

**IN THE
INTERNATIONAL COURT OF JUSTICE**



**AT THE PEACE PALACE,
THE HAGUE**

THE CASE CONCERNING THE WINDSCALE ISLANDS

**REPUBLIC OF ASPATRIA
(APPLICANT)**

V.

**KINGDOM OF RYDAL
(RESPONDENT)**

MEMORIAL FOR THE RESPONDENT

**2010 Philip C. Jessup
International Law Moot Court Competition**

TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES vi

STATEMENT OF JURISDICTION xvi

QUESTIONS PRESENTED xvii

STATEMENT OF FACTS xviii

SUMMARY OF PLEADINGS xxiii

PLEADINGS 1

A. RYDAL HAS SOVEREIGNTY OVER THE WINDSCALE ISLANDS 1

I. RYDAL, AND NOT PLUMBLAND, ACQUIRED TITLE BY OCCUPATION 1

1) The Islands were *res nullius* 1

2) Rydal effectively occupied the Islands 2

(a) Admiral Aikton’s actions are attributable to Rydal 3

(b) Rydal displayed actual state authority 3

(c) Rydal manifested sovereign intent 4

3) Occupation was peaceful and uninterrupted for a reasonable period 4

II. ASPATRIA CANNOT DERIVE TITLE *UTI POSSIDETIS JURIS* FROM PLUMBLAND 5

III. RYDAL HAS TITLE BY ACQUISITIVE PRESCRIPTION 6

1) Acquisitive prescription is a valid mode of acquiring territory 6

2) Determination of a critical date 7

3) The elements of acquisitive prescription are satisfied	8
(a) <u>Possession was à titre de souverain</u>	9
(b) <u>Possession was peaceful and uninterrupted</u>	9
(i) <i>Aspatria did not protest for 30 years between 1880 and 1910</i>	9
(ii) <i>Alternatively, Aspatria did not protest effectively between 1919 and 2009</i>	10
(c) <u>Possession persisted for a reasonable period</u>	10
B. THE ISLANDERS ARE ENTITLED TO INDEPENDENCE AS AN EXERCISE OF THEIR RIGHT TO SELF-DETERMINATION	12
I. SELF-DETERMINATION IS A LEGAL RIGHT UNDER INTERNATIONAL LAW	12
II. THE ISLANDERS ARE ENTITLED TO THE RIGHT OF SELF-DETERMINATION	14
1) The Islands have been correctly classified as a Chapter XI non-self-governing territory	14
.....	
(a) <u>The Islands are geographically separate</u>	15
(b) <u>The Islands are culturally distinct</u>	15
(c) <u>The Islands also satisfy Principle V of Resolution 1541</u>	15
2) The exceptional circumstances in which self-determination has been denied do not apply to the Islands	16
3) The right can be exercised even if Aspatria has sovereignty	17
(a) <u>Territorial integrity does not prevail over self-determination</u>	17
(b) <u>No “colonial enclave exception” applies</u>	17
III. THE ISLANDERS ARE ENTITLED TO INDEPENDENCE	18
1) Independence is a legitimate outcome of self-determination	18

2) Viability does not impact the Islands’ right to independence.....	18
IV. RYDAL MAY LEGALLY ASSIST WITH THE ISLANDERS’ INDEPENDENCE EVEN IF RYDAL DOES NOT HOLD SOVEREIGNTY OVER THE ISLANDS	19
1) Rydal has obligations as the administering state.....	19
2) Additionally, there is an <i>erga omnes</i> obligation to promote self-determination.....	20
C. THE NON-ADMISSION OF MDR’S BID DID NOT VIOLATE ARTICLE IV OF THE BIT.....	21
I. RYDAL HAS AFFORDED MDR TREATMENT NO LESS FAVOURABLE THAN THAT IT ACCORDS, IN LIKE CIRCUMSTANCES, TO ITS OWN INVESTORS (“NATIONAL TREATMENT”).....	21
1) There is no breach of national treatment.....	22
(a) <u>MDR and ROCO were not in like circumstances</u>	22
(b) <u>Alternatively, MDR has not received “less favourable” treatment than ROCO</u>	23
2) Further, and in the alternative, any differential treatment was justified.....	23
D. THE NON-ADMISSION OF MDR’S BID DID NOT VIOLATE ARTICLE V OF THE BIT.....	25
I. ARTICLE V DOES NOT EXTEND TO PRE-ADMISSION ACTIVITIES.....	25
II. FURTHER, AND IN THE ALTERNATIVE, MDR’S BID IS NOT AN INVESTMENT UNDER THE BIT.....	25
1) There are five “characteristics of an investment” that must be satisfied.....	26
2) MDR’s bid does not have the “characteristics of an investment”	26
(a) <u>There has been no significant commitment of capital</u>	26
(b) <u>There is no reasonable expectation of profit or gain</u>	27
(c) <u>There is no assumption of risk</u>	27

(d) <u>The bid was not of sufficient duration</u>	27
(e) <u>There has been no contribution to Rydal’s economic development</u>	28
III. IN THE ALTERNATIVE, RYDAL’S ACTIONS SATISFIED THE REQUIREMENTS OF ARTICLE V	28
1) The treatment of MDR was fair and equitable	29
(a) <u>Rydal’s conduct was not arbitrary</u>	29
(b) <u>There was no violation of due process</u>	29
(c) <u>Rydal provided a transparent framework for investments to protect legitimate expectations</u>	30
2) The treatment of MDR was non-discriminatory	31
E. ASPATRIA’S SEIZURE OF ALEC’S ASSETS CONSTITUTES A BREACH OF THE BIT FOR WHICH RYDAL HAS STANDING	32
I. RYDAL HAS STANDING TO MAKE A CLAIM EITHER ON BEHALF OF ALEC OR ROCO	32
1) Rydal has standing on the basis of effective nationality	32
2) Alternatively, Rydal has standing on the basis of substitution	33
3) Further, and in the alternative, Rydal has standing on the basis of ROCO’s investment	35
4) There is no requirement to exhaust local remedies	35
II. THE SEIZURE IS A VIOLATION OF ARTICLE VI	36
1) Aspatria has directly expropriated ALEC’s assets	36
2) Alternatively, Aspatria has indirectly expropriated ALEC’s northeast licence and ROCO’s shareholding	37
(a) <u>The degree of interference is not proportional to the purpose</u>	38

(i) <i>The economic impact is substantial</i>	38
(ii) <i>The duration of the seizure renders it permanent</i>	38
(b) <u>The seizure was discriminatory</u>	39
3) Aspatria’s failure to pay compensation is a violation of Art VI	39
III. THE SEIZURE IS A VIOLATION OF ART V	40
1) The threshold for a breach of the minimum standard has been significantly liberalised	40
.....	
2) Aspatria has not afforded ALEC fair and equitable treatment	41
(a) <u>Aspatria’s conduct was arbitrary, grossly unfair, unjust or idiosyncratic</u>	41
(b) <u>Aspatria’s conduct was a denial of justice</u>	42
3) Aspatria has not afforded ALEC full protection and security	42
PRAYER FOR RELIEF	43

INDEX OF AUTHORITIES

TREATIES

<i>Agreement for the Promotion and Protection of Investments</i> , Netherlands and Philippines, 27 February 1985, 1488 U.N.T.S. 304	40
<i>Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries</i> , 28 June 1989, 1650 U.N.T.S. 383	15
<i>Energy Charter Treaty</i> , 17 December 1994, 2080 U.N.T.S. 100	30, 40
<i>Fourth ACP-EEC Convention (LOME IV)</i> , 15 December 1989, 1924 U.N.T.S. 4	30, 40
<i>International Covenant on Civil and Political Rights</i> , 16 December 1966, 999 U.N.T.S. 171	13, 24, 31
<i>International Covenant on Economic, Social and Cultural Rights</i> , 16 December 1966, 993 U.N.T.S. 3	13, 24
<i>North American Free Trade Agreement</i> , 17 December 1992, Can. T.S. 1994 No. 2	22
<i>Statute of the International Court of Justice</i>	7, 21, 22
<i>UN Charter</i>	12, 14, 19
<i>Vienna Convention on the Law of Treaties</i> , 23 May 1969, 1155 U.N.T.S. 331	21, 32, 35

UN DOCUMENTS

<i>Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations</i> , GA Res. 2625(XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8082 (1970)	12, 13, 17, 20
<i>Declaration on the Granting of Independence to Colonial Countries and Peoples</i> , GA Res. 1514(XV), UN GAOR, 15 th Sess., Supp. No. 16, UN Doc. A/4684 (1960)	12, 13, 18

<i>Draft International Covenant on Human Rights and Measures of Implementation</i> , GA Res. 421(V), UN GAOR, 5 th Sess., Supp. No. 20, UN Doc. A/1775 (1950)	13
<i>Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government</i> , GA Res. 742(VIII), UN GAOR, 8 th Sess., Supp. No. 17, UN Doc. A/2630 (1953)	18
International Law Commission, <i>Diplomatic Protection: Comments and Observations Received from Governments</i> , 58 th Sess., UN Doc. A/CN.4/561 (2006)	34
International Law Commission, <i>Diplomatic Protection: Comments and Observations Received from Governments - Addendum</i> , 58 th Sess., UN Doc. A/CN.4/561/Add.1 (2006)	34
International Law Commission, <i>Report of the International Law Commission: Draft Articles on Diplomatic Protection</i> , UN GAOR, 61 st Sess., Supp. No. 10, UN Doc. A/61/10 (2006)	34
International Law Commission, <i>Report on the Work of its Fifty-third Session</i> , UN GAOR, 56 th Sess., Supp. No. 10, UN Doc. A/56/10 (2001)	3, 40
International Law Commission, <i>Seventh Report on Diplomatic Protection</i> , 58 th Sess., UN Doc. A/CN.4/567 (2006)	32, 33, 36
<i>Permanent Sovereignty Over Natural Resources</i> , GA Res. 1803(XVII), UN GAOR, 17 th Sess., UN Doc. A/5217 (1962)	21, 24, 25
<i>Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter</i> , GA Res. 1541(XV), UN GAOR, 15 th Sess., Supp. No. 16, UN Doc. A/4684 (1960)	13, 14, 15, 18
<i>Question of Gibraltar</i> , GA Res. 2353(XXII) UN GAOR, 22d Sess., Supp. No. 16, UN Doc. A/6716 (1967)	16
<i>Question of the Falkland Islands (Malvinas)</i> , GA Res. 2065(XX) UN GAOR, 10 th Sess., Supp. No. 14, UN Doc. A/9030 (1965)	16

Question Relating to Angola, SC Res. 163, UN SCOR, 16th Sess.,
Supp. April-June, UN Doc. S/4835 (1961) 13

