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INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE,
THE HAGUE, THE NETHERLANDS

THE 2010 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

THE CASE CONCERNING THE WINDSCALE ISLANDS

THE REPUBLIC OF ASPATRIA

Applicant

v.

THE KINGDOM OF RYDAL

Respondent

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The Republic of Aspatria and the Kingdom of Rydal have submitted the present dispute to this Court by Special Agreement, dated 10 September 2009 pursuant to Article 40(1) of the Court's Statute. Both parties have thus accepted the ad hoc jurisdiction of the Court in accordance with Article 36(1) of the Court's Statute. Both parties shall accept the judgment of this Court as final and binding and execute it in good faith in its entirety.

QUESTIONS PRESENTED

The Republic of Aspatria respectfully asks this Court:

I. Whether sovereignty over the Islands belongs to Aspatria;

II. Whether Rydal can invoke the principle of self-determination to grant independence to the Islands;

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

IV. Whether Rydal has standing to invoke the Aspatria-Rydal BIT to protect the assets of ALEC, an Aspatrian company; and if so, whether the sequestration of ALEC's assets violated Article VI of the Aspatria-Rydal BIT.

STATEMENT OF FACTS

This dispute concerns sovereignty over an archipelago, the Windscale Islands ("the Islands"). The Republic of Aspatria, 500 miles away, is the closest country to the Islands by some distance. Prior to independence, Aspatria was a colony of the Kingdom of Plumbland. The Kingdom of Rydal lies 7500 miles from the Islands.

First Occupation

In 1778, the Islands were discovered by a Plumbland naval ship. The Viceroy of Aspatria then sent Lieutenant Ricoy to settle and claim the Islands for Plumbland. Ricoy's men established the first settlement on the Islands, called Salkeld, which they occupied for 21 years before internal disturbances in Aspatria necessitated their return. They left the flag of Plumbland flying over the Salkeld fort with a notice declaring Plumbland's continued sovereignty over the Islands. Nautical charts produced in Plumbland and Aspatria described the Islands as Plumbland's.

Shipwreck Survivors

In 1817, the Viceroy of Aspatria sent Commander Crook to the Islands to establish a penal colony. Crook discovered a temporary settlement, called St. Bees, on one of the islands. Outnumbered by the settlers, they departed under protest.

These settlers comprised Rydalian nationals, including Admiral Aikton, and Sodorian nationals. Aikton and his crew had been shipwrecked in 1813. The Sodorians had landed in 1815 after drifting for months on board a damaged ship. Aikton declared the slaves free and offered them and the crew refuge. Unable to resist, they swore allegiance. In 1816, the settlers found the Salkeld settlement with the Plumbland flag.

Following Crook's return, Plumbland made a formal protest to Rydal regarding the St. Bees settlement. Until then unaware of the survival of Aikton and his crew, the Queen sought to adopt Aikton's acts. She also relied on the discovery of the Islands in 1777 by a Captain Parrish, who had been on a naturalist voyage by Rydal.

Aspatria's Independence

Following the military expulsion of Plumbland from Aspatria in 1819, the leaders of Aspatria's independence movement signed a Declaration of Independence. A Constitutional Convention was held in January 1820 which established a federal system of government and defined Aspatria's territory as including the Islands.

By 1821, Plumbland and Rydal had been at war for 7 years over issues unrelated to the Islands. Plumbland sued for peace, signing the Treaty of Great Corby by which it, *inter alia*, acknowledged Rydal's sovereignty over the Islands and transferred any Plumbland sovereignty over the Islands to Rydal.

In 1826, Aspatria unsuccessfully attempted to retake the Islands.

In 1827, Rydal recognized Aspatrian independence. Aspatria's Ambassador to Rydal asserted Aspatria's sovereignty over the Islands. Rydal maintained that the Islands were Rydalian. In 1839, Plumbland recognized Aspatria's independence and acknowledged Aspatria's continued claim to the Islands.

In 1845, Aspatria established a permanent diplomatic mission in Rydal. Aspatria's Ambassador continued to protest any Rydalian acts inconsistent with Aspatrian sovereignty over the Islands.

Between 1880 and 1910, beleaguered by a political and economic crisis, Aspatria recalled all its ambassadors. Aspatria resumed its claim to the Islands once civil government was restored. Upon the restoration of civil government, the new President continued to assert Aspatria's claim.

In 1949, upon joining the United Nations, Aspatria asserted its sovereignty over the Islands to the Secretary-General and before the Special Committee on Decolonisation. 18 states have regularly supported Aspatria's claim before the Special Committee and the General Assembly.

Status of the Islanders

Under a succession of Rydalian governors, the main activities on the Island were fishing and farming. Rydal's navy used it as a strategic harbour.

Geographical proximity facilitated the establishment of regular trade between the Islands and Aspatria. Aspatria levied no import duties on goods from the Islands and treated persons born on the Islands as Aspatrians.

Rydal restricted foreign commercial activity on the Islands, which remained poor by international standards with no self-sustainable economy. The Islanders do not possess full Rydalian citizenship.

In 1945, Rydal joined the United Nations and designated the Islands a non-self-governing territory. It gave the Islanders a Constitution in 1947, granting them control over day-to-day administration subject to the Governor's approval.

Discovery of Oil

In 1997, discovery galvanized a growing independence movement within the Islands.

In 2003, MDR Limited, an Aspatrian company engaged in extracting and processing oil, obtained from Aspatria an exclusive license to extract oil from the Islands, but took no steps to extract the oil. The Islands remained under Rydalian control.

In 2006, with Rydal's approval, the Assembly of the Islands invited bids for the right to exploit the oil. The bidding process was promised to be "open, transparent and competitive". Bidding companies had to be incorporated or have a registered office in Rydal. The Assembly would select the winning bid, subject to Rydal's approval.

Only two bids were made. MDR's included, *inter alia:-*

- an up-front payment of US$500 million upon the signing of a final license agreement;
- 50% of net proceeds;
- a strategic plan with
    - a customer list,
    - projected sales, and
    - proposed transportation routes
- plans to build a facility in the Islands;
- employment of Islanders as part of the enterprise;

The second bid was from "ROCO", a major shareholder of "ALEC", an Aspatrian company. ROCO's bid :

- promised 45% of net proceeds;

- listed the existing equipment, personnel, and assets of ALEC located in Aspatria as resources to be used to extract and process the oil.

MDR's bid was rapidly endorsed by a vote of 20 to 15. First Minister Craven declared "the MDR bid was without question the more economically attractive". However, the Rydalian Governor withheld her assent and asked the Assembly to reconsider, reminding the Islanders of their ties with Rydal. It was only after two weeks that the Assembly voted again to then approve ROCO's bid by 22 to 13, while still reiterating that MDR's bid was more "generous".

Repercussions

The Governor's rejection of the Assembly's first vote sparked protests across the Islands. A plebiscite called by the Assembly resulted in 76% of the Islanders voting for independence, 18% for remaining with Rydal, and 6% for prospective unification with Aspatria. The plebiscite was endorsed by Rydal but rejected by Aspatria as illegal.

The owner of MDR, an Aspatrian, filed a judicial challenge in Rydal against the result of the bid. The case was dismissed for lack of standing. Appeals were unsuccessful. The Supreme Court denied discretionary review. MDR's owner called upon Aspatria to assert its rights under the Bilateral Investment Treaty (BIT) between Aspatria and Rydal, concluded in 1985, which required parties to extend "no less favourable treatment" and fair and equitable treatment to investments by nationals of one state in the territory of the other.

In Aspatria, criminal charges were filed against ALEC under the Natural Resources Act for "action inconsistent with an exclusive government license or patent concerning natural resources". Contemporaneously, all of ALEC's assets that "might be used to further, to promote, or to conceal criminal conduct" was sequestered pending the conclusion of the criminal case.

ALEC's petition against this was dismissed. International non-governmental organisations estimate the criminal case will be concluded within 4 to 6 years.

On 16 September 2009, the parties agreed to submit their dispute to this Court.

SUMMARY OF PLEADINGS

I. Sovereignty over the Islands belongs to Aspatria. Plumbland first claimed and occupied the Islands in 1778. The 21 years of settlement at Salkeld established Plumbland's sovereignty by a continuous and peaceful display of state authority. This sovereignty was preserved by the flag and notice left by Ricoy upon his departure.

Parrish's discovery of the Islands in 1777 did not establish Rydalian sovereignty because it was not followed by occupation. Any effect it had in law was extinguished by the Salkeld occupation. Neither can Rydal acquire sovereignty through the subsistence of shipwrecked Rydalian sailors on the Islands.

