory*, 1928 P.C.I.J., Series A, No.17; OECD EXPROPRIATION, *supra* note 173, 4.

¹⁷⁸ *Middle East Cement v. Egypt* (ICSID Case No.ARB/19/6), Award, 12 April 2002, ¶108.

¹⁷⁹ *Compromis*, ¶41.

¹⁸⁰ *Tippetts*, *supra* note 172; *Wena Hotels v. Egypt* (ICSID Case No.ARB/98/4), Award, 8 December 2000 [hereinafter *Wena*], ¶98.

¹⁸¹ *Wena*, *supra* note 180, ¶99.

years.¹⁸² The damage may be irrevocable if ALEC is forced to cease business entirely.

D. The seizure is not proportionate to any legitimate public purpose

It is insufficient for Aspatria to claim its actions were undertaken for public welfare objectives if the seizure was not reasonably and proportionately related to a public purpose.¹⁸³

This Court has recognized proportionality as a principle of law requiring: fit between the ends sought to be achieved and the means used, the application of the least harmful measures, and that any damage to individuals be proportional to the benefit the State receives.¹⁸⁴

1. Article VI(b) does not apply in light of the excessive burden imposed on ALEC

Arbitral awards find that measures to protect public interests must be proportionate to their stated objective to avoid expropriation.¹⁸⁵ Investment tribunals frequently cite proportionality analysis from the European Court of Human Rights.¹⁸⁶ The court has applied proportionality to cases of criminal seizure, finding improper balance between the interests of society in investigating criminal activity and the burden born by the affected company—taking

¹⁸² Compromis, ¶59.

¹⁸³ Jasper Krommendijk and John Moijn; ‘Proportional’ by What Measure(s)? *Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle*, in INVESTOR-STATE ARBITRATION, IN HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Dupuy et al. eds 2009), 443.

¹⁸⁴ Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion), 2004 I.C.J. 136, ¶136; MALCOLM SHAW, INTERNATIONAL LAW, (6TH ED. 2008), 1183.

¹⁸⁵ *Tecmed*, *supra* note 173, ¶122.

¹⁸⁶ *Id.*, ¶122; *Azurix Corp. v. Argentina* (ICSID Case No.ARB/01/12), Award, 14 July 2006, ¶311; *In the Case of James and others*, 98 E.C.H.R. (ser.A) (1986) ¶50,63; Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262, art.1.

into account the duration of seizure and value of the assets .¹⁸⁷

Aspatria has seized all of ALEC's assets in Aspatria—including a vessel valuing US\$80 million.¹⁸⁸ ALEC has not been found in violation of any law; even if it were, the NRA provides a maximum penalty of 5% of worldwide revenue. ALEC's revenues are unknown, but there is no indication that the seized assets bear any relationship to the ultimate penalty.

The seizure is so severe in light of its purpose that it cannot reasonably be viewed as undertaken in good faith, and Article VI(b) of the BIT cannot excuse the expropriation.¹⁸⁹

2. Lack of proportionality is a violation of the FET standard

Even if Aspatria's seizure were in good faith, the disproportionate burden imposed upon ALEC is a violation of Article V. An assessment of fair and equitable treatment requires examination of the proportionality between the State's aims and the treatment investors receive.¹⁹⁰

Even if the NRA is a legitimate regulation, it cannot lawfully be used to halt ALEC's activities in Aspatria entirely. An injunction would meet the same aim without imposing as great a burden on ALEC.

¹⁸⁷ *Forminster Enterprises Limited v. the Czech Republic*, E.C.H.R. no.38238/04 (Sect. 5) (2008), ¶77.

¹⁸⁸ *Compromis*, ¶57.

¹⁸⁹ Annex I, art.IV(b).

¹⁹⁰ *Tecmed*, *supra* note 173, ¶122; A. Stone Sweet and F. Grisel, *Transnational Investment Arbitration: From Delegation to Constitutionalization?*, in *INVESTOR-STATE ARBITRATION, IN HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* (Dupuy et al. eds 2009), 130.

E. ALEC has suffered a denial of justice in violation of Article V

1. ALEC has been denied due process

The content of the FET standard includes treatment in adjudicatory proceedings in accordance with the “principle of due process embodied in the principal legal systems of the world,”¹⁹¹ which include notice, the right to be fully and fairly heard, and the right to trial without undue delay.¹⁹²

The prosecutor requested the seizure of ALEC’s assets contemporaneously with the criminal charges; it is not clear whether ALEC received prior notice. ALEC had no opportunity to be heard prior to the seizure. Moreover, ALEC faces a delay of over 4 years before its criminal case will be resolved, and is meanwhile deprived of property on mere speculation of assisting crime. These procedural shortcomings violate the FET standard.¹⁹³

Under international law, defendants in a criminal case have the right to be presumed innocent until proven guilty.¹⁹⁴ Yet the prosecutor’s request that “all” of ALEC’s assets be seized, with no value specified and referencing vessels and drilling equipment suggests a punitive measure rather than intent to satisfy a future judgment..¹⁹⁵

That the Aspatrian criminal code authorizes seizure in these circumstances does not alter

¹⁹¹ Office of the U.S. Trade Representative, 2004 U.S. Model Bilateral Investment Treaty (BIT), available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf, art.5(2)(a); DOLZER, *supra* note 110, 162.

¹⁹² DOLZER, *supra* note 110, 142-144; *Thunderbird*, *supra* note 110, ¶198; ICCPR, *supra* note 56, art.14(3)(c).

¹⁹³ IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* (2008), 163.

¹⁹⁴ ICCPR, *supra* note 56, 14(2).

¹⁹⁵ *Compromis*, ¶57.

Aspatria's obligations under FET, which are based on international rather than domestic law.¹⁹⁶
A host State may not justify, on the basis of domestic law, violations of treaty obligations.¹⁹⁷

2. The circumstances of the seizure suggest a misapplication of the NRA

Misapplication of the law is a form of denial of justice involving a 'pretence of form' to mask a violation of international law."¹⁹⁸

The NRA punishes the taking of "any action" inconsistent with an Aspatrian license. Yet there is no indication that ALEC took any action related to the ROCO bid whatsoever; ROCO's decision to list ALEC's assets does not imply action by ALEC. The Prosecutor filed its claim against ALEC merely two days after ROCO's award. The actions and statements of the Prosecutor, combined with the circumstances of the asset seizure, suggest a misapplication of the NRA as a retaliation against ROCO's successful bid award.

¹⁹⁶ Tudor, *supra* note 193, 162-163.

¹⁹⁷ *Id.*, 163; Genin and others v. Estonia, (ICSID Case No.ARB/99/2), Award, 25 June 2001, 367.

¹⁹⁸ Robert Azinian v. Mexico (ICSID Case No.ARB(AF)/97/2), Award of 1 November 1999, ¶103.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons argued in this memorial, the Kingdom of Rydal (Respondent) respectfully requests that this honorable Court:

- I. **DECLARE** that Rydal is permitted to take steps giving effect to independence for the Windscale Islands because sovereignty over the Islands belongs to Rydal;
- II. **DECLARE** Rydal is permitted to take steps giving effect to Islanders' independence based on their right to self-determination;
- III. **DECLARE** that the rejection of MDR's bid did not constitute a breach of Rydal's obligations under the Aspatria-Rydal BIT;
- IV. **DECLARE** that 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.

Respectfully submitted,

Team 241R