INTERNATIONAL COURT OF JUSTICE CASES

Anglo-Norwegian Fisheries Case (UK v. Norway), [1952] I.C.J.
Rep. 116 3, 6, 10

*Case Concerning Ahmadou Sadio Diallo (Guineau v. Democratic
Republic of Congo)*, Judgment of 24 May 2007, I.C.J. General List
No. 103 33, 34, 35

Case concerning East Timor (Portugal v. Australia), [1995] I.C.J.
Rep. 90 13, 20

*Case Concerning Elettronica Sicula S.p.A (ELSI) (United States v.
Italy)*, [1989] I.C.J. Rep. 16 29, 36, 40, 41, 42

Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia),
[1999] I.C.J. Rep. 1045 3, 6, 8, 9

*Case Concerning Military and Paramilitary Activities in and
against Nicaragua (Nicaragua v. United States)*, [1986] I.C.J. Rep.
14 7, 14

Case Concerning Oil Platforms (Iran v. United States), [2003]
I.C.J. Rep. 161 32

*Case Concerning Sovereignty over Pedra Branca/Pulau Batu
Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*,
Judgment of 23 May 2008, I.C.J. General List No. 130 6, 9

*Case Concerning the Barcelona Traction, Light and Power
Company, Limited (Belgium v. Spain)*, [1970] I.C.J. Rep. 3 13, 20, 33, 34

Case Concerning the Frontier Dispute (Burkina-Faso v. Mali),
[1986] I.C.J. Rep. 554 5

*Case Concerning the Temple of Preah Vihear (Cambodia v.
Thailand)*, [1962] I.C.J. Rep. 6 9

<i>Case Concerning the Territorial Dispute (Libya v. Chad)</i> , [1994] I.C.J. Rep. 6	6, 8, 9, 10
<i>Case of Certain Norwegian Loans (France v. Norway)</i> , [1957] I.C.J. Rep. 9	35
<i>Fisheries Jurisdiction Case (Second Phase) (United Kingdom v. Iceland)</i> , [1974] I.C.J. Rep. 3	14
<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276</i> , Advisory Opinion, [1971] I.C.J. Rep. 16	13, 14
<i>Minquiers and Ecrehos Case (France v. United Kingdom)</i> , [1953] I.C.J. Rep. 47	1, 7, 8
<i>North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)</i> , [1969] I.C.J. Rep. 3	7
<i>Nottebohm (Second Phase) (Liechtenstein v. Guatemala)</i> , [1955] I.C.J. Rep. 4	22, 32
<i>Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)</i> , [2002] I.C.J. Rep. 554	7, 8
<i>Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)</i> , Judgment of 8 October 2007, I.C.J. General List No. 120	8
<i>Western Sahara</i> , Advisory Opinion, [1975] I.C.J. Rep. 12	13, 16, 17, 18
PERMANENT COURT OF INTERNATIONAL JUSTICE CASES	
<i>Case Concerning the Factory at Chorzow (Germany v Poland)</i> (1928), P.C.I.J. (Ser. A) No. 17	39, 40
<i>Case Concerning the Legal Status of Eastern Greenland (Denmark v. Norway)</i> (1933), P.C.I.J. (Ser. A/B) No. 53	1, 2, 4, 5
<i>Oscar Chinn Case (UK v Belgium)</i> (1934), P.C.I.J. (Ser. A/B) No. 63	31, 39

ARBITRAL AWARDS

<i>Affaire relative à la concession des phares de l'Empire ottoman</i> (1956), 12 R.I.A.A. 155	3
<i>Ambatielos Claim (Greece v. United Kingdom)</i> (1956), 12 R.I.A.A. 83	35
<i>Amoco International Finance Corporation v. Iran</i> (1987), 15 Iran-US C.T.R. 189	37
<i>Argentine-Chile Frontier Case (Argentina v. Chile)</i> (1969), 38 I.L.R. 20	7, 8
<i>Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela</i> (2007), 28 R.I.A.A. 331	7, 11
<i>Bayindir v. Pakistan</i> (2005), Case No. ARB/03/09, Decision on Jurisdiction (ICSID)	27
<i>Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)</i> (1989), 20 R.I.A.A. 119	6
<i>Chamizal Arbitration (United States v. Mexico)</i> (1911), 11 R.I.A.A. 309.	9, 10
<i>Clipperton Island Arbitration (France v. Mexico)</i> (1931), 2 R.I.A.A. 1105	2, 5
<i>Compania Del Desarrollo de Santa Elena, S.A. v. Costa Rica</i> (2000), 39 I.L.M. 1317 (ICSID)	37, 38
<i>Consortium R.F.C.C. v. Morocco</i> (2003), Case No. ARB/00/6, Award (ICSID)	22, 23
<i>Dubai-Sharjah Border Arbitration (Dubai v. Sharjah)</i> (1993), 91 I.L.R. 543	6
<i>Fedax N.V. v. Venezuela</i> (1998), 37 I.L.M. 1378 (ICSID)	26

<i>F-W Oil Interests Inc. v. Trinidad and Tobago</i> (2006), Case No. ARB/01/14, Award (ICSID)	26, 27
<i>GAMI Investments, Inc. v. Mexico</i> (2004), 44 I.L.M. 545 (NAFTA)	24,37, 38
<i>Glamis Gold, Ltd. v. United States</i> , Award, 8 June 2009 (NAFTA)	36, 37, 38
<i>Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India v. Pakistan)</i> (1968), 17 R.I.A.A. 1	9
<i>International Thunderbird Gaming Corporation v. Mexico</i> , Award, 26 January 2006 (NAFTA)	29, 30
<i>Island of Palmas Case (Netherlands v. USA)</i> (1928), 2 R.I.A.A. 829	1, 2, 4, 6, 8, 9
<i>Joy Mining Machinery Ltd. v. Egypt</i> (2004), ICSID Rev.- F.I.L.J. 486 (ICSID)	26, 27
<i>L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States</i> (1926), 4 R.I.A.A. 60	40
<i>LG&E Energy Corporation v. Argentina</i> (2006), 46 I.L.M. 40 (ICSID)	37, 38
<i>Libyan American Oil Company v. Libya</i> (1977), 20 I.L.M. 1	39
<i>Loewen Group, Inc. v. United States</i> (2003), 42 I.L.M. 811 (ICSID)	29, 30, 42
<i>Malaysian Historical Salvors v. Malaysia</i> (2007), Case No. ARB/05/10, Award on Jurisdiction (ICSID)	26
<i>Metalclad Corporation v. Mexico</i> (2000), 40 I.L.M. 36 (ICSID)	29, 30, 35, 36
<i>Methanex Corporation v. United States</i> (2005), 46 I.L.M. 1345 (NAFTA)	22
<i>Middle East Cement Shipping Company v. Egypt</i> (2000), 18 ICSID Rev. - F.I.L.J. 602 (ICSID)	42

<i>Mihaly International Corporation v. Sri Lanka</i> (2002), 41 I.L.M. 867 (ICSID)	26, 27, 28
<i>Mondev International Ltd. v. United States</i> (2002), 42 I.L.M. 85 (ICSID)	29, 40
<i>Parkerings-Compagniet AS v. Lithuania</i> (2007), Case No. ARB/05/8, Award (ICSID)	22
<i>Patrick Mitchell v. Democratic Republic of Congo</i> (2006), Case No. ARB/99/7, Decision on Application for Annulment of Award (ICSID)	26
<i>Pope & Talbot, Inc. v. Canada (Merits of Phase 2)</i> (2001), 122 I.L.R. 352 (NAFTA)	21, 23, 24
<i>S.D. Myers, Inc. v. Canada</i> (2000), 40 I.L.M. 1408 (NAFTA)	23, 24, 35, 36, 38
<i>Salini Costruttori S.P.A v. Morocco</i> (2003), 42 I.L.M. 609 (ICSID)	26
<i>Saluka Investments B.V. v. Czech Republic</i> , Partial Award, 17 March 2006 (UNCITRAL)	31, 37, 39, 40
<i>Starrett Housing Corporation v. Iran</i> (1984), 4 Iran-US C.T.R. 123	37
<i>Técnicas Medioambientales Tecmed, S.A. v. Mexico</i> (2003), 43 I.L.M. 133 (ICSID)	30, 37, 38
<i>Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran</i> (1984), 6 Iran-US C.T.R. 219	36, 37
<i>Waste Management, Inc. v. Mexico</i> (2004), 43 I.L.M. 967 (ICSID)	29, 40, 41
<i>William Nagel v. Czech Republic</i> (2004), 1 Stockholm Arb. Rep 141 (ICSID)	26, 27

BOOKS

Asamoah, O. <i>The Legal Significance of the Declarations of the General Assembly of the United Nations</i> (Hague: M.Nijhoff, 1966)	18
--	----

Brownlie, I. <i>Principles of Public International Law</i> , 7 th ed. (Oxford: Oxford University Press, 2008)	3, 13, 22, 33, 39
Cassese, A. <i>Self-Determination of Peoples</i> (Cambridge: Cambridge University Press, 1995)	12
Crawford, J. <i>The Creation of States in International Law</i> , 2d ed. (Oxford: Clarendon Press, 2006)	12, 17, 18, 19
Dolzer, R. & Schreuer, C. <i>Principles of International Investment Law</i> (Oxford: Oxford University Press, 2008)	23, 25, 33
Dolzer, R. & Stevens, M. <i>Bilateral Investment Treaties</i> (The Hague: Martinus Nijhoff, 1995)	28
Higgins, A.P. & Colombos, C.J. <i>International Law of the Sea</i> (New York: Longmans, Green & Co, 1943)	2
Jennings, R. & Watts, A. eds. <i>Oppenheim's International Law (Vol.1, Pt.2)</i> , 9 th ed. (London: Longman, 1996)	3, 10
Jennings, R. <i>The Acquisition of Territory in International Law</i> (Manchester: Manchester University Press, 1963)	7
Lindley M. F. <i>The Acquisition and Government of Backward Territory in International Law</i> (New York: Greenwood Publishing, 1929)	3
McLachlan, C., Shore, L. & Weiniger, M. <i>International Investment Arbitration</i> (Oxford: Oxford University Press, 2007)	41
OECD, <i>International Investment Law: Understanding Concepts and Tracking Innovations</i> (Paris: OECD Publishing, 2008)	32
Riga, S. <i>The Evolution of the Right to Self-Determination</i> (Leiden: A.W.Sijthoff, 1973)	12
Roche, A.G. <i>The Minquiers and Ecrehos Case</i> (Geneva: Droz, 1959)	7