Sovereignty over the Islands devolved to Aspatria under the principle of *uti possidetis juris* when it became independent from Plumbland in 1820. Plumbland's purported cession of sovereignty to Rydal by treaty in 1821 was void because it could not cede what it did not possess.

Rydal's *de facto* administration of the Islands cannot establish sovereignty by acquisitive prescription without Aspatria's acquiescence. Aspatria has consistently protested Rydal's unlawful administration, both to Rydal and to the United Nations.

II. Rydal cannot invoke the principle of self-determination to grant the Islands independence. Rydal's unlawful colonisation of the Islands redrew the lines of Aspatrian sovereignty. The Islanders are a Rydalian settler population whose settlement on the Islands was unlawful. The United Nations has refused to allow a colonial power to invoke the wishes of an imported settler population to defeat a pre-colonial territorial claim. The principle of territorial integrity requires the reintegration of Aspatria and the Islands. This principle can only be

breached as a last resort if a government is discriminatory and non-representative, but the Aspatrian government has always granted the Islanders full rights as citizens.

III. Because Aspatria is the true sovereign over the Islands, MDR's license from the Aspatrian government should have been sufficient to grant it access to the Islands' oil reserves. Rydal's tender process was an unlawful exercise of sovereignty over Aspatrian territory. Nevertheless, Rydal owes obligations under international law with regard to its acts in the Islands because of its physical control over the territory, including its obligations under the Aspatria-Rydal BIT.

IV. Rydal violated its obligations under the Aspatria-Rydal BIT when it rejected MDR's bid. By bidding for the right to exploit the oil around the Islands, MDR was an investor attempting to make an investment within the Islands. Rydal's rejection of MDR's bid violated the obligation under Article IV to accord MDR no less favourable treatment than it accorded to ROCO, a Rydalian investor. It discriminated on the basis of nationality and cannot be justified by any rational government policy. In the alternative, MDR's bid bears the objective features of an investment under the Aspatria-Rydal BIT. Rydal's rejection violated the obligation under Article V to accord fair and equitable treatment to the bid. Rydal's specific representations during the bidding process raised the legitimate expectation that economic competitiveness, and not nationality, would be the basis of selection. Instead, Rydal interfered with the initial approval by the Assembly on the basis of nationalistic concerns.

V. Rydal does not have standing to invoke the Aspatria-Rydal BIT to protect the assets of ALEC, an Aspatrian company. The measure taken against ALEC was in accordance with Aspatria's criminal law, a matter within Aspatria's domestic jurisdiction. Under international law, the national State of shareholders cannot exercise diplomatic protection for injuries suffered

by their company. The Aspatria-Rydal BIT does not modify this general rule and the present case does not fall within any exception under customary international law. In any event, the sequestration of ALEC's assets did not constitute indirect expropriation as defined by Article VI(b) of the Aspatria-Rydal BIT. It was a non-discriminatory measure designed and applied to protect legitimate public welfare objectives: the legitimate exercise of police powers and the protection of Aspatria's permanent sovereignty over its natural resources. Further, it was a temporary measure that left intact ALEC's most essential asset in Aspatria: its license to exploit oil in Aspatria's northeast province. Therefore, it was not so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.

PLEADINGS

I. ASPATRIA IS THE TRUE SOVEREIGN OVER THE ISLANDS.

A. PLUMBLAND HAD ESTABLISHED SOVEREIGNTY OVER THE ISLANDS BY THE CRITICAL DATE IN 1818.

The dispute between Plumbland and Rydal concerning sovereignty over the Islands crystallized on the critical date of 15 September 1818, when both States formally opposed each other's claims to the Islands.[1] As this Court stated in *Pedra Branca*, the critical date is significant in "distinguishing between those acts which should be taken into consideration for the purpose of establishing…sovereignty and those acts occurring after such date".[2] Acts after the critical date cannot be considered because the State could have taken those actions purely to buttress its claims of sovereignty.[3]

1. Plumbland established sovereignty over the Islands by a continuous and peaceful display of authority between 1778 and 1799.

A State establishes sovereignty over previously unoccupied territory when it demonstrates a continuous and peaceful display of authority over the territory (*corpus occupandi*), reflecting its intention and will to act as sovereign (*animus occupandi*).[4] In *Eastern Greenland,* the Permanent Court held that Norway demonstrated "a manifestation and exercise

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[1] Compromis, para.15.

[2] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), 47 I.L.M. 833, para.32 (May 23).

[3] *Id.,* at para.32; Minquiers and Ecrehos case (Fr. v. U.K.), 1953 I.C.J. 47, 59-60 (Nov. 17); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), 2005 I.C.J. 625, para.135 (Dec. 17).

[4] Legal Status of Eastern Greenland 1933 P.C.I.J. (ser. A./B.) No. 53, 45-46 (Apr. 5); Clipperton Island Arbitration (Fr. v. Mex.), 26 AM. J. INT'L L. 390, 394 (1931).

of sovereign rights" over Greenland when Hans Egede founded colonies in Greenland in 1721 for the King of Norway and subsequently established settlements in those colonies.[5]

The discovery of the Islands by a Plumbland naval ship in 1778 was followed by Lieutenant Ricoy's claim of sovereignty over the Islands for the King of Plumbland, on the instructions of the Viceroy of Aspatria. Ricoy and his men established a fort and settlement named Salkeld and displayed Plumbland's authority for a continuous period of 21 years thereafter until 1799. Nautical charts from Plumbland and Aspatria during that period showed the Islands as Plumbland's territory.

At the time of Ricoy's departure, the planting of the flag of Plumbland and a notice claiming the Islands for the King of Plumbland provided sufficient notice to other States about Plumbland's claim.[6] Indeed, Salkeld was subsequently discovered by the Rydalian, Aikton. Considering the notoriety of Plumbland and Rydal's strained relations, culminating in the war in 1814, and Aikton's position as an Admiral of the Rydalian navy, he must have realized the significance of the flag of Plumbland, even without Ricoy's notice.[7]

Plumbland's sovereignty over the Islands is not affected by the absence of evidence that Ricoy had explored the entire archipelago.[8] According to Judge Huber in the *Palmas* arbitration, under the doctrine of contiguity, uninhabited groups of islands may "be regarded as in law a unit,

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[5] Eastern Greenland, supra n.4 at 28, 48, 55.

[6] Clipperton Island, supra n.4 at 394.

[7] Compromis, para.6-11.

[8] Compromis, para.8.

and the fate of the principal part may involve the rest".[9] This permits "a State to establish exclusive appropriation of areas which form a geographical whole, even though the area has not been subjected to activity".[10] The Salkeld settlement was on one of the largest islands in the uninhabited archipelago, and was therefore sufficient to imply sovereignty over the entire territory. The inclusion of the entire archipelago as Plumbland's territory in nautical charts from Plumbland and Aspatria confirms that Plumbland's sovereignty was exercised over the whole of the Islands.[11]

2. Plumbland did not abandon sovereignty over the Islands.

Rydal bears the burden of proving that Plumbland had abandoned the Islands.[12] It must show that Plumbland had the intention to abandon the Islands, and it is insufficient to establish a short hiatus during which Plumbland's authority was not actually exercised.[13] In the *Clipperton Island* arbitration, the absence of effective administration by France over Clipperton Island for three decades after sovereignty was acquired over the Island did not imply France's intention to forfeit sovereignty.[14]

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[9] Island of Palmas Arbitration (U.S. v. Neth.), 2 R.I.A.A. 829, 840, 854, 855 (Perm. Ct. Arb. 1928). *See also Eastern Greenland, supra* n.4 at 46.

[10] MYRES MCDOUGAL ET AL., LAW AND PUBLIC ORDER IN SPACE 864-865 (1963). *SEE ALSO* ROBERT JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 75 (1963); Hersch Lauterpacht, *Sovereignty over Submarine Areas,* 27 Brit. Y.B. Int'l L. 376, 426-428 (1950).

[11] Compromis, paras. 8, 9, Annex II.

[12] Frontier Dispute (Burk. Faso v. Mali) 1986 I.C.J. 554, para.65. (Dec. 22).

[13] *Eastern Greenland, supra* n.4 at 47. *See also Clipperton Island, supra* n.4 at 394; Aves Island (Neth. v. Venez.) (Award of Mar. 30, 1865) in JOHN MOORE, 5 HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS 5027 (1898).

[14] Clipperton Island, supra n.4 at 394.