Russell, R. & Muther, J. <i>A History of the United Nations Charter</i> (Washington: Brookings Institution, 1958)	18
Schreuer, C. <i>The ICSID Convention: A Commentary</i> (Cambridge: Cambridge University Press, 2001)	35
Shahabuddeen, M. <i>Precedent in the World Court</i> (Cambridge: Cambridge University Press, 1996)	22
Sornarajah, M. <i>The International Law on Foreign Investment</i> , 2d ed. (Cambridge: Cambridge University Press, 2004)	37
UNITAR, <i>Small States and Territories: Status and Problems</i> (New York: Arno Press, 1971)	18
Verykios, P.A. <i>La Prescription en droit international public</i> (Paris: A. Pedone, 1934)	7, 10
ARTICLES	
Christie, G.C. “What Constitutes a Taking of Property Under International Law?” (1962) 38 B.Y.I.L. 307	36, 38
Fischer Williams, J. “Sovereignty, Seisin, and the League” (1926) 3 B.Y.I.L. 24	7
Fitzmaurice, G. “The Law and Procedure of the International Court of Justice, 1951-54” (1954) 31 B.Y.I.L. 371	5
Franck, T. & Hoffman, P. “The Right of Self-Determination in Very Small Places” (1975) 8 N.Y.U.J.I.L.P. 332	16
Goldie, L.F.E. “Critical Date” (1963) 12 I.C.L.Q. 1251	8
Hannum, H. “Rethinking Self-Determination” (1993) 34 V.J.I.L. 1	15, 19
Hasani, E. “Uti possidetis juris: from Rome to Kosovo” (2003) 27 Fletcher F. World Aff. 85	5
Higgins, R. “The Taking of Property by the State” (1982) 3 R.C.A.D.I. 263	38

Johnson, D. H. N. “Acquisitive Prescription in International Law” (1950) 27 B.Y.I.L. 332 6, 7, 8, 10

MacGibbon, I.C. “Scope of Acquiescence in International Law” (1954) 31 B.Y.I.L. 143 5, 9

Schwebel, S. “The Overwhelming Merits of Bilateral Investment Treaties” 32 Suffolk Transnat’l L. Rev. 263 41

Sloan, B. “General Assembly Resolutions Revisited” (1987) 58 B.Y.I.L. 39 14

MISCELLANEOUS

Case Concerning the Legal Status of Eastern Greenland (Denmark v. Norway), "Memorial of Denmark" (1933) Ser. C No. 52 7

E. Lauterpacht, S. Schwebel et al., *Joint Legal Opinion on Belize*, online: Global Arbitration Review
<http://www.globalarbitrationreview.com/_files/legal-opinion_-_Guatemala_Belize_2001.pdf> 4, 6

Non-Self-Governing Territories Listed by General Assembly in 2002, online: United Nations
<<http://www.un.org/Depts/dpi/decolonization/trust3.htm>>. 16

OECD, Directorate for Financial and Enterprise Affairs, “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law*, Working Paper No. 4, September 2004 37

Restatement (Third) of Foreign Relations Law of the United States (1986) 29, 31, 39

UNCTAD, *Fair and Equitable Treatment*, UNCTAD/ITE/IIT/11 (Vol. III) (1999) 28

Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, online: United States Department of State
<<http://www.state.gov/documents/organization/117601.pdf>> 30

STATEMENT OF JURISDICTION

The Kingdom of Rydal and the Republic of Aspatia have agreed to submit this dispute to the International Court of Justice pursuant to article 40(1) of the Statute of the International Court of Justice ('the Statute') and in accordance with the *Compromis* notified to the Court on 16 September 2009. Pursuant to article 36(1) of the Statute, the Court has jurisdiction to decide all matters referred to it for decision. Both parties shall accept the Court's decision as final and execute it in good faith.

QUESTIONS PRESENTED

I.

Whether Rydal has territorial sovereignty over the Windscale Islands.

II.

Whether the Windscale Islanders are entitled to independence as an exercise of their right to self-determination and whether Rydal may take steps to give effect to this independence.

III.

Whether the non-admission of MDR Ltd's bid is a breach of Rydal's obligations under the Aspatria-Rydal Bilateral Investment Treaty.

IV.

Whether Rydal has standing to invoke the Aspatria-Rydal Bilateral Investment Treaty to protect the assets of the A & L Exploration Corporation, either on behalf of the A & L Exploration Corporation itself or on behalf of the Rydalian Oil Company.

V.

Whether the seizure of the A & L Exploration Corporation's assets is a violation by Aspatria of its obligations under the Aspatria-Rydal Bilateral Investment Treaty.

STATEMENT OF FACTS

The Kingdom of Rydal (“Rydal”) is a developed country in the Northern Hemisphere. Rydal has established colonies throughout the world, including the Windscale Islands (“Islands”), an archipelago in the Southern Hemisphere, approximately 7,500 miles from Rydal.

Discovery and occupation of the Islands

The Islands were first discovered on 6 December 1777 by Captain Geoffrey Parrish (“Parrish”) on a voyage commissioned by the King of Rydal. They were uninhabited. Parrish left behind the Rydalian flag and a stone carving asserting Rydalian sovereignty over the Islands.

Historical evidence shows that, between 1778 and 1799, the Islands were used by pirates, slave-ships and other seafarers. During this period, sailors from the Viceroyalty of Aspatria (“Aspatria”), a colony of the Kingdom of Plumbland (“Plumbland”) inhabited a fort and settlement named Salkeld on one of the islands. They all left Salkeld in 1799.

In September 1813, a Rydalian naval ship commanded by Admiral George Aikton (“Aikton”) was wrecked on one of the islands. He and his crew built a settlement named St. Bees. In May 1815, a storm-damaged Sodorian slave ship drifted into St. Bees’ harbour. Those on board were helped to shore and the slaves were freed in accordance with Rydalian law. All pledged allegiance to Queen Constance of Rydal.

By 1816, Aikton and his men had explored most of the archipelago. They cultivated the land and domesticated a wild equine species. They discovered an abandoned fort and settlement at Salkeld, containing only a flag of Plumbland. Settlers began living in the fort.

In June 1817, an Aspatrian ship landed at Salkeld. Rydalian sailors turned away the landing party.

In 1818, in a diplomatic note, the King of Plumbland protested Aikton's actions on the Islands. Upon learning of Aikton's survival, Queen Constance of Rydal ratified and adopted all of his actions and reasserted Rydal's sovereignty over the Islands.

In 1819, Rydal sent *HMS Braithwaite* to the Islands under the command of the newly-appointed Governor of the Islands, Vice-Admiral Arthur Wilkinson. Though some of the crew and some of Aikton's men returned to Rydal, the majority chose to remain on the Islands.

After a long war between Rydal and Plumbland, the Treaty of Great Corby was signed in 1821, by which Plumbland ceded any title it had over the Islands to Rydal.

In 1827, the newly-independent Republic of Aspatria was recognised by Rydal. Aspatria asserted that, upon independence, the territory of the former Viceroyalty, including the Islands, devolved to the new Republic. Rydal expressly rejected this claim.

Between 1845 and 1880, successive Rydalian governors established control over the entire archipelago. The population of the Islands grew steadily, supplemented by immigration. By 1899, the population of the Islands had grown to 7,054.

Between 1880 and 1910, Aspatria took no action in relation to the Islands and made no claims over them.

Political and economic development of the Islands

In 1903, Rydal established a consultative Assembly on the Islands to facilitate the expression of Islanders' views on day-to-day administrative matters. The Governor retained sole authority to act. Rydal maintained control over the defence and foreign relations of the Islands.

The Islands were given a constitution in 1947, which granted the Assembly control over day-to-day governance, subject to the approval of the Governor. Universal suffrage was guaranteed to all adult Islanders and elections were held for the Assembly.

Rydal has invested in and significantly developed local businesses and infrastructure on the Islands. An extensive telecommunications network has been installed and an airport built. Farming and fishing have been developed and the Islands are used as a harbour for Rydal's navy.

Duties are levied on all goods imported to the Islands from outside Rydal, including those from Aspatria, and foreign commercial activity on the Islands is limited.

Economic relations with Aspatria

Despite the disagreement over the Islands, Rydal enjoys good trade relations with Aspatria. In 1985, the Aspatria-Rydal Bilateral Investment Treaty ("BIT") was concluded in order to foster mutual investment for the economic benefit of both states.

The Rydalian Oil Company ("ROCO") has made significant investments in Aspatria through its shareholding in the A & L Exploration Corporation ("ALEC"), an Aspatrian oil company. ROCO's Aspatrian business is conducted through ALEC.

The bid for the Islands' oil

Oil was discovered in the Islands' basin in 1997. Rydal contracted with ROCO to explore and map these reserves.

In 2003, Aspatria granted MDR Ltd ("MDR"), an Aspatrian company, a licence to exploit the Islands' oil. The Rydalian Prime Minister, Agnes Abbott, strongly protested this blatant violation of Rydalian sovereignty. MDR did not extract any oil under the licence.

In December 2006, the Assembly invited bids to exploit the Islands' oil reserves. A number of conditions were attached to the bidding process. It was made clear that the decision would be made by a majority vote of the Assembly, with the subsequent assent of the Governor. MDR and ROCO submitted bids. Though both bids were economically attractive, the Assembly and the Governor decided that ROCO's bid was more beneficial to the Islands. After consultation with Prime Minister Abbott, the Governor approved ROCO's bid.

MDR was refused standing to challenge the decision in the Rydalian courts.

The seizure of ALEC's assets

After the acceptance of ROCO's bid, Aspatria filed criminal charges against ALEC for an alleged violation of the Aspatrian *Natural Resources Act*. By an order of the Aspatrian Administrative Court, all of ALEC's assets in Aspatria were seized. ALEC has pursued all administrative remedies in Aspatria. The criminal case against ALEC has been continuing for two years and is likely to take much longer, costing ALEC millions of dollars in forgone revenue. Rydal publicly protested against the seizure of ALEC's assets. MDR was not prosecuted.

The Islands' movement towards independence

In 1945, Rydal joined the United Nations ('UN'). The Islands were designated a non-self-governing territory under Chapter XI of the UN Charter. Rydal has conscientiously fulfilled its obligations under Article 73 of the Charter.

The UN Special Committee has always expressed concern for the interests of the Islanders. Rydal has committed to respect and facilitate the Islanders' wishes.

The discovery of oil around the Islands energised the Islanders Longing for Sovereignty and Autonomy (“ILSA”), a growing independence movement on the Islands. ILSA’s ultimate goal is independence, but it has expressed a desire to remain with Rydal in the meantime. In 2002 and 2006, ILSA members were elected to the Assembly in growing numbers.

Following the approval of ROCO’s bid, ILSA organised a number of rallies calling for the Islands’ independence. On 6 September 2008, the Assembly passed a resolution declaring that the Islanders had the right to determine their own future and calling for a plebiscite.