Plumbland never abandoned the Islands. Ricoy's return to Aspatria was a matter of military necessity, and, quite contrary to any intention to abandon the Islands, he planted Plumbland's flag and the notice asserting Plumbland's continued claim. Commander Crook's subsequent voyage to establish a penal colony on the Islands in 1817, on the authority of the Viceroy of Aspatria, further affirms Plumbland's intention to maintain its sovereignty.[15]

3. Rydal failed to establish a stronger claim than Plumbland over the Islands before the critical date in 1818.

This Court in *Minquiers and Ecrehos* stated that, in determining sovereignty over territory, it must "appraise the relative strength of the opposing claims to sovereignty" before the critical date.[16] Plumbland's sovereignty over the Islands is unassailable because Rydal could not establish a stronger claim to the Islands before the critical date in 1818.

a. Parrish's act of discovery of the Islands did not establish sovereignty on behalf of Rydal.

Distinguished publicists from Grotius[17] to Oppenheim[18] agree that discovery without more cannot establish sovereignty over territory. Judicial decisions[19] and state practice[20] support

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[15] Compromis, paras. 7, 14.

[16] Minquiers and Ecrehos, supra n.3 at 67. See also Eastern Greenland, supra n.4 at 46.

[17] HUGO GROTIUS, MARE LIBERUM 11 (Ralph Magoffin trans., 1916) (1609).

[18] LASSA OPPENHEIM, 2 OPPENHEIM'S INTERNATIONAL LAW 689 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). *See also* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 214-215 (1952); Friedrich von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law* 29 AM. J. INT'L L. 448, 452 (1935).

[19] *Island of Palmas, supra* n.9 at 846; *Pedra Branca, supra* n.2 at para.29 (Separate Opinion of Judge Rao), *available at* http://www.icj-cij.org/docket/files/130/14504.pdf.

[20] ARNOLD MCNAIR, INTERNATIONAL LAW OPINIONS 285, 287, 300 (1956); GREEN HACKWORTH, 1 DIGEST OF INTERNATIONAL LAW 400, 453, 469 (1940).

the view that title by discovery exists only as an "inchoate title" until it is perfected by effective occupation of the territory. In the meantime, this inchoate title can be defeated by sovereignty acquired through a continuous and peaceful display of authority.[21] This describes precisely the circumstances of the present case. Parrish's accidental discovery of the Islands was unaccompanied by any occupation by Rydal, and unlike Plumbland's flag and settlement which were later discovered, nothing indicates that the flag of Rydal and the carved stone were ever discovered. Therefore, once Plumbland established sovereignty over the Islands through a continuous and peaceful display of authority, Rydal's inchoate title was defeated.

b. The private acts of shipwrecked persons cannot establish Rydalian sovereignty over the Islands.

This Court in *Sedudu Island* emphasized that "the use of the disputed territory by private individuals for their private ends" is irrelevant as to a State's claim of sovereignty.[22] The Court then found that since the Masubia tribe "used the island intermittently, according to the seasons and their needs, for exclusively agricultural purposes", it was insufficient to establish Namibia's sovereignty "even if links of allegiance may have existed between the Masubia and the [Namibian] authorities".[23] Similarly, this Court in *Pulau Sipadan* found that the Bajau Laut's

[21] Island of Palmas, supra n.9 at 869.

[22] Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, para. 94 (Dec. 13). *See also* Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 184 (Dec. 18) (Dissenting Opinion of Sir Arnold McNair); Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen) 22 R.I.A.A. 209, 283-284 (Perm. Ct. Arb., 1998).

[23] Sedudu Island, id., at 1105.

private acts of fishing and collecting forest products could not establish sovereignty for the Sultan of Sulu despite the existence of links of allegiance.[24]

Aikton and his crew were stranded on the Islands in 1813 as a result of a shipwreck. The Queen of Rydal knew nothing of their survival, let alone their private act of building the temporary settlement of St. Bees. Likewise, the cultivation of land and domestication of animals were for their survival and subsistence, and not functions of State authority. These acts cannot establish Rydalian sovereignty even if any links of allegiance arose when the Sodorians, weakened and hungry, swore loyalty to the Queen of Rydal.[25] Even if Aikton had intended to claim the Islands for Rydal, these acts were invalid because the Queen of Rydal only purported to ratify them five years after Aikton's landing. As former ICJ President de Aréchaga stated, private individuals can only perform valid acts of acquisition if "their acts are immediately ratified by their Governments".[26]

B. SOVEREIGNTY OVER THE ISLANDS DEVOLVED TO ASPATRIA FROM PLUMBLAND UPON ASPATRIA'S INDEPENDENCE IN 1820.

1. Aspatria became an independent State under international law in 1820.

a. Aspatria fulfilled all the criteria of statehood under international law in 1820.

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[24] *Pulau Sipadan*, *supra* n.3 at 669, 670, 675. *See also* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, para.95 (Oct. 16); *Pedra Branca, supra* n.2 at para.15 (Separate Opinion of Judge Rao).

[25] Compromis, para.12, 13.

[26] Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 188 (1978).

A State comes into existence when "a people is settled in a territory under its own sovereign government".[27] The customary character of these criteria since the 19th century is confirmed by the writings of distinguished publicists such as Crawford[28] and Verzijl,[29] and state practice.[30] As British Foreign Secretary Canning stated in relation to the secession of Greece from Austria in 1826, a new State must be "capable of maintaining an independent existence, of carrying on a Government of its own…and of being responsible to other nations for the observance of international laws".[31] These criteria were codified in Article I of the 1933 *Montevideo Convention*.[32]

Aspatria's emergence into statehood had already commenced in 1819, when the Aspatrian independence movement purged the Plumbland forces from the garrison at Langdale. At the time, Plumbland's forces were severely incapacitated by the Plumbland-Rydal war and there was no reasonable possibility of retaking Aspatria. Therefore, Aspatria already possessed

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[27] LASSA OPPENHEIM, 1 OPPENHEIM'S INTERNATIONAL LAW 120-121 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

[28] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 55-60, 382-383 (2nd ed. 2006).

[29] JAN VERZIJL, 2 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 62 (1969); Jules Basdevant, *Regles générales du droit de la paix*, 58 RECUEIL DES COURS 578 (1936); Alfred Verdross, *Regles générales du droit de la paix*, 30 RECUEIL DES COURS 271, 333 (1929).

[30] Duff Development v. Government of Kelantan [1924] A.C. 747, 814 (H.L.) (U.K.); Harris v. Minister of the Interior 1952 (2) SA 428 (A) at 478 (S. Afr.).

[31] BRITISH FOREIGN AND STATE PAPERS, 40 B.S.P. 1216, 1244 (1826).

[32] Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 L.N.T.S. 19.

"freedom from control by any external authority",[33] without any "relation of superiority and subordination" between itself and Plumbland.[34] Aspatria's formation as a sovereign State continued through the Declaration of Independence on 2 November 1819, and was consummated by the adoption of its Constitution in July 1820, which established a federal system of government, extending Aspatria's domestic jurisdiction over the whole of its territory, including the Islands.[35]

b. Aspatria's statehood was independent of recognition by Plumbland or third States like Rydal.

Distinguished publicists like Hall[36] and Brownlie[37] agree that, since the 19th century, recognition by other States has been unnecessary to confer a new State international legal rights, and recognition is merely declaratory of an existing state of law and fact (the declaratory theory). These publicists disavow the notion that a new State's international legal rights are contingent on recognition (the constitutive theory) because it would mean that a new State can simultaneously

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[33] JAMES FAWCETT, THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW 89 (1963). *See also The Aaland Islands Question*, Report of the International Committee of Jurists, League of Nations Official Journal, Special Supplement No. 3, 5 (1920).

[34] Customs Regime between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A./B.) 41, 45 (Sept. 31) (Separate Opinion of Judge Anzilotti).

[35] Compromis, para.17, 18, 19.

[36] WILLIAM HALL, INTERNATIONAL LAW 19 (8th ed. 1924).

[37] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 86-88 (7TH ED. 2008). *See also* MALCOLM SHAW, INTERNATIONAL LAW 447 (6th ed. 2008); Crawford, *supra* n.28 at 376-379.

exist in relation to some States but not in relation to others. Further, a legal vacuum would result where a new State is deprived of any legal rights until recognition.[38]

The declaratory theory is supported by State practice from the time of Aspatria's independence until the present day.[39] In the early 19th century, many Spanish colonies, like Mexico (1810) and Colombia (1810) declared and maintained their independence from Spain. Notwithstanding the absence of formal recognition, these States acquired international legal rights and obligations such as the use of their flags for commercial purposes and appointment of consul.[40] As Canning put it, the "assumed Independence is therein admitted, not created".[41]

International tribunals have also supported the view that "the effects of recognition by other states are purely declaratory".[42] This was codified in international agreements like the Montevideo Convention.[43]

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[38] Hans Kelsen, *Recognition in International Law: Theoretical Observations,* 35 AM. J. INT'L L 605, 609 (1941); Josef Kunz, *Critical Remarks on Lauterpacht's Recognition in International Law*, 44 AM. J. INT'L L. 713, 718 (1950).

[39] ELEANOR MCDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, 19-20 (1976); U.K. Parliamentary Debates, 102 Parl. Deb., H.C. (6th ser.) (1986) 977; Française, Débats Parlementaires, Journal Officiel de la République Française [J.O.] [Official Gazette of France] at 2324 (1988).

[40] JOHN MOORE, 1 A DIGEST OF INTERNATIONAL LAW, 43-45 (1906); HERBERT SMITH, 1 GREAT BRITAIN AND THE LAW OF NATIONS, 271-275 (1932).

[41] CHARLES WEBSTER, 1 BRITAIN AND THE INDEPENDENCE OF LATIN AMERICA, 1812-1830, 292 (1938). See also: U.S. Annals of Congress, 41 ANNALS OF CONG. 22-23 (1823) (Statement of James Monroe, United States President).

[42] Aguilar-Amory and Royal Bank of Canada claims (U.K. v. Costa Rica) 1 R.I.A.A. 369, 381 (1923). *See also* Opinion No. 1 (Dissolution of the Socialist Federal Republic of Yugoslavia), 92 I.L.R. 162, 165 (Yugo. Arb. Comm. 1991).

[43] Montevideo Convention, *supra* n.32, art. 3. *See also* Charter of the Organization of American States, art. 9, Apr. 30 1948, 119 U.N.T.S. 3.

Therefore, Aspatria possessed international legal rights, including the right to acquire territory,[44] once it fulfilled the criteria of statehood in 1820. The subsequent recognition of Aspatria by Rydal in 1827 and Plumbland in 1839 were, at best, declarations of this pre-existing condition. In consequence, any subsequent acts of Rydal and Plumbland purporting to affect Aspatria's sovereignty, such as the 1821 Treaty of Great Corby, were unlawful and invalid.[45]

2. Sovereignty over the Islands devolved to Aspatria from Plumbland under the principle of *uti possidetis juris.*

This Court in *Frontier Dispute* defined *uti possidetis juris* as "a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers",[46] and that *uti possidetis juris* is "a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs".[47] As a former colony which has achieved independence, Aspatria would acquire sovereignty over the Islands under *uti possidetis juris* if the Islands had formed part of the former Viceroyalty.

Territorial boundaries ascribed to a new State under *uti possidetis juris* extend as far as "administrative control was exercised by the colonial entity with the will of the [former] monarch".[48] Plumbland's administrative control of the Islands, from the initial occupation in 1778 to the attempt to establish a penal colony in 1817, was exercised upon the initiative of the

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[44] 2 OPPENHEIM, *supra* n.18 at 677.

[45] *Infra,* Section I.C.1.

[46] Frontier Dispute, supra n.12 at para.23.

[47] *Id.,* at para.20. See also: Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nica. v. Hond.), at para.151 (Judgment of Oct. 8 2007), *available at* http://www.icj-cij.org/docket/files/120/14075.pdf.

[48] Honduras Borders (Guat. v. Hond.), 2 R.I.A.A. 1307, 1324 (1933).

Viceroyalty of Aspatria, the closest Plumbland colony to the Islands by some distance. King Piero of Plumbland, some 6000 nautical miles away from the Islands, was only alerted to Rydal's unlawful presence by his Viceroy in Aspatria.[49] Nothing indicates Plumbland's intention to administer the Islands independently from the Viceroyalty of Aspatria. Therefore, upon Aspatria's independence, the boundaries separating its territory, including the Islands, from the rest of Plumbland, were consolidated into international frontiers under *uti possidetis juris*.

Rydal's *de facto* administration over the Islands in 1820 did not impede the operation of *uti possidetis juris*.[50] This Court declared in *Frontier Dispute* that, "where the territory…is effectively administered by a State other than the one possessing the legal title [under *uti possidetis juris*], preference should be given to the holder of the title".[51] This is consistent with the purposes of "securing respect for the territorial boundaries at the moment when independence is achieved"[52] and preventing the usurpation and renewal of colonization in the territories of new States.[53] Rydal's attempt to resurrect colonization in the Islands is precisely the sort of insidious conduct that *uti possidetis juris* seeks to prevent.

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[49] Compromis, para.6, 14.

[50] Compromis, para.16.

[51] Frontier Dispute, supra n.12 at para.63.

[52] Id., at para.20, 23. See also Maritime Dispute Between Nicaragua and Honduras supra, n.47 at para.153.

[53] Frontier Dispute, id., at para.23; Malcolm Shaw, *Peoples, Territorialism and Boundaries*, 8 EUR. J. INT'L L. 478, 492 (1997).

C. RYDAL'S SUBSEQUENT ACTS CANNOT SUPPLANT ASPATRIA'S SOVEREIGNTY OVER THE ISLANDS.

1. Plumbland could not validly cede sovereignty over the Islands to Rydal by the 1821 Treaty of Great Corby.

The principle of *nemo dat non quod habet* is a general principle of international law.[54] Plumbland's sovereignty over the Islands had devolved to Aspatria when Aspatria became an independent State in 1820. Therefore, Plumbland could not cede the Islands to Rydal in 1821.

2. Rydal cannot establish sovereignty over the Islands by acquisitive prescription.

A State can only establish prescriptive title when contesting States acquiesce in its adverse possession of the territory.[55] Acquiescence can only be inferred when these States have remained "silent without good reason in the face of acts in derogation of their rights".[56]

Aspatria never acquiesced to Rydal's unlawful administration of the Islands. Distinguished writers[57] and tribunals[58] agree that diplomatic protests suffice to indicate a lack of acquiescence. In the *Chamizal* arbitration, the United States could not acquire prescriptive title over El Chamizal because Mexico had persistently made diplomatic protests against the adverse possession of the territory.[59] Even writers supporting forcible measures as the principal means of

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[54] BROWNLIE, *supra* n.37 at 121; JENNINGS, *supra* n.10 at 16; *Palmas, supra* n.9 at 842.

[55] D.H.N. Johnson, *Acquisitive Prescription in International Law* 27 BRIT. Y.B. INT'L L. 332, 346 (1950), PAUL FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 760 (8th ed. 1921-1926).

[56] Ian MacGibbon, *The Scope of Acquiescence in International Law* 31 BRIT. Y.B. INT'L L. 143, 171 (1954); P.A. VERYKIOS, LA PRESCRIPTION EN DROIT INTERNATIONAL 26 (1934).

[57] CHARLES HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 387-388 (2nd ed. 1945); 2 OPPENHEIM AT 706-707; BROWNLIE AT 149.

[58] The Chamizal Case (Mex. v. U.S.) 11 R.I.A.A. 309 (Int'l Boundary Comm. 1911).

[59] *Id.,* at 323, 329.

interrupting prescription emphasize that protests would suffice if a State were too weak to utilize forcible measures.[60]

Aspatria has persistently protested against Rydal's unlawful occupation of the Islands, starting with the attempt to retake Salkeld by force and continuing with Ambassador Trinidad's regular complaints against any acts inconsistent with Aspatria's sovereignty over the Islands, Aspatria's diplomatic note to the UN Secretary-General in 1949, and regular protests before the GA.[61] These protests continued until this dispute was brought before this Court.[62] Rydal cannot be allowed to usurp Aspatria's rightful sovereignty over the Islands on the basis of 'acquiescence' when Aspatria has protested in every possible manner short of declaring war.

The brief lapse in Aspatria's protests did not amount to acquiescence. As Vattel put it, a State claiming prescriptive title cannot impute acquiescence to a State which "sets forth valid reasons for [its] silence such as the impossibility of speaking".[63] Aspatria was beleaguered by an internal crisis from 1880 to 1910 and recalled all of its ambassadors. Aspatria's claim under the Aspatria-Rydal BIT relating to oil exploitation within the Islands does not amount to acquiescence. During negotiations, the parties deliberately left the question of sovereignty over

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[60] FAUCHILLE, *supra* n.55 at 760, cited in Ian MacGibbon, *Some Observations on the Part of Protest in International Law* 30 BRIT. Y.B. INT'L L. 293, 307 (1953).

[61] Compromis, paras. 22, 27, 33, 36, 38.

[62] Statute of the International Court of Justice art. 36(1), June 26, 1945, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute].