A plebiscite was held on 6 December 2008. The Islanders had the option to become independent, remain with Rydal or unify with Aspatria. Independence was favoured by 76% of the Islanders and 18% voted to remain part of Rydal. Only 6% chose unification with Aspatria. Rydal endorsed the plebiscite’s outcome and pledged full support in assisting the Islanders towards independence.

Aspatria denounced the plebiscite process from its inception and has sought to hinder the Islands’ movement towards independence.

SUMMARY OF PLEADINGS

Pleading A

Sovereignty over the Islands belongs to Rydal for three reasons.

First, Rydal acquired inchoate title through discovery which was perfected by occupation. The Islands were *res nullius* because Plumbland had not effectively occupied them. Rydal effectively occupied them for a period sufficient to create title.

Secondly, in the alternative, Aspatria derived no title *uti possidetis juris* from Plumbland because it was not the applicable law of the period. In any event, *uti possidetis juris* only applies where parties have expressly consented to its application. This has not occurred here.

Thirdly, in the alternative, Rydal has acquired title by acquisitive prescription. Acquisitive prescription is a customary norm and a general principle of municipal law. Irrespective of any determination of a critical date, the four elements of acquisitive prescription are satisfied by Rydal.

Rydal therefore has sovereignty over the Islands.

Pleading B

Rydal may lawfully take steps to give effect to the Islanders' independence for four reasons.

First, the right to self-determination is a well-established customary norm and may have the status of *jus cogens*.

Secondly, the right attaches to all non-self-governing territories. The Islands have been correctly classified as a non-self-governing territory, as they satisfy the criteria for classification. Therefore, the Islanders have a right to self-determination.

Thirdly, independence is a legitimate outcome of the exercise of self-determination and has been chosen by the Islanders in the plebiscite. Viability does not preclude independence and, in any case, the Islands have the potential to be a viable nation state.

Fourthly, the obligation to promote and facilitate the exercise of self-determination is an *erga omnes* obligation. Even if Rydal does not have sovereignty over the Islands, it must fulfill this obligation. Therefore, Rydal may lawfully take steps to give effect to the Islands' independence

Pleading C

Rydal's rejection of MDR's bid is not a violation of Article IV of the BIT.

First, there can be no breach of the national treatment standard because ROCO and MDR were not in like circumstances. In any case, MDR has not received treatment less favourable than ROCO because both companies were in a competitive bidding process and subject to the same criteria.

Secondly, any differential treatment of MDR was justified on rational grounds. ROCO's bid carried less risk and there were doubts about MDR's desire or ability to exploit the oil.

As a result, Rydal has not violated Article IV.

Pleading D

The rejection of MDR's bid is not a violation Article V of the BIT. The protections in Article V do not extend to MDR's bid for two reasons.

First, Article V applies only to ‘investments’. Given the distinction between ‘investors’ and ‘investments’, Article V does not extend to pre-admission activities. MDR’s bid is merely a pre-admission activity and is not protected by Article V.

Secondly, in the alternative, MDR’s bid does not have the ‘characteristics of an investment’ required by the definition of ‘investment’ in the BIT. As a result, the bid cannot come within the protection of Article V.

Alternatively, if MDR’s bid is an investment, Rydal has treated MDR in accordance with the customary standards in Article V.

Pleading E

Aspatria’s seizure of ALEC’s assets is a violation of Articles V and VI of the BIT. Rydal has standing to bring a claim for three reasons.

First, ALEC is a Rydalian national on the basis of effective nationality or substitution. This gives Rydal standing pursuant to Article XIII of the BIT

Secondly, if ALEC is not Rydalian, ROCO’s shareholding is an investment according to the BIT. This makes ROCO a Rydalian investor for the purposes of Article XIII.

Thirdly, there is no requirement for ALEC or ROCO to exhaust local remedies. Even if there is such a requirement, local remedies have been exhausted.

The seizure of ALEC’s assets is a direct expropriation by Aspatria. Alternatively, the seizure is an indirect expropriation of ALEC’s Aspatrian oil licence and ROCO’s shareholding because it was not a valid exercise of Aspatria’s police powers. Aspatria’s failure to pay compensation is a violation of Article VI.

Additionally, the seizure is a violation of Article V. Aspatria has not accorded fair and equitable treatment and full protection and security to ALEC or ROCO.

PLEADINGS

A. RYDAL HAS SOVEREIGNTY OVER THE WINDSCALE ISLANDS

Rydal has sovereignty over the Windscale Islands ('Islands') because: first, Rydal, and not Plumbland, acquired title by occupation; secondly, in the alternative, Aspatria could not derive title *uti possidetis juris* from Plumbland; and thirdly, in the alternative, Rydal has acquired title by acquisitive prescription.

I. RYDAL, AND NOT PLUMBLAND, ACQUIRED TITLE BY OCCUPATION

The annexation of the Islands by Rydal's Captain Parrish¹ created inchoate title which was perfected by occupation.² Occupation requires that: first, the Islands were *res nullius*; secondly, occupation was effective; and thirdly, occupation endured for a reasonable period.

1) The Islands were *res nullius*

The Islands were *res nullius* when settled by Rydalian in 1813³ because Plumbland had not effectively occupied them. Effective occupation requires the display of actual state authority and sovereign intent.⁴

¹ *Compromis*, 5 [C.].

² *Island of Palmas Case (Netherlands v. United States)* (1928), 2 R.I.A.A. 829, 869 [*Palmas*].

³ C.10.

⁴ *Case Concerning the Legal Status of Eastern Greenland (Denmark v. Norway)* (1933), P.C.I.J. (Ser. A/B) No. 53, 42 [*Eastern Greenland*]; *Minquiers and Ecrehos Case (France v. United Kingdom)* [1953] I.C.J. Rep. 47, 71 [*Minquiers*].

Plumbland did not display state authority because it did not establish an organisation capable of making its laws respected.⁵ This is evidenced by the absence of any exploration⁶ or inhabitation of the Islands, except for a fort at Salkeld.⁷ Additionally, Plumbland failed to extend requisite minimum protections to other states' interests.⁸ In particular, Plumbland took no action to protect other states' seafarers from pirates who used the Islands during this period.⁹ As piracy was an international crime, Plumbland had an obligation to take action against it.¹⁰

Sovereign intent requires acts of jurisdiction and local administration.¹¹ There is no evidence that Plumbland exercised jurisdiction or local administration over the Islands.

2) Rydal effectively occupied the Islands

Rydal displayed actual state authority and manifested sovereign intent to occupy the Islands.

⁵ *Clipperton Island Arbitration (France v. Mexico)* (1931), 2 R.I.A.A. 1105, 1110 [*Clipperton*].

⁶ C.8.

⁷ C.6.

⁸ *Palmas*, n2, 839.

⁹ C.6.

¹⁰ C.8; A.P. Higgins & C.J. Colombos, *International Law of the Sea* (New York: Longmans, Green & Co, 1943), 283.

¹¹ *Eastern Greenland*, n4, 65.

(a) Admiral Aikton's actions are attributable to Rydal

The acts of public officials in their official capacity are attributable to a state.¹² Admiral Aikton ('Aikton'), an official of Rydal, acted in his official capacity in establishing a settlement,¹³ governing the survivors of the shipwreck,¹⁴ and adopting the laws of Rydal.¹⁵

Alternatively, private acts when subsequently ratified are attributable to the state.¹⁶ Unequivocal adoption is given retroactive effect.¹⁷ Rydal's ratification¹⁸ transformed Aikton's actions retrospectively into those of Rydal.

(b) Rydal displayed actual state authority

The exploration¹⁹ and settlement of the Islands,²⁰ domestication of livestock²¹ and military protection of the Islands²² indicate Rydal's establishment of an organisation capable of making

¹² International Law Commission, *Report on the Work of its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), art.9 [*Draft Articles on State Responsibility*]; R. Jennings & A. Watts, eds., *Oppenheim's International Law (Vol.1)*, 9th ed. (London: Longman, 1996), 138 [*Oppenheim*].

¹³ C.10.

¹⁴ C.10.

¹⁵ C.12.

¹⁶ *Draft Articles on States Responsibility*, n12, art.11; *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, [1999] I.C.J. Rep. 1045, 1105 [*Kasikili*]; *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*, [1952] I.C.J. Rep. 116, 184 [*Fisheries*]; I. Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), 138 [*Brownlie*].

¹⁷ *Affaire relative à la concession des phares de l'Empire ottoman*, (1956), 12 R.I.A.A. 155, 197-8; M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (New York: Greenwood Publishing, 1929), 286.

¹⁸ C.15.

its laws respected. Rydal extended minimum protections to another state by assisting those onboard *The Unthank*.²³

(c) Rydal manifested sovereign intent

Aikton manifested acts of jurisdiction and local administration²⁴ by adopting Rydalian laws, freeing slaves, and swearing non-nationals to the crown.²⁵ These acts manifest sovereign intent.

3) Occupation was peaceful and uninterrupted for a reasonable period

Occupation must remain unchallenged for a period of time, such that any other state claiming sovereignty has a reasonable opportunity to discover the occupation.²⁶

A protest will only preserve the pre-existing title of a protesting state.²⁷ As Aspatria never effectively occupied the Islands, it had no title upon which a protest could be based.²⁸ Therefore, Aspatria's protests²⁹ could not affect Rydal's occupation.³⁰

¹⁹ C.13.

²⁰ C.14.

²¹ C.13.

²² C.12.

²³ C.12.

²⁴ *Eastern Greenland*, n4, 65.

²⁵ C.12.

²⁶ *Palmas*, n2, 867.

²⁷ E. Lauterpacht, S. Schwebel et al., *Joint Legal Opinion on Belize*, online: Global Arbitration Review <http://www.globalarbitrationreview.com/_files/legal-opinion_-_Guatemala_Belize_2001.pdf> 158 [*Belize*].

Rydal's occupation of the Islands remained uninterrupted until the present day. Its occupation remained peaceful from 1813 until the attempted Aspatrian invasion in 1826.³¹

This 13 year period was sufficient for any other state claiming sovereignty to become aware of Rydal's occupation.³²

II. ASPATRIA CANNOT DERIVE TITLE *UTI POSSIDETIS JURIS* FROM PLUMBLAND

Even if Plumbland obtained title by occupation, Plumbland ceded title to the Islands to Rydal in the Treaty of Great Corby of 1821.³³ Aspatria can only have acquired title prior to this treaty.