[63] EMMERICH DE VATTEL, 2 THE LAW OF NATIONS at para. 144 (Charles Fenwick trans.) (1916).

the Islands open, which "implies the reservation and preservation of the legal positions of both Parties".[64]

II. RYDAL CANNOT INVOKE THE PRINCIPLE OF SELF-DETERMINATION TO GRANT INDEPENDENCE TO THE ISLANDS.

A. THE ISLANDERS DO NOT QUALIFY AS A "PEOPLE" ENTITLED TO INDEPENDENCE UNDER THE PRINCIPLE OF SELF-DETERMINATION.

An imported settler population is a minority not forming a "peoples" entitled to independence under the principle of self-determination.[65] According to Professor Higgins, "peoples" refers not to minority groups within a sovereign State, but a "majority within a generally accepted political unit".[66] In considering the Aaland Islands question, the League of Nations Special Rapporteurs found that the Swedish population in the Aaland Islands were no more than a Finnish minority without a right to independence from Finland.[67] Similarly, in the case of Gibraltar, over which Spain had sovereignty, the GA rejected the right of independence

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[64] *Fisheries, supra* n.22 at 203 (Dissenting Opinion of Judge Read). *See also* Rights of Nationals of the United States in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 200-201 (Aug. 27).

[65] Charter of the United Nations, art. 1 (2), art. 55, 15 U.N.C.I.O. 335 (Jun. 26, 1945) [hereinafter U.N. Charter]; International Covenant on Civil and Political Rights, art. 1(1), Dec. 16, 1996, 999 U.N.T.S. 171, 1057 U.N.T.S. 407.

[66] ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 104 (1964). *See also* Thomas Carey, *Self-determination in the Post-Colonial Era: The Case of Quebec*, 1 ILSA J. INT'L & COMP. L. 47, 50 (1977); Gillot v. France, Human Rights Committee Case No. 932/2000, U.N. Doc. A/57/40, para. 13.16 (26 July 2002).

[67] Aaland Islands Question, *Report by the Commission of Rapporteurs*, League of Nations Council Document B7 21/68/106, 318 (1921).

on the part of the population of Gibraltar, which comprised imported settlers from Britain, the colonizing power.[68]

The Islanders comprise Rydalian descendants and freed Sodorian slaves who swore loyalty to Rydal, who inter-married and produced offspring. They also include Rydalian immigrants.[69] The Islanders do not form a population with a separate identity and interest from Rydal, but a Rydalian minority illegally annexed into the sovereign territory of Aspatria. This Court stated in the *Legal Consequences* advisory opinion concerning Palestine that a State's annexation of its population into territory not under its sovereignty is contrary to the very idea of self-determination.[70]

B. THE PRINCIPLE OF SELF-DETERMINATION CANNOT IMPAIR ASPATRIA'S TERRITORIAL INTEGRITY.

GA Resolutions, which constitute "subsequent practice" for interpreting UN Charter provisions,[71] prohibit the principle of self-determination from dismembering or impairing "the territorial integrity or political unity of sovereign and independent States".[72] UN practice shows

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[68] G.A. Res. 2353 (XXII), U.N. Doc. A/6716 (Dec. 19, 1967); Sonia Viejobueno, *Self-Determination v Territorial Integrity: The Falkland/Malvinas Dispute with Reference to Recent Cases in the United Nations*, 16 S. AFR. Y.B. INT'L L. 1, 15 (1990-1991).

[69] Compromis, para.28.

[70] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 181 (July 9).

[71] Vienna Convention on the Law of Treaties, art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 [VCLT].

[72] Declaration on the Granting of Independence to Colonial Territories and Peoples, G.A. Res. 1514 (XV), para. 6, U.N. Doc. A/RES/1514(XV) (Dec. 14 1960); Declaration on Friendly Relations between States, G.A. Res. 2625 (XXV), principle 5, para.7, U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970); Vienna Declaration, U.N. Doc. A/CONF.157/24, (June 25, 1993).

that territorial limitations "based on a legitimate historical title supersede the right to self-determination" in non-self-governing territories.[73] In 1967, Britain held a referendum in Gibraltar, a non-self-governing territory under its administration, in breach of Spain's historical sovereignty over the territory. Notwithstanding the wishes of Gibraltar's population to retain links with Britain, the GA declared the referendum invalid, condemning "any colonial situation which partially or completely destroys the national unity and territorial integrity of a country".[74] In the case of the Falkland Islands, the GA decided that it is the "interests of the population", not their wishes that must be taken into account.[75]

The territorial integrity principle was recognized by this Court in *Western Sahara*,[76] where Judge Singh explained that the principle of self-determination would not apply to the territory if, at the time of colonization, there was evidence of "the existence of one single State…which would have been dismembered by the colonizer and thus justify reunion on decolonization at the present time".[77]

The Islands do not fall within the typical case of colonialism. Rydal's unlawful administration dismembered the sovereign State comprising Aspatria and the Islands. The territorial integrity principle demands a reintegration of the Islands with Aspatria upon

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[73] THOMAS MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 247 (2000). See also Alejandro Schwed, *Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute*, 6 FORDHAM INT'L L.J. 443, 459 (1983).

[74] G.A. Res. 2353, *supra* n.68.

[75] G.A. Res. 2065 (XX), para.1, U.N. Doc. A/6014 (Dec. 6, 1965); G.A. Res. 3160 (XXVIII), 3rd preambular paragraph, U.N. Doc. A/9030 (Dec. 14, 1973).

[76] Western Sahara, supra n.24 at 33.

[77] *Id.,* (Declaration of Judge Singh) at 79-80. *See also* Separate Opinion of Judge Petren at 110.

decolonization. The Special Committee explained that it is the "interests", not the wishes of the Islanders that are paramount.[78] It follows that the plebiscite endorsed by Rydal was invalid under international law.

C. THE ASPATRIAN GOVERNMENT IS REPRESENTATIVE AND NON-DISCRIMINATORY.

The only exception to the territorial integrity principle is when the government fails to "represent the whole people belonging to the territory without distinction [and] without discrimination on grounds of race, creed or colour".[79] Secession "can only be considered as an altogether exceptional solution, a last resort",[80] like Bangladesh from Pakistan (1971) and Croatia from Yugoslavia (1991), where the parent State committed widespread and systematic violations of human rights.[81] The pending decision regarding the unilateral declaration of independence by Kosovo must be considered with Serbia's "grave violations of human rights in Kosovo which affected ethnic Albanians" identified by the GA[82] and the Security Council.[83]

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[78] Compromis, para.37.

[79] G.A. Res. 2625, *supra* n.72, principle 5, para.7; CRAWFORD, *supra* n.28 at 118; Reference Re Secession of Quebec [1998] 2 S.C.R 217, para.126 (Can.).

[80] *The Aaland Islands Question*, Report by the Commission of Rapporteurs, *supra* n.67 at 318.

[81] DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 332-372 (2002).

[82] G.A. Res. 54/183, 5th and 6th preambular paragraphs, U.N. Doc. A/RES/54/183 (Dec. 17, 1999).

[83] S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 23, 1998); S.C. Res. 1199, 11th preambular paragraph, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

Aspatria has always granted those born on the Islands full rights as Aspatrian citizens and full access into the mainland.[84] The Islanders cannot claim independence under the banner of institutionalized discrimination.

III. RYDAL MUST CEDE ADMINISTRATION OF THE ISLANDS TO ASPATRIA AND CEASE ALL ACTS CONTRARY TO ASPATRIA'S SOVEREIGNTY

In light of the above, Aspatria's sovereignty over the Islands renders Rydal's administration over the Islands illegal. Rydal must cease all acts that are inconsistent with Aspatria's sovereignty over the Islands,[85] and must cede administration over the Islands to Aspatria. The Governor must be recalled, the tender process for concessions to exploit the Islands' oil is void, and Rydal's attempts to grant independence to the Islanders are ineffective.

IV. RYDAL'S REJECTION OF MDR'S BID VIOLATED ITS OBLIGATIONS UNDER THE ASPATRIA-RYDAL BIT.

A. ASPATRIA'S CLAIM IS ADMISSIBLE BECAUSE ALL LOCAL REMEDIES HAVE BEEN EXHAUSTED.

Under customary international law,[86] all local remedies must be pursued within the State allegedly responsible before an international claim is admissible.[87] Aspatria's claim is admissible since MDR had pursued all administrative and judicial remedies possible under Rydalian law.[88]

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[84] Compromis, para.33.

[85] Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 30(a), International Law Commission, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [Draft Articles on State Responsibility].

[86] Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 at para.50 (July 20); Finnish Ships Arbitration (Fin. v. U.K.), 2 R.I.A.A. 1479, 1502 (1934).

[87] *ELSI, id.,* at para.59; Draft Articles on Diplomatic Protection, art. 14(1), International Law Commission, U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/61/10 [Draft Articles on Diplomatic Protection]; Draft Articles on State Responsibility, *supra* n.85, art. 44(b).

B. RYDAL OWES OBLIGATIONS UNDER THE ASPATRIA-RYDAL BIT TO ASPATRIAN INVESTORS AND INVESTMENTS IN THE ISLANDS.

Since the Aspatria-Rydal BIT is an instrument of international law, a court "should have recourse to the rules of general international law to supplement those of the treaty".[89] The *Legal Consequences* advisory opinion concerning Namibia states that "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".[90] This Court held that South Africa owed obligations to other States under a League of Nations Mandate, "an international agreement having the character of a treaty or convention", in relation to the exercise of its powers within Namibia.[91] South Africa's lack of sovereignty did not preclude the imposition of these treaty obligations because it had physical control over Namibia.

Interpreted in accordance with international law, the Aspatria-Rydal BIT imposes obligations on Rydal to protect Aspatrian investors and investments within the Islands because of Rydal's physical control over the Islands, not because of Rydalian sovereignty. This is consistent with the object and purpose of the Aspatria-Rydal BIT to promote and reciprocally protect investments irrespective of the sovereignty dispute over the Islands.[92]

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[88] Compromis, para.61.

[89] VCLT, *supra* n.71, art. 31(3)(c); Antonio Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, 16 ICSID REV. FOREIGN INV. L.J. 20, 21 (2001).

[90] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, para.118 (June 21).

[91] *Id.,* at para.92, 94.

[92] VCLT, *supra* n.71, art. 31(1).

C. RYDAL'S REJECTION OF THE MDR BID VIOLATED ITS OBLIGATION UNDER ARTICLE IV OF THE ASPATRIA-RYDAL BIT.

MDR is an "investor" under the Aspatrian-Rydal BIT as an Aspatrian national "attempting to make…an investment" in the Islands by submitting a bid for the concession to exploit the oil reserves.

Decisions of the Iran-U.S. Claims Tribunal and International Centre for Settlement of Investment Disputes ("ICSID") form "subsidiary means"[93] for determining the content of the national treatment principle in Article IV, a term found in most modern investment treaties.[94] The Tribunal in *Pope & Talbot* held that a host State violates the national treatment requirement when it: (1) accords different treatment to foreign and domestic investors in "like circumstances"; and (2) cannot prove that the differentiation bears a reasonable nexus to a rational government policy which is not discriminatory, either on its face or *de facto*.[95]

1. Rydal treated MDR less favourably than it did ROCO when the two were in "like circumstances".

The term "like circumstances" in Article IV encompasses investors within the same business or economic sector.[96] MDR and ROCO fulfill this requirement since they both operate

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[93] I.C.J. Statute, *supra* n.62, art. 38(1)(d).

[94] Campbell McLachlan et al., International Investment Arbitration: Substantive Principles 251 (2008).

[95] Pope & Talbot Inc. v. Canada, 7 ICSID (W. Bank) 43, at para.78-79 (Award on the Merits of Phase 2) (Apr. 10, 2000); Marvin Feldman v. Mexico, 42 I.L.M. 625, 662 (Award) (ICSID, Dec. 16, 2002).

[96] *Pope and Talbot Interim Award* at para.78; S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, 1437 (Partial Award) (ICSID, Nov. 13, 2000); Organization for Economic Cooperation and Development [OECD], *National Treatment for Foreign-Controlled Enterprises* at 16-17 (1985).

in the oil exploitation industry. Indeed, the likeness goes further since they are in direct competition for the same concession.

In consequence, the national treatment principle demands that MDR and ROCO "be subject to the same competitive conditions" during the Rydalian bidding process.[97] The bidding process was promised to be "open, transparent and competitive". The MDR bid was superior to the ROCO bid. It provided an upfront payment of USD 500 million, and 50 percent of the net proceeds. The ROCO bid only promised 45 percent of the net proceeds, an amount realizable only after the realization period that can extend to 50 years, according to studies within the oil production industry.[98] Industry practice further reveals that the 5 percent difference in net proceeds between the two bids translates to a difference of USD 1 billion in absolute terms.[99] Additionally, the MDR bid provided infrastructure development on the Islands and guaranteed local employment of the Islanders. As First Minister Craven himself admitted, "the MDR bid was without question the more economically attractive to the people of the Islands".[100]

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[97] United Nations Conference on Trade and Development, *National Treatment,* 8, UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11(Vol. IV) (2000).

[98] ROGER BLANCHARD, THE FUTURE OF GLOBAL OIL PRODUCTION: FACTS, FIGURES, TRENDS AND PROJECTIONS, BY REGION 20 – 21 (2005).

[99] BRITISH PETROLEUM, ANNUAL REPORT AND ACCOUNTS, 7 (2007), *available at* http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/set_branch/STAGING/common_assets/downloads/pdf/ara_2007_annual_report_and_accounts.pdf

[100] Compromis, para.49, 50, 51, 52.

The first vote of the Assembly was clearly in favour of the MDR bid. As ILSA stated, Governor Black's refusal to assent was a denial of the freely will of the Islanders. It is telling that Black herself admitted that the MDR proposal was appealing in the short term.[101]

2. The rejection of the MDR bid bore no reasonable nexus to a rational government policy that does not discriminate against investors.

Rydal cannot invoke its government policies to justify its differential treatment, unless the policies were not intentionally discriminatory nor discriminatory in effect.[102] The circumstances surrounding the rejection of the MDR bid reveal Rydal's prejudice on the basis of nationality. The ILSA members voting against the MDR bid asserted that they had to "be wary of Aspatrians bearing gifts", and Black also declared that "the future of the Windscale Islands lies with that community of States, led by Rydal".[103] This intentional discrimination is fatal to any justification by Rydal for its differential treatment.

[101] Compromis, para.53.

[102] KENNETH VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE AT 77 (1992); Loewen v. The United States of America, 7 ICSID (W. Bank) 421, para.132 (Award) (2003); Antoine Goetz v. Burundi, 6 ICSID (W. Bank) 5, para.121 (Award) (2004).

[103] Compromis, para.52, 53.

D. RYDAL'S REJECTION OF MDR'S BID VIOLATED ITS OBLIGATIONS UNDER ARTICLE V OF THE ASPATRIA-RYDAL BIT.

1. MDR's bid is an "investment" under the Aspatrian-Rydal BIT.

ICSID Tribunals have found that pre-contractual "development costs" constitute protected investments if (1) they fulfill the requisite conditions within the investment treaty; and (2) such an interpretation is consistent with the intentions of the State parties.[104]

The Aspatria-Rydal BIT defines "investment" to include "every asset", and this term "embraces everything of economic value, virtually without limitation".[105] The MDR bid involved an exposure to the latent obligation of an upfront payment of USD 500 million, which ripened into an asset of economic value once the Assembly reached the initial consensus to select the MDR bid.[106] At that stage of the bidding process, the approved bid became a protected investment and Rydal was bound to treat it fairly and equitably.

Such a finding is consistent with the intentions of the parties under the Aspatria-Rydal BIT. In *Mihaly v. Sri Lanka,* the investment treaty both defined the conditions of an investment and further provided for "the Parties' prerogative in this respect". Since the host State explicitly represented that it did not consider there to be an investment until a contract was signed, the Tribunal found that the development costs did not constitute an investment.[107] The Aspatria-Rydal BIT does not make reference to the intentions of the parties apart from providing the

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[104] MCLACHLAN, *supra* n.94 at 178-179; Zhinvali Development Limited v. Georgia, 10 ICSID (W. Bank) 6, para.415 (2003); Mihaly International Corporation v Sri Lanka, 41 I.L.M. 867, para.48, 49, 60 (Award) (ICSID, 2002).

[105] Bayindir Insaat v. Pakistan, I.I.C. 27, para.112-113 (Decision on Jurisdiction) (ICSID, 2005).

[106] Compromis, para.51, 52.

[107] *Mihaly, supra* n.104 at para.51, 60.

requisite conditions for an investment. Therefore, the MDR bid constituted an investment since it fulfilled the necessary conditions. Indeed, Rydal expressed no contrary intention during its intercourse with the bidders.

2. Rydal's rejection of the MDR bid violated its obligation to accord it "fair and equitable treatment".

The standard of "fair and equitable treatment" encompassed in Article V provides "an autonomous standard that is additional to general international law".[108] This requires treatment "that does not affect the basic expectations [of] the foreign investor".[109]

ICSID Tribunals have ruled that clear and unambiguous conduct by the host State "creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct".[110] In *Metalclad v. Mexico*, Mexican federal officials assured the investor that a federal permit was "all that was needed to undertake the landfill project". The refusal of the investor's operations for lack of a municipal permit breached the investor's legitimate expectation.[111]

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[108] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 124 (2008); Azurix Corp. v. Argentina, I.I.C. 24, para.361 (Award) (ICSID, 2004); MTD Equity v. Chile, 44 I.L.M. 91, para.109-115 (Award) (ICSID, 2004).