Uti possidetis juris prescribes that borders of new states follow the administrative boundaries of the antecedent colonial power.³⁴ However, the prevailing law of the nineteenth century was *uti possidetis defacto*,³⁵ as evidenced in the breakup of the Ottoman and Austro-Hungarian empires.³⁶ *Uti possidetis defacto* restricted the borders of new states to territory they

²⁸ G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54" (1954) 31 B.Y.I.L. 1, 167; I.C. MacGibbon "Scope of Acquiescence in International Law" (1954) 31 B.Y.I.L. 143, 167 [MacGibbon].

²⁹ C.14, C.15.

³⁰ *Eastern Greenland*, n4, 42.

³¹ C.22.

³² *Clipperton*, n5, 1110.

³³ C.20.

³⁴ *Case Concerning the Frontier Dispute (Burkina-Faso v. Mali)*, [1986] I.C.J. Rep. 554, 565.

³⁵ E. Hasani, "Uti possidetis juris: from Rome to Kosovo" (2003) 27 Fletcher F. World Aff. 85, 87 [Hasani].

³⁶ Hasani, n35, 87.

effectively controlled. Aspatria could not derive title to the Islands *uti possidetis defacto*, as it had no effective control over them.

Aspatria's claims in 1819 must be assessed in light of the law of that period; *uti possidetis juris* cannot apply retrospectively.³⁷ In the nineteenth century, *uti possidetis juris* was only applied to determine the boundaries between states where they specifically consented to its operation.³⁸ There being no such agreement here, *uti possidetis de facto* should be applied.

III. RYDAL HAS TITLE BY ACQUISITIVE PRESCRIPTION

Even if Aspatria derived title *uti possidetis juris* from Plumbland, it has since passed to Rydal through acquisitive prescription. Prescription arises where possession is initially wrongful, but the legal title holder fails to assert their rights.³⁹

1) Acquisitive prescription is a valid mode of acquiring territory

This Court has on several occasions held that title can be lost by long and uninterrupted possession by another.⁴⁰ It is a norm of customary international law ("custom"),⁴¹ supported by

³⁷ *Palmas*, n2, 845; *Case Concerning the Territorial Dispute (Libya v. Chad)*, [1994] I.C.J. Rep. 6, 89 (Separate Opinion of Judge Ajibola) [*Territorial Dispute*]; *Belize*, n27, 60-61.

³⁸ *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)* (1989), 20 R.I.A.A. 119, 143, *Dubai-Sharjah Border Arbitration (Dubai v. Sharjah)* (1993), 91 I.L.R 543, 579.

³⁹ D. H. N. Johnson, "Acquisitive Prescription in International Law" (1950) 27 B.Y.I.L. 332, 337 [Johnson].

⁴⁰ *Fisheries*, n16, 139; *Kasikili*, n16, 1105; *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment of 23 May 2008, I.C.J. General List No. 130, ¶274-7 [*Pedra Branca*].

⁴¹ *Kasikili*, n16, 1103; *Palmas*, n2, 839, 846; *Pedra Branca*, n40, ¶274-277.

constant and “virtually uniform”⁴² state practice and widespread⁴³ *opinio juris*.⁴⁴ It is also a general principle of law, prevalent in all legal systems,⁴⁵ in the doctrines of adverse possession,⁴⁶ *seisin*,⁴⁷ and *uscapio*.⁴⁸

2) Determination of a critical date

Where acquisitive prescription is asserted, the Court has discretion⁴⁹ to determine a critical date after which no evidence can be adduced,⁵⁰ as it may be self-serving.⁵¹

The critical date may differ for different modes of territorial acquisition.⁵² The legal dispute in relation to acquisitive prescription crystallised at the date of the Special Agreement.⁵³

⁴² *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)*, [1969] I.C.J. Rep. 3, 43.

⁴³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, [1986] I.C.J. Rep. 14, 99-100 [*Nicaragua*].

⁴⁴ *Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela* (2007), 28 R.I.A.A. 331, 335 [*British Guiana*]; *Case Concerning the Legal Status of Eastern Greenland (Denmark v. Norway)*, "Memorial of Denmark" (1933) Ser. C No. 52, 103.

⁴⁵ *Statute of the International Court of Justice*, art.38(1)(c) [*I.C.J. Statute*]; P.A. Verykios, *La Prescription en droit international public* (Paris: A. Pedone, 1934), 25 [Verykios].

⁴⁶ R. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), 21; A.G. Roche, *The Minquiers and Ecrehos Case* (Geneva: Droz, 1959), 35.

⁴⁷ J. Fischer Williams, "Sovereignty, Seisin, and the League" (1926) 3 B.Y.I.L. 24, 32.

⁴⁸ Johnson, n39, 334.

⁴⁹ *Argentine-Chile Frontier Case (Argentina v. Chile)* (1966), 16 R.I.A.A. 109, 167 [*Argentine-Chile*].

⁵⁰ *Minquiers*, n4, 59.

⁵¹ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, [2002] I.C.J. Rep. 554, 682 [*Pulau Ligitan*].

Should the critical date be earlier, subsequent Rydalian acts should be considered because Rydal's activities on the Islands commenced before any critical date, have continued without interruption since,⁵⁴ and were not carried out to improve its legal position⁵⁵ but rather because it viewed its activities as confirmation of already existing sovereignty.⁵⁶

3) The elements of acquisitive prescription are satisfied

To acquire title by prescription, possession must: first, be exercised *à titre de souverain*; secondly, be peaceful and uninterrupted; thirdly, persist for a reasonable period; and fourthly, be public.⁵⁷ Rydal's occupation and administration was public, according to the state practice of the period.⁵⁸

⁵² *Territorial Dispute*, n37, 91 (Separate Opinion of Judge Ajibola); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, I.C.J. General List No.120 ¶123 [*Caribbean Sea*].

⁵³ *Argentine-Chile*, n49, 166-7; *Caribbean Sea*, n52, ¶129.

⁵⁴ *Minquiers*, n4, 59-60; *Pulau Ligitan*, n51, 682; L.F.E. Goldie, "Critical Date" (1963) 12 I.C.L.Q. 1251, 1254.

⁵⁵ *Pulau Ligitan*, n51, 682.

⁵⁶ *Argentine-Chile*, n49, 166.

⁵⁷ *Kasikili*, n16, 1103; Johnson, n39, 344-347.

⁵⁸ *Palmas*, n2, 868.

(a) Possession was à titre de souverain

Acts *à titre de souverain* are acts performed as a function of state authority.⁵⁹ By settling and militarily defending the Islands,⁶⁰ freeing slaves and swearing non-nationals to allegiance,⁶¹ Aikton and subsequent Rydalian governors exercised state authority.

(b) Possession was peaceful and uninterrupted

Possession is peaceful when it is unchallenged by other states.⁶² A state must do everything reasonable to protest against encroachment.⁶³ Absence of protest may amount to tacit acquiescence in a rival claim to sovereignty.⁶⁴

(i) *Aspatria did not protest for 30 years between 1880 and 1910*

In the *Passamaquoddy Bay Award*, silence for 23 years was sufficient for acquiescence.⁶⁵ Similarly, Judge Ajibola, in his Separate Opinion in the *Territorial Dispute*,⁶⁶ held that silence for 31 years constituted acquiescence.

⁵⁹ *Kasikili*, n16, 1104.

⁶⁰ C.14; C.22.

⁶¹ C.12.

⁶² *Palmas*, n2, 867; *Pedra Branca*, n40, ¶66.

⁶³ *Chamizal Arbitration (United States v. Mexico)* (1911), 11 R.I.A.A. 309, 328 [*Chamizal*].

⁶⁴ *Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India v. Pakistan)* (1968), 17 R.I.A.A. 1, 75; *Pedra Branca*, n40, ¶121; *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, [1962] I.C.J. Rep. 6, 23.

⁶⁵ *MacGibbon*, n28, 162.

⁶⁶ *Territorial Dispute*, n37, 82 (Separate Opinion of Judge Ajibola).

Aspatria had to protest to preserve any title it had. Aspatria's inaction for 30 years amounts to tacit acquiescence in Rydal's sovereignty.

(ii) *Alternatively, Aspatria did not protest effectively between 1919 and 2009*

Following the establishment of the Permanent Court of International Justice in 1919, diplomatic protest was no longer the sole means of asserting sovereignty.⁶⁷ In the *Chamizal Arbitration*, diplomatic protests by Mexico were insufficient once there was a competent international body before which it could bring its claim.⁶⁸

By making no attempt at judicial settlement, Aspatria failed to take all reasonable steps to resolve the dispute.⁶⁹ Its acquiescence should be presumed, even though paper protests were occasionally made.⁷⁰

(c) Possession persisted for a reasonable period

Possession must persist for a period such that there develops a "general conviction that the present condition of things is in conformity with international order".⁷¹ Various courts and tribunals, including this Court, have held 64 years,⁷² 60 years,⁷³ and 50 years⁷⁴ to be reasonable

⁶⁷ Verykios, n45, 101; Johnson, n39, 341-2.

⁶⁸ *Chamizal*, n63, 328.

⁶⁹ *Chamizal*, n63, 329.

⁷⁰ C.33,36,38; Verykios, n45, 101; Johnson, n39, 341-2.

⁷¹ *Oppenheim*, n12, 707.

⁷² *Fisheries*, n16.

⁷³ *Territorial Dispute*, n37, 81 (Separate Opinion of Judge Ajibola).

periods. Rydal's possession of the Islands has persisted for 90 years since 1919, when Aspatrian protests ceased to be effective. Accordingly, possession has persisted for a reasonable period.

⁷⁴ *British Guiana*, n44.

B. THE ISLANDERS ARE ENTITLED TO INDEPENDENCE AS AN EXERCISE OF THEIR RIGHT TO SELF-DETERMINATION

Rydal's actions were lawful under international law because: first, there is a legal right to self-determination; secondly, the Islanders are entitled to this right; and thirdly, this right includes the choice of independence. Even if Rydal does not have sovereignty over the Islands, its actions are lawful because of the *erga omnes* obligation to facilitate self-determination.

I. SELF-DETERMINATION IS A LEGAL RIGHT UNDER INTERNATIONAL LAW

Self-determination is the right of peoples to “freely determine their political status”⁷⁵ and includes the option to become an independent state or freely associate or integrate with an independent state.⁷⁶

State practice and *opinio juris* since 1945 recognise a customary norm of self-determination.⁷⁷ This state practice and *opinio juris* is evidenced in the UN Charter,⁷⁸ the

⁷⁵ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514(XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 (1960) 66, art.2 [*Colonial Declaration*].

⁷⁶ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625(XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8082 (1970) 121, 124 [*Friendly Relations Declaration*].

⁷⁷ J. Crawford, *The Creation of States in International Law*, 2d ed. (Oxford: Clarendon Press, 2006) 108-121 [Crawford]; S. Riga, *The Evolution of the Right to Self-Determination* (Leiden: A.W.Sijthoff, 1973); A. Cassese, *Self-Determination of Peoples* (Cambridge: Cambridge University Press, 1995).

⁷⁸ *UN Charter*, arts.1(2), 55, 73(b), 76(b).

Security Council's work relating to non-self-governing territories,⁷⁹ and the General Assembly's recognition of self-determination as a fundamental human right.⁸⁰ The right is also incorporated in the *International Covenant on Civil and Political Rights*⁸¹ and the *International Covenant on Economic, Social and Cultural Rights*,⁸² to which both Rydal and Aspatria are party.⁸³ Further, this Court has recognised the customary nature of the right to self-determination.⁸⁴ The right is so well-established that many eminent publicists consider it to be a *jus cogens* norm.⁸⁵

A number of General Assembly Resolutions⁸⁶ on self-determination reflect binding customary norms, as they intend to declare law and were adopted by genuine consensus.⁸⁷ They

⁷⁹ *Question Relating to Angola*, SC Res. 163, UN SCOR, 16th Sess., Supp. April-June, UN Doc. S/4835 (1961), 7.

⁸⁰ *Draft International Covenant on Human Rights and Measures of Implementation*, GA Res. 421(V), UN GAOR, 5th Sess., Supp. No. 20, UN Doc. A/1775 (1950) 42, 43.

⁸¹ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 [I.C.C.P.R.].

⁸² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 [I.C.E.S.C.R.].

⁸³ C.69.

⁸⁴ *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, [1971] I.C.J. Rep. 16, 31 [Namibia]; *Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12, 31-33 [Western Sahara]; *Case concerning East Timor (Portugal v. Australia)*, [1995] I.C.J. Rep. 90, 102 [East Timor].

⁸⁵ Brownlie, n16, 511-512; *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, [1970] I.C.J. Rep. 3, 304 (Separate Opinion of Judge Ammoun) [Barcelona Traction].

⁸⁶ *Friendly Relations Declaration*, n76; *Colonial Declaration*, n75; *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, GA Res. 1541(XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 (1960) 29 [Res.1541].

clarify the scope and application of self-determination, as their widespread adoption is indicative of state practice and *opinio juris*.⁸⁸

II. THE ISLANDERS ARE ENTITLED TO THE RIGHT OF SELF-DETERMINATION

Self-determination is a recognised right for peoples in non-self-governing territories.⁸⁹ The Islands have been recognised as a non-self-governing territory by Rydal⁹⁰ and the UN Special Committee.⁹¹ While self-determination has been denied to peoples on rare occasions, the exceptional circumstances in which this has occurred do not apply to the Islands. The Islanders' right to self-determination exists even if Aspatria has sovereignty over the Islands.

1) The Islands have been correctly classified as a Chapter XI non-self-governing territory

The Islands are *prima facie* a non-self-governing territory because they are geographically separate from Rydal and culturally distinct.⁹² The Islands also satisfy the requirements of Principle V of Resolution 1541,⁹³ which further supports their classification as a non-self-governing territory.

⁸⁷ B. Sloan, "General Assembly Resolutions Revisited" (1987) 58 B.Y.I.L. 39, 93; *Fisheries Jurisdiction Case (Second Phase) (United Kingdom v. Iceland)*, [1974] I.C.J. Rep. 3, 162 (Dissenting Opinion of Judge Petren).

⁸⁸ *Nicaragua*, n43, 101.

⁸⁹ *UN Charter*, Ch. XI; *Namibia*, n84, 31.

⁹⁰ C.34.

⁹¹ C.37; C.38.

⁹² Res.1541, n86, Annex Principle IV.

⁹³ Res.1541, n86.

(a) The Islands are geographically separate

The Islands are approximately 7,500 miles away from Rydal and in a different hemisphere.⁹⁴

(b) The Islands are culturally distinct

The existence and increasing popularity of the political group “Islanders Longing for Sovereignty and Autonomy” indicates that the people identify themselves as “Islanders” rather than Rydalians.⁹⁵ Self-identification is indicative in identifying cultural distinctiveness.⁹⁶ The original Rydalians and Sodorians have intermarried and produced offspring and there has been immigration to the Islands from other states.⁹⁷ Farming and fishing were developed by early settlers,⁹⁸ indicating traditions unique to the Islands. After almost two centuries of geographic isolation and separate governance the Islanders cannot be considered culturally homogeneous with Rydal.

(c) The Islands satisfy Principle V of Resolution 1541

According to Principle V, the political status of the Islands can support their classification as a non-self-governing territory.⁹⁹ Rydal has continued to assist with the governance of the Islands,

⁹⁴ C.4.

⁹⁵ C.43.

⁹⁶ H. Hannum, “Rethinking Self-Determination” (1993) 34 V.J.I.L. 1, 35 [Hannum]; *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 28 June 1989, 1650 U.N.T.S. 383, art.1(2).

⁹⁷ C.28.

⁹⁸ C.28.

⁹⁹ Res.1541, n86, 29.

but as a Rydalian Dependent Territory, the population has no right to vote in Rydalian elections.¹⁰⁰ Historically, the Islands have relied on political assistance from Rydal. Rydal wishes to rectify this by supporting and facilitating the Islander's exercise of the right to external self-determination, in accordance with the Islanders' wishes.

2) The exceptional circumstances in which self-determination has been denied do not apply to the Islands

The Islands are not analogous to the exceptional cases of the Falkland Islands and Gibraltar, where self-determination has been denied.¹⁰¹ In those cases, the denial of the right was linked to the colonial disruption of earlier inhabitants of the territory.¹⁰² State practice illustrates that islands of settlers without an indigenous population, such as the Pitcairn Islands, can be classified as non-self-governing territories.¹⁰³

¹⁰⁰ C.29; *Clarifications*, 7.

¹⁰¹ *Question of Gibraltar*, GA Res. 2353(XXII) UN GAOR, 22d Sess., Supp. No. 16, UN Doc. A/6716 (1967) 53; *Question of the Falkland Islands (Malvinas)*, GA Res. 2065(XX) UN GAOR, 10th Sess., Supp. No. 14, UN Doc. A/6014 (1965) 57.

¹⁰² T. Franck & P. Hoffman, "The Right of Self-Determination in Very Small Places" (1975) 8 N.Y.U.J.I.L.P. 332, 379-384; *Western Sahara*, n84, 79-81.

¹⁰³ *Non-Self-Governing Territories Listed by General Assembly in 2002*, online: United Nations <<http://www.un.org/Depts/dpi/decolonization/trust3.htm>>.

3) The right can be exercised even if Aspatria has sovereignty

(a) Territorial integrity does not prevail over self-determination

Although a state's territorial integrity is protected by international law,¹⁰⁴ the right of self-determination cannot be overridden by the competing territorial claims of third states.¹⁰⁵

If Aspatria has sovereignty over the Islands, it cannot rely on territorial integrity to deny the Islanders' right to self-determination.

(b) No "colonial enclave exception" applies

Crawford¹⁰⁶ has argued for a "colonial enclave" exception to the right to self-determination.

However, no such exception has been recognised as forming part of customary law. Accordingly, it should not be applied to the Islands. In any case, the exception formulated by Crawford only applies to territories that are "ethnically and economically...derivative of"¹⁰⁷ the sovereign state.

The Islands are not ethnically Aspatrian,¹⁰⁸ and have never been economically derivative of Aspatria. All Aspatrian settlers left the territory after only twenty years of settlement.¹⁰⁹ This does not meet the "limited circumstances"¹¹⁰ in which the exception is said to apply.

¹⁰⁴ *Friendly Relations Declaration*, n76, Annex Principle 5(7).

¹⁰⁵ *Western Sahara*, n84, 36.

¹⁰⁶ Crawford, n77, 637-38.

¹⁰⁷ Crawford, n77, 647.

¹⁰⁸ Memorial, B(II)(1)(b).

¹⁰⁹ C.7.

¹¹⁰ Crawford, n77, 646.

III. THE ISLANDERS ARE ENTITLED TO INDEPENDENCE

1) Independence is a legitimate outcome of self-determination

“Emergence as a sovereign independent state”¹¹¹ is an option for non-self-governing territories that have exercised the right of self-determination. When drafting the UN Charter, delegates made it clear that the stipulated objective of “self-government” for non-self-governing territories did not exclude independence.¹¹² A majority of 76% in a plebiscite with 93% participation¹¹³ reflects the “freely expressed will”¹¹⁴ of the Islanders to become a sovereign independent state.

2) Viability does not impact the Islands’ right to independence

Viability has been rejected as a means of denying the right to independence of a non-self-governing territory.¹¹⁵ In any case, the Islands have the potential to be a viable nation state.

The Islands have a functioning political system¹¹⁶ and infrastructure, including an airport and telephone and radio communications.¹¹⁷ The sizable oil reserves¹¹⁸ are sufficient to secure

¹¹¹ *Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government*, GA Res. 742(VIII), UN GAOR, 8th Sess., Supp. No. 17, UN Doc. A/2630 (1953) 21, art.6; Res.1541, n86, Annex Principle VI.

¹¹² R. Russell & J. Muther, *A History of the United Nations Charter* (Washington: Brookings Institution, 1958), 813-818.

¹¹³ C.63.

¹¹⁴ Res.1541, n86, principle VII; *Western Sahara*, n84, 21, 36.

¹¹⁵ *Colonial Declaration*, n75, art.3; Crawford, n77, 634-35; O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (Hague: M.Nijhoff, 1966), 170; UNITAR, *Small States and Territories: Status and Problems* (New York: Arno Press, 1971), 22-23.

the economic future of the Islands. Further, similarly sized states, such as Tuvalu, have become independent and have been accepted as members of the United Nations.¹¹⁹

IV. RYDAL MAY LEGALLY ASSIST WITH THE ISLANDERS' INDEPENDENCE EVEN IF RYDAL DOES NOT HOLD SOVEREIGNTY OVER THE ISLANDS

A legitimate claim to sovereignty by Aspatria does not interfere with the Islanders' right to self-determination. Territories may be classified as non-self-governing, and therefore be entitled to independence, without the consent of the sovereign state.¹²⁰ Even if Rydal does not have sovereignty over the Islands, it can assist with the Islanders' independence.

1) Rydal has obligations as the administering state

As the administering state, Rydal has an obligation under article 73 of the UN Charter to “develop self-government”¹²¹ on the Islands and “to take due account of the political aspirations of the [Islanders]”.¹²² As a result, Rydal may lawfully take steps to assist the Islanders to achieve independence.

¹¹⁶ C.35.

¹¹⁷ C.32.

¹¹⁸ C.42.

¹¹⁹ Crawford, n77, 185.

¹²⁰ Hannum, n96, 36.

¹²¹ *UN Charter*, art.73(b).

¹²² *UN Charter*, art.73(b).

2) Additionally, there is an *erga omnes* obligation to promote self-determination

The obligation to facilitate and respect self-determination is an *erga omnes* obligation,¹²³ binding on all states.¹²⁴ “Every State has the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of peoples”.¹²⁵ Regardless of whether it has sovereignty over the Islands, Rydal may lawfully take steps to facilitate the Islanders’ independence, as it has an obligation to promote the self-determination of the Islands. By committing to respect and facilitate the Islanders’ desire for independence, as expressed in the plebiscite,¹²⁶ Rydal has fulfilled its international obligations, and has not acted unlawfully.

¹²³ *East Timor*, n84, 102.

¹²⁴ *Barcelona Traction*, n85, 32.

¹²⁵ *Friendly Relations Declaration*, n76, 123-124.

¹²⁶ C.64.

C. THE NON-ADMISSION OF MDR’S BID DID NOT VIOLATE ARTICLE IV OF THE BIT

The Aspatria-Rydal Treaty Concerning the Encouragement and Reciprocal Protection of Investments (“BIT”) must be interpreted in good faith according to the ordinary meaning of its terms in their context and in light of its object and purpose.¹²⁷ The preamble of the BIT establishes that its object and purpose is the protection and promotion of investments. The emphasis on economic benefit and prosperity indicates a desire to preserve control over admission of investments, particularly those that concern natural resources.¹²⁸

I. RYDAL HAS AFFORDED MDR TREATMENT NO LESS FAVOURABLE THAN THAT IT ACCORDS, IN LIKE CIRCUMSTANCES, TO ITS OWN INVESTORS (“NATIONAL TREATMENT”)

The purpose of Article IV is to prevent discrimination on the basis of nationality.¹²⁹

The terms “less favourable” and “like circumstances” are not defined in the BIT.

Reference can be made to international jurisprudence interpreting analogous provisions.¹³⁰

¹²⁷ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art.31 [V.C.L.T.].

¹²⁸ *Permanent Sovereignty Over Natural Resources*, GA Res. 1803(XVII), UN GAOR, 17th Sess., UN Doc. A/5217 (1962) [Res.1803].

¹²⁹ *Pope & Talbot, Inc. v. Canada (Merits of Phase 2)* (2001), 122 I.L.R. 352, 373 (NAFTA) [*Pope & Talbot II*].

¹³⁰ V.C.L.T., n127, art.31(3)(c); *I.C.J. Statute*, n45, art.38(1)(d).

The decisions of international arbitral tribunals, which have been referred to by this Court, are subsidiary sources of international law,¹³¹ and may hold evidentiary value outside the scope of the particular treaty they are interpreting.¹³²

The North American Free Trade Agreement¹³³ and several bilateral investment treaties share the aims of the BIT and contain analogous national treatment provisions. World Trade Organisation (“WTO”) jurisprudence is of limited relevance due to textual discrepancies and the differing aims of WTO instruments.¹³⁴

1) There is no breach of national treatment

(a) MDR and ROCO were not in like circumstances

The national treatment standard can only be breached where investors are in like circumstances.¹³⁵ In a bid process, like circumstances cannot exist where there is an objective difference between bids.¹³⁶

¹³¹ *I.C.J. Statute*, n45, art.38(1)(d); Brownlie, n16, 19.

¹³² *Nottebohm (Second Phase) (Liechtenstein v. Guatemala)*, [1955] I.C.J. Rep. 4, 22 [Nottebohm]; M. Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 1996), 35.

¹³³ *North American Free Trade Agreement*, 17 December 1992, Can. T.S. 1994 No. 2, art.1102(1).

¹³⁴ *Methanex Corporation v. United States* (2005), 44 I.L.M. 1345, 1447-1448 (NAFTA).

¹³⁵ C. Annex 1 (BIT art.IV).

¹³⁶ *Consortium R.F.C.C. v. Morocco* (2003), Case No. ARB/00/6, Award, ¶75 (ICSID) [R.F.C.C.]; *Parkerings-Compagniet AS v. Lithuania* (2007), Case No. ARB/05/8, Award, ¶396 (ICSID).

A difference in risk is an objective difference between bids.¹³⁷ The Rydalian Oil Company's ("ROCO") bid carried less risk, as ROCO's exploration and mapping of the oil reserves in the Islands' Exclusive Economic Zone ("EEZ")¹³⁸ gave it prior experience and detailed knowledge of the reserves.

(b) Alternatively, MDR has not received "less favourable" treatment than ROCO
"Less favourable treatment" is treatment which discriminates against foreign investors as compared to domestic investors.¹³⁹ MDR Ltd ("MDR") has not received less favourable treatment than ROCO. Both companies were in a competitive bidding process where the ultimate decision was discretionary. They were subject to the same criteria and treated in the same manner throughout the bid process.

2) Further, and in the alternative, any differential treatment was justified

The existence of rational and non-discriminatory grounds for differentiation justifies any differential treatment.¹⁴⁰

Rydal had rational grounds for differential treatment, as it was controlling the exploitation of a natural resource. Sovereignty over natural resources is a well-recognised

¹³⁷ *R.F.C.C.*, n136, ¶75.

¹³⁸ C.42.

¹³⁹ R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), 178 [Dolzer & Schreuer]; *Pope & Talbot II*, n129, 373.

¹⁴⁰ *S.D. Myers, Inc v. Canada* (2000), 40 I.L.M. 1408, 1437 (NAFTA) [*S.D.Myers*]; *Pope & Talbot II*, n129, 373.

principle at international law.¹⁴¹ In reliance on this sovereign right, Rydal had legitimate reasons to award the licence to ROCO. First, as submitted,¹⁴² ROCO had prior experience with the oil reserves. Secondly, Monte de Rosa had expressed his intent to exploit the oil for the benefit of Aspatria, and not the Islands.¹⁴³ This professed patriotism is inconsistent with the basis of the project, which is to support the self-determination claims of the Islanders. Thirdly, there could be doubts about MDR's ability or desire to exploit the oil. It held what it believed to be a valid Aspatrian licence, but took no steps to exploit the oil under that licence.¹⁴⁴ Therefore, Rydal was justified in granting the licence to ROCO.¹⁴⁵

The rejection of MDR's bid was the least restrictive measure available to Rydal to achieve the above objectives¹⁴⁶ and was reasonable in the circumstances.¹⁴⁷ Rydal did not discriminate against MDR on the basis of nationality. Rather, it was concerned with MDR's experience and intentions. Rydal allowed MDR to submit a bid and gave it full consideration.

¹⁴¹ *I.C.C.P.R.*, n81, art.1(2); *I.C.E.S.C.R.*, n82, art.1(2); Res.1803, n128.

¹⁴² Memorial, C(I)(1)(a).

¹⁴³ C.46.

¹⁴⁴ C.48.

¹⁴⁵ *S.D. Myers*, n140, 1437.

¹⁴⁶ *S.D. Myers*, n140, 1437; *Pope & Talbot II*, n129, 373.

¹⁴⁷ *GAMI Investments, Inc. v. Mexico* (2004), 44 I.L.M. 545, 564 (NAFTA) [*GAMI*].

**D. THE NON-ADMISSION OF MDR'S BID DID NOT VIOLATE ARTICLE V
OF THE BIT**

I. ARTICLE V DOES NOT EXTEND TO PRE-ADMISSION ACTIVITIES

International law imposes no obligation to admit investments.¹⁴⁸ In refusing to admit MDR's bid, Rydal was exercising its sovereign right to control the admission of foreign investments. This right has not been curtailed by Article V.

Article V applies only to investments. The BIT distinguishes "investors" from "investments", prescribing certain rights only to investors. Future investments have been intentionally excluded from the definition of investment. The inclusion of such investments would affect the plain meaning of the treaty. The exclusion of future investments prevents foreign investments from receiving treatment potentially better than that afforded to domestic investments at the admission stage.¹⁴⁹

II. FURTHER, AND IN THE ALTERNATIVE, MDR'S BID IS NOT AN INVESTMENT UNDER THE BIT

MDR's bid does not fall into any of the listed categories in the definition of investment. Therefore, the bid must be an asset of MDR which has the "characteristics of an investment".¹⁵⁰

¹⁴⁸ Res.1803, n128; Dolzer & Schreuer, n139, 79.

¹⁴⁹ Dolzer & Schreuer, n139, 178.

¹⁵⁰ C.Annex 1.

1) There are five “characteristics of an investment” that must be satisfied

The three illustrative characteristics in the definition are non-exhaustive. Tribunals have also considered long-term duration and contribution to the economic development of the host state as typical characteristics of an investment.¹⁵¹ In light of the object and purpose of the BIT,¹⁵² these additional requirements are of significance. Short term projects that do not contribute to the host state’s development will not satisfy these objectives. All five characteristics must be satisfied for an investment to exist.¹⁵³

2) MDR’s bid does not have the “characteristics of an investment”

(a) There has been no significant commitment of capital

Tribunals have repeatedly rejected attempts to characterise pre-investment costs during a bid as a commitment of capital.¹⁵⁴ MDR has merely provided documents in association with its bid application and made an offer concerning an up-front payment.

¹⁵¹ *Fedax N.V. v. Venezuela* (1998), 37 I.L.M. 1378, 1387 (ICSID); *Salini Costruttori S.P.A v. Morocco* (2003) 42 I.L.M. 609, 622 (ICSID).

¹⁵² Memorial, C.

¹⁵³ *Joy Mining Machinery Ltd. v. Egypt* (2004), 19 ICSID Rev.—F.I.L.J. 486, 500 (ICSID) [*Joy Mining*]; *Patrick Mitchell v. Democratic Republic of Congo* (2006), Case No. ARB/99/7, Decision on Application for Annulment of Award, ¶27 (ICSID); *Malaysian Historical Salvors v. Malaysia* (2007), Case No. ARB/05/10, Award on Jurisdiction, ¶106 (ICSID).

¹⁵⁴ *Mihaly International Corporation v. Sri Lanka* (2002), 41 I.L.M. 867, 877 (ICSID) [*Mihaly*]; *F-W Oil Interests Inc. v. Trinidad and Tobago* (2006), Case No. ARB/01/14, Award, ¶184 (ICSID) [*F-W Oil*]; *William Nagel v. Czech Republic* (2004), 1 Stockholm Arb. Rep. 141, 164-165 (ICSID) [*Nagel*].

(b) There is no reasonable expectation of profit or gain

An expectation of profit or gain must have financial value.¹⁵⁵ Financial value must be real rather than potential; disappointed expectations are not enough.¹⁵⁶ MDR's mere prospect of obtaining the right to exploit the oil reserves is not a legitimate expectation with financial value.

The only legitimate expectation MDR could have held was the expectation to be considered. This is not an expectation of profit or gain; further, Rydal did consider the bid.

(c) There is no assumption of risk

The risk assumed by MDR that it would not be awarded the final right to exploit the oil reserves was an ordinary commercial risk and not the type of long term risk generally associated with investments.¹⁵⁷

(d) The bid was not of sufficient duration

This element requires a long-term commitment of capital by the investor.¹⁵⁸ MDR only made a one-off transaction in preparing documentation for its application, and an offer to make an up-front payment if its bid was accepted.

¹⁵⁵ *Nagel*, n154, 164.

¹⁵⁶ *Nagel*, n154, 164.

¹⁵⁷ *Joy Mining*, n153, 501; *Bayindir v. Pakistan* (2005), Case No. ARB/03/09, Decision on Jurisdiction, ¶136 (ICSID).

¹⁵⁸ *Joy Mining*, n153, 500; *Mihaly*, n154, 875; *F-W Oil*, n154, ¶184; *Nagel*, n154, 164-165.

(e) There has been no contribution to Rydal's economic development

MDR merely submitted a bid in a competitive bidding process. It failed to inject any funds or capital into Rydal.

Even if the above factors are not independent requirements, the bid's failure to satisfy any of them demonstrates that at most, it can be characterised as a 'pre-investment expenditure'. As stated above,¹⁵⁹ pre-investment expenditures have been repeatedly rejected as constituting an investment. International investment would be significantly harmed if every unsuccessful bidder in a bid process had recourse to international arbitration. Rydal did not undertake to treat MDR's application expenditures as an investment. MDR could not expect that its bid would be treated as such, given the preliminary nature of the bid process and the absence of exclusive negotiations.¹⁶⁰

III. IN THE ALTERNATIVE, RYDAL'S ACTIONS SATISFIED THE REQUIREMENTS OF ARTICLE V

An interpretation of Article V according to the above principles¹⁶¹ reveals that the parties have provided for the application of the customary standards of treatment rather than an autonomous treaty standard.¹⁶² The customary standard includes requirements of fair and equitable treatment and non-discrimination. Rydal's actions did not breach these requirements.

¹⁵⁹ Memorial, D(II)(2)(a).

¹⁶⁰ *Mihaly*, n154, 875.

¹⁶¹ Memorial, C.

¹⁶² UNCTAD, *Fair and Equitable Treatment*, UNCTAD/ITE/IIT/11 (Vol. III) (1999), 20; R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995), 60.

1) The treatment of MDR was fair and equitable

Under custom, states are required to provide fair and equitable treatment to foreign investments.¹⁶³ This standard contains several requirements,¹⁶⁴ all of which Rydal has satisfied.

(a) Rydal's conduct was not arbitrary

Conduct is arbitrary if it is “unfair and unreasonable”¹⁶⁵ such that it “surprises...a sense of judicial propriety”.¹⁶⁶ A discretionary decision is not arbitrary if all relevant matters are given due consideration and clear reasons are provided.¹⁶⁷ MDR's bid was duly considered and clear reasons were provided for the selection of ROCO's bid. Therefore, Rydal's actions were not arbitrary.

(b) There was no violation of due process

A violation of due process occurs where there is an “an outcome which offends judicial propriety”.¹⁶⁸ Nothing in the bid process violated this standard.

¹⁶³ *International Thunderbird Gaming Corporation v. Mexico*, Award, 26 January 2006, ¶194 (NAFTA) [*Thunderbird*]; *Metalclad Corporation v. Mexico* (2000), 40 I.L.M. 36, 47 (ICSID) [*Metalclad*]; *Mondev International Ltd. v. United States* (2002), 42 I.L.M. 85, 107 (ICSID) [*Mondev*].

¹⁶⁴ *Waste Management, Inc. v. Mexico* (2004), 43 I.L.M. 967, 986 (ICSID) [*Waste Management*].

¹⁶⁵ *Restatement (Third) of Foreign Relations Law of the United States* § 712 (1986) [*Restatement*].

¹⁶⁶ *Case Concerning Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy)*, [1989] I.C.J Rep 16, 76 [*ELSI*].

¹⁶⁷ *ELSI*, n166, 76.

¹⁶⁸ *Loewen Group, Inc. v. United States* (2003), 42 I.L.M. 811, 831 (ICSID) [*Loewen*]; *ELSI*, n166, 76.

First, the bid process afforded MDR the same treatment extended to ROCO. This treatment was in accordance with the criteria outlined in the request for bids.

Secondly, Aspatria must demonstrate that the refusal of standing to MDR was a denial of due process. The *Compromis* does not reveal the reasons for the refusal. Thus, there is no evidence whether the refusal of standing amounted to “manifest injustice.”¹⁶⁹

(c) Rydal provided a transparent framework for investments to protect legitimate expectations

A state must provide a transparent and stable framework for investments to preserve the legitimate expectations of investors.¹⁷⁰ The standard can only be breached if expectations are held.¹⁷¹ MDR had no expectation that only economic considerations would be taken into account in the bid process. Monte de Rosa’s statements that he believed the oil ought to be exploited by Aspatrians,¹⁷² his letter published in *The Times of Rydal* recognising that MDR was involved in a dispute between Rydal and Aspatria,¹⁷³ and his letter acknowledging that the granting of the oil licence was linked to the future of the Islands reveal that MDR recognised that non-economic

¹⁶⁹ *Loewen*, n168, 831.

¹⁷⁰ *Técnicas Medioambientales Tecmed, S.A. v. Mexico* (2003), 43 I.L.M. 133, 173 (ICSID) [*Tecmed*]; *Metalclad*, n163, 47; *Energy Charter Treaty*, 17 December 1994, 2080 U.N.T.S. 100, art.20(2) [*ECT*]; *Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, online: United States Department of State <<http://www.state.gov/documents/organization/117601.pdf>> art.10(1)(a); *Fourth ACP-EEC Convention (LOME IV)*, 15 December 1989, 1924 U.N.T.S. 4, art.258(c) [*ACP-EEC*].

¹⁷¹ *Thunderbird*, n163, ¶164.

¹⁷² C.46.

¹⁷³ C.48.

considerations would be taken into account.¹⁷⁴ Thus, MDR had no expectation that Rydal could have frustrated.

2) The treatment of MDR was non-discriminatory

A state action satisfies the customary protection¹⁷⁵ of non-discrimination if there is a reasonable justification for any differential treatment.¹⁷⁶ The refusal of MDR's bid was based on safeguarding the Islanders' capacity to pursue their economic and social future. Rydal's actions occurred within the framework of the bid process itself and were therefore reasonable.

¹⁷⁴ C.51.

¹⁷⁵ *I.C.C.P.R.*, n81, art.26.

¹⁷⁶ *Saluka Investments B.V. v. Czech Republic*, 17 March 2006, Partial Award, ¶ 313 (UNCITRAL) [*Saluka*]; *Oscar Chinn Case (United Kingdom v Belgium)* (1934), P.C.I.J. (Ser. A/B) No. 63, 92 (Dissenting Opinion of Judge Altamira) [*Oscar Chinn*]; *Restatement*, n165, § 711.

E. ASPATRIA’S SEIZURE OF ALEC’S ASSETS CONSTITUTES A BREACH OF THE BIT FOR WHICH RYDAL HAS STANDING

I. RYDAL HAS STANDING TO MAKE A CLAIM EITHER ON BEHALF OF ALEC OR ROCO

Art XIII of the BIT confers standing on the basis of nationality. The term ‘national’ can be interpreted by reference to “any relevant rules of international law applicable in the relations between the parties”,¹⁷⁷ including custom.¹⁷⁸

Rydal has standing because the A & L Exploration Corporation (“ALEC”) is a Rydalian national, either on the basis of effective nationality or substitution. ROCO is an investor for the purposes of Art XIII, as its shareholding in ALEC is an investment. There is no requirement for ALEC or ROCO to exhaust local remedies in Aspatria; alternatively, all available remedies have been exhausted.

1) Rydal has standing on the basis of effective nationality

Effective nationality permits a corporation to have multiple nationalities based on a ‘genuine link’ with a state.¹⁷⁹ This is determined by a combination of factors, including place of incorporation, seat of management and shareholding.¹⁸⁰ Although this Court in *Barcelona*

¹⁷⁷ *V.C.L.T.*, n127, art.31(3)(c).

¹⁷⁸ *Case Concerning Oil Platforms (Iran v. United States)*, [2003] I.C.J. Rep. 161, 182.

¹⁷⁹ International Law Commission, *Seventh Report on Diplomatic Protection*, 58th Sess., UN Doc. A/CN.4/567 (2006), 23 [*Diplomatic Protection*]; *Nottebohm*, n132, 23.

¹⁸⁰ *Diplomatic Protection*, n179, 23; OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (Paris: OECD Publishing, 2008), 18.

Traction excluded effective nationality in relation to corporations,¹⁸¹ a number of Separate Opinions affirmed its application.¹⁸² Additionally, custom and corporate realities have evolved; *Barcelona Traction* does not reflect the law in this area.¹⁸³

ROCO's shareholding in ALEC,¹⁸⁴ as well as its provision of machinery and capital to ALEC¹⁸⁵ provides a genuine link between ALEC and Rydal. As a result, ALEC is a Rydalian national.

2) Alternatively, Rydal has standing on the basis of substitution

Even if incorporation is the test for corporate nationality at custom, there are recognised exceptions to the test.¹⁸⁶

Substitution is an exception to the incorporation test that applies where the state of incorporation is the author of the injury to the company.¹⁸⁷ The corporation's nationality is substituted for that of its primary shareholders and the corporation becomes a foreign investor.¹⁸⁸

¹⁸¹ *Barcelona Traction*, n85, 42.

¹⁸² *Barcelona Traction*, n85, 83, 186, 280-281 (Separate Opinions of Judges Fitzmaurice, Jessup and Gros).

¹⁸³ Brownlie, n16, 482-483; *Diplomatic Protection*, n179, 23.

¹⁸⁴ C.40.

¹⁸⁵ C.41.

¹⁸⁶ *Barcelona Traction*, n85, 40.

¹⁸⁷ *Barcelona Traction*, n85, 40, 48; *Case Concerning Ahmadou Sadio Diallo (Guineau v. Democratic Republic of Congo)*, [2007] I.C.J. Rep. 1, 30 [*Diallo*].

¹⁸⁸ Dolzer & Schreuer, n139, 57.

The exception was recognised in the majority judgment in *Barcelona Traction*¹⁸⁹ and in a number of Separate Opinions.¹⁹⁰ This Court has left open the question of whether a narrow formulation of substitution is a norm