[109] Técnicas Medioambientales Tecmed S.A. v Mexico, 43 I.L.M. 133, para.154 (Award) (ICSID, 2003).

[110] International Thunderbird Gaming Corp. v. Mexico, para.147 (NAFTA/UNCITRAL) (Award) (Jan. 25, 2006), *available at* http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf. *See also* GAMI Investments Inc. v. Mexico, at para. 76 (NAFTA/UNCITRAL) (Final Award) (Nov. 15, 2004), *available at* http://ita.law.uvic.ca/documents/Gami.pdf.

[111] Metalclad Corp v. Mexico, 5 ICSID (W. Bank.) 209, 228 (Award) (ICSID, 2000).

The bidding process was expressly represented to be "open, transparent and competitive", and the only qualification required was a registered office in Rydal.[112] These representations raised MDR's legitimate expectations that economic competitiveness, and not nationality, would be the yardstick against which bids would be evaluated. Rydal's eventual rejection of the MDR bid on the basis of nationality[113] was irreconcilable with the initial representations and breached the standard of fair and equitable treatment. This is unlike *Thunderbird v. Mexico,* where Mexican authorities provided no assurance that gaming machines would be approved, and the investor was aware that gaming was illegal in Mexico.[114]

V. ASPATRIA IS NOT LIABLE UNDER THE ASPATRIA-RYDAL BIT FOR SEQUESTERING THE ASSETS OF AN ASPATRIAN COMPANY.

A. RYDAL LACKS STANDING TO INVOKE ASPATRIA'S RESPONSIBILITY FOR MEASURES TAKEN AGAINST AN ASPATRIAN COMPANY.

1. The sequestration of ALEC's assets is a matter essentially within Aspatria's domestic jurisdiction.

Article 2(7) of the UN Charter prohibits the organs of the UN, including this Court, from intervening in "matters which are essentially within the domestic jurisdiction of any State".[115] Accepted State practice shows that, absent any human rights violations, domestic criminal justice is invariably a matter in which this Court cannot intervene.[116]

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[112] Compromis, para.49.

[113] *Supra*, Section IV.C.

[114] Thunderbird, supra n.110, at para.149-164.

[115] U.N. Charter, *supra* n.65, art. 2, para.7.

[116] United Nations General Assembly, Note verbale from States addressed to the Secretary General, 3, U.N. Doc. A/62/658 (Feb. 2, 2008).

The sequestration of the assets of ALEC, an Aspatrian company, was a valid exercise of the jurisdiction of the Aspatrian courts, in accordance with the Aspatrian Criminal Code and the NRA.[117] These measures were essentially within Aspatria's domestic jurisdiction and this Court should declare its lack of competence over this claim.[118]

2. Rydal cannot exercise diplomatic protection on behalf of ROCO for measures taken against ALEC.

a. The national State of shareholders cannot exercise diplomatic protection on behalf of the shareholders for an injury to their company.

The doctrine of separate legal personality is a general principle of international law, under which the only proper claimant for an injury suffered by a company is the company itself, not its shareholders.[119] Accordingly, the national State of shareholders in a company is not entitled to exercise diplomatic protection on behalf of the shareholders for an injury to the corporation.[120] As this Court stated in *Barcelona Traction*, "an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected".[121] *Prima facie*, Rydal cannot exercise diplomatic protection on behalf of ROCO, a shareholder of ALEC, for an alleged injury to ALEC alone.

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[117] Compromis, para.40, 57; Compromis Clarifications, para.6.

[118] I.C.J. Statute, *supra*, n.62, art. 36(6).

[119] GRAZHDANSKII KODEKS RF [GK] [CIVIL CODE] art. 48(1) (Russ.), 中国人民共和国公司法 [COMPANY LAW] art. 3 (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 7, 2005, effective Jan. 1, 2006) (P.R.C.); Salomon v. Salomon & Co Ltd, [1897] A.C. 22 (H.L.) (U.K.).

[120] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain) 1970 I.C.J. 3, 42, 46 (Second Phase, Feb. 5); Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo.) 46 I.L.M. 712, 727 (I.C.J., Preliminary Objections, May 27, 2007), Draft Articles on Diplomatic Protection, *supra* n. 87, art. 11.

[121] *Barcelona Traction*, *supra* n.120 at 35-36.

b. Nothing in the Aspatria-Rydal BIT permits Rydal to deviate from the general rule.

The general rule on diplomatic protection of companies can only be modified by an express and unambiguous treaty provision.[122] In *ELSI*, the United States could exercise diplomatic protection on behalf of United States shareholders of an Italian company because the United States-Italy Treaty provided for obligations owed to Italian companies "organized or participated in" or "controlled" by United States companies.[123]

The inclusion of "shares, stock and equity participation in an enterprise" in the definition of "investment" under the Aspatria-Rydal BIT is no such exception.[124] There is no resemblance to the position under the ICSID Convention. ICSID tribunals[125] have only allowed shareholder claims on the basis of similar definitions of "investment" because of the special exception in Article 25(2)(b) of the ICSID Convention, which permits parties to agree to treat a company of host State incorporation as a national of another State "because of foreign control".[126] Former ICSID Secretary-General Broches,[127] and several ICSID tribunals[128] have emphasized that the

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[122] *ELSI, supra* n.86 at 86 (Separate Opinion of Judge Oda); Aron Broches, *Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case* in COMMERCIAL ARBITRATION, ESSAYS IN MEMORIAM EUGENIO MINOLI 76 (1974).

[123] *ELSI, supra* n.86 at 49 (Judgment), 89 (Judge Oda).

[124] Compromis, Annex I.

[125] American Manufacturing & Trading Inc. v. Zaire, 36 I.L.M. 1534, 1544 (Award) (ICSID, Feb. 21, 1997); CMS Gas Transmission Co. v. Argentina, ICSID (W. Bank) ARB/01/8 at para. 57, (Decision on Objections to Jurisdiction) (July 17, 2003) *available at* http://ita.law.uvic.ca/documents/cms-argentina_000.pdf.

[126] Convention on the Settlement of Disputes between States and Nationals of Other States, art. 25(2)(b), Oct. 14, 1966, 575 U.N.T.S. 159 [ICSID Convention]; CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 292–293 (2001).

ICSID mechanism of investor-State arbitration involves the role of "the State host to the investment" and is conceptually distinct from diplomatic protection, which involves "the role of the State of the investor's nationality".

To replicate the ICSID position and modify the general rule of diplomatic protection, an investment treaty must expressly provide for obligations owed to a company incorporated in the host State, as provided in *ELSI*. No such provision exists in the Aspatria-Rydal BIT. As this Court in *Barcelona Traction* warned, extending diplomatic protection to shareholders without express treaty provision to that end would create "confusion and insecurity in international economic relations".[129] This is especially where "the shares of companies whose activity is international are widely scattered and frequently change hands", creating the risk of multiple claims.[130] This risk eventuates here because ALEC's has more than 5000 shareholders of various nationalities.[131]

c. Rydal cannot avail itself of any exception under customary international law.

Customary international law only permits diplomatic protection of shareholders in two situations: (1) when the company has ceased to exist according to the law of the State of

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[127] Aron Broches, *The Convention on The Settlement of Investment Disputes Between States and Nationals of Other States,* 136 RECUEIL DES COURS 330, 360-361 (1972).

[128] Sempra Energy Int'l v. Argentina, I.I.C. 304, para.150 (Decision on Objections to Jurisdiction) (May 11, 2005). *See also CMS Gas, supra* n.125 at para.43; *Azurix, supra* n.108 at para.72.

[129] *Barcelona Traction, supra* n.120 at para.96.

[130] *Ibid. See also* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, 2 HISTORY OF THE ICSID CONVENTION 581 (1970).

[131] Compromis, para.40.

incorporation for a reason unrelated to the injury;[132] and (2) when a State causes direct injury to the rights of shareholders as such, as distinct from those of the company itself.[133]

None of these exceptions apply. ALEC still retains its corporate personality under Aspatrian laws, and none of ROCO's direct rights *qua* shareholder like voting at general meetings, and sharing in the company's assets on liquidation have been infringed.[134]

Rydal may rely on an alleged third exception suggested in Article 11(b) of the International Law Commission Draft Articles on Diplomatic Protection ("Draft Articles"): that the company had, at the date of the injury, the nationality of the State responsible for causing the injury, and incorporation in that State was required as a precondition for doing business there.[135]

Rydal bears the burden of proving the existence of this alleged exception under customary international law.[136] However, this Court has never affirmed the customary character of this exception, even when the occasion arose for clarification.[137] Judge Nervo in *Barcelona Traction* strongly objected to it because it undermines "the essential need not to have public utilities and national resources subordinated to the private interests of foreign corporations".[138]

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[132] Draft Articles on Diplomatic Protection, *supra* n.87, art. 11(a); *Barcelona Traction, supra* n.120 at para. 64.

[133] Draft Articles on Diplomatic Protection, *supra* n.87, art. 12; *Barcelona Traction supra* n.120 at para. 47.

[134] *Barcelona Traction*, *supra,* n.120 at para.46-47.

[135] Draft Articles on Diplomatic Protection, *supra* n.87, art. 11(b).

[136] Asylum Case (Colomb. v. Peru) 1950 I.C.J. 266, 276 (Nov. 20); The Case of the S.S. "Lotus" (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10 at 18 (Sept. 7).

[137] *Barcelona Traction supra* n.120, at 42; *Ahmadou, supra* n.120 at para.91.

[138] *Barcelona Traction, supra* n.120 at 259 (Separate Opinion of Judge Nervo).

Also, Article 11(b) of the Draft Articles was, at best, progressive development rather than a codification of custom. The Commission itself was divided on the customary character of this exception.[139] Finally, no constant and uniform State practice or *opinio juris* exists as to the normative character of this exception.[140] Several States have rejected Article 11(b) because "it lacks support in customary international law".[141]

3. In any event, Rydal's claim is inadmissible because local remedies were not exhausted.

Under customary international law,[142] an international claim is not admissible unless the essence of the claim has been pursued as far as permitted by the local law of the State allegedly responsible.[143] These include all judicial and administrative remedies.[144] The Aspatrian Criminal Code allows the sequestration of assets to prevent the furtherance, promotion, or concealment of the alleged criminal conduct. A final determination on the criminal charges against ALEC is required before the legality of the sequestration can be assessed. Rydal's claim is premature.[145]

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[139] International Law Commission, 55th Sess., 27764th mtg. at para.7-9, U.N. Doc. A/CN.4/SR.2764. *See also* Special Rapporteur John Dugard, *Fourth Report on Diplomatic Protection,* 13 March 2003, A/CN.4/530, at para.68.

[140] North Sea Continental Shelf Cases (F.R.G. v. Den.), 1969 I.C.J. 3, 42-43 (Feb. 20). *See also* Legality of Nuclear Weapons Case, Advisory Opinion, 1996 I.C.J. 226, 254-255 (July 8).

[141] International Law Commission, 58th Sess., *Diplomatic Protection: Comments and observations received by Governments*, at 34 (United States), U.N. Doc. A/CN.4/561. *See also* U.N. GAOR, 62nd Sess., 10th mtg. at para.6 (Portugal), 15 (Venezuela), 40 (United States), 50 (Russian Federation), U.N. Doc. A/C.6/52/SR.10.

[142] *ELSI, supra* n.86 at para. 50; *Finnish Ships, supra* n.86 at 1479.

[143] Draft Articles on State Responsibility, *supra* n.85, art. 44(b); Draft Articles on Diplomatic Protection, *supra* n.87, art. 14(1); *ELSI, supra* n.86 at para.59.

[144] Commentaries on Draft Articles on Diplomatic Protection, *supra* n.87 at 72.

[145] Compromis, para.58-59; Compromis Clarifications, para.6.

ALEC must exhaust all local remedies because there was no undue delay in the Aspatrian remedial process.[146] In light of "the volume of the work involved by a thorough examination of the case",[147] which concerns a multi-billion-dollar tender bid and USD 80 million worth of ALEC's assets, the period of four to six years for a first instance decision is permissible.[148] This is unlike the *EL Oro Mining* arbitration, where the Mexican judicial system failed to render a decision after nearly a decade.[149]

B. THE SEQUESTRATION OF ALEC'S ASSETS WAS NOT AN "EXPROPRIATION" UNDER ARTICLE VI OF THE ASPATRIA-RYDAL BIT.

1. The measure was not a direct expropriation under Article VI(a).

Direct expropriation only occurs when there is a formal transfer of individual property rights by the State through administrative or legislative action.[150] The measure against ALEC is not direct expropriation since ALEC retains its formal property rights over all of its assets.[151]

2. The measure was not an indirect expropriation under Article VI(b).

Article VI(b) of the Aspatria-Rydal BIT provides that a measure does not constitute indirect expropriation if it is (1) designed and applied to protect legitimate public welfare objectives; (2) non-discriminatory; and (3) not so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.

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[146] Draft Articles on Diplomatic Protection, *supra* n.87, art. 15(b).

[147] El Oro Mining & Railway Co. (Ltd.) v. Mexico, 5 R.I.A.A. 191, 198 (1931).

[148] Compromis, para.57, 59.

[149] *El Oro, supra* n.147 at 198-199.

[150] DOLZER & SCHREUER, *supra* n.108 at 92.

[151] Compromis, para.57.

a. The measure was designed and applied to protect legitimate public welfare objectives.

The Aspatrian Criminal Code and the NRA were both applied to protect legitimate public welfare objectives. Legitimate exercises of police power, including "confiscation as a penalty for crimes", [152] are acceptable measures justifying the affectation of foreign property. The sequestration of ALEC's assets was not a confiscation, but a temporary measure to prevent the furtherance, promotion and concealment of criminal conduct alleged under the NRA, pending the conclusion of the criminal case.[153]

Legitimate public welfare objectives also include public health, safety, the environment and real estate price stabilization.[154] The NRA prohibits "any action inconsistent with an exclusive government license or patent concerning natural resources".[155] Its object is to protect Aspatria's peoples from deprivation of their permanent sovereignty over natural resources, a right that transcends purely domestic concerns and constitutes an "inalienable right" protected under international law.[156] *A fortiori*, the NRA was for the protection of a legitimate public welfare purpose.

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[152] BROWNLIE, *supra* n.37 at 536; Restatement (Third) of the Foreign Relations Law of the United States, §712, comment (g), 1 A. L. I. 524 [hereinafter *Restatement (3rd)*].

[153] Compromis, para.57, 60; Compromis Clarifications, para.6.

[154] James v. United Kingdom, 98 Eur. Ct. H.R. (ser. B) at para.46 (1986); Draft Convention on the Protection of Foreign Property, art. 3, 7 I.L.M. 124 (1968); Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10.5, 55 AM. J. INT'L. L 545, 554 (1961).

[155] Compromis, para.41.

[156] Permanent Sovereignty Over Natural Resources, G.A. Res. 1803 (XVII), 4th and 6th preambular paragraphs, U.N. Doc. A/5217 (Dec. 14, 1962); Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 1, U.N. Doc. A/RES/29/3281 (Dec. 12, 1974); G.A. Res. 2626 (XXV), para.73, U.N. Doc. A/RES/25/2626 (Oct. 24, 1970).

b. The measure was non-discriminatory.

In order for measures affecting foreign property to be discriminatory, there must be unreasonable distinctions without objective justification.[157] Nothing indicates that the actions against ALEC were unreasonable compared to any similarly situated comparator.

c. The measure was not so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.

Temporary measures affecting foreign property are a mere delay of opportunities, not measures severe enough to constitute expropriation.[158] A measure can only constitute expropriation if its effects on foreign property are not merely ephemeral.

ALEC retains its most essential asset in Aspatria: the license to exploit oil in the northeast province of Aspatria. Its sole source of income within Aspatria is preserved. The sequestration ends once ALEC is found innocent.[159] There is no permanent impairment of ALEC's viability.

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[157] Draft Convention on the Protection of Foreign Property, *supra* n.154, art. 3; Restatement (3rd), *supra* n.152, §712; Amoco Int'l Finance Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, para.139 (1987).

[158] *S.D. Myers, supra* n.96 at para.287; Case 44/79, Liselotte Hauer v. Land Rheinland Pfalz , 1979 E.C.R. 3727, para.2, 29 (Dec. 13).

[159] Compromis, para.41, 57, 59, 60; Compromis Clarifications, para.6.

PRAYER FOR RELIEF

For the foregoing reasons, Aspatria respectfully requests this Honorable Court to:

1. **DECLARE** that Rydal may not lawfully take steps giving effect to the independence of the 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 under the principle of self-determination;

2. **DECLARE** that Rydal's rejection of the MDR bid violated the Aspatria-Rydal BIT; and

3. **DECLARE** that Rydal does not have standing to invoke the Aspatria-Rydal BIT to protect the assets of ALEC, and in any event, the sequestration of ALEC's assets did not violate the Aspatria-Rydal BIT.

Respectfully submitted,

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Agent for Aspatria, 248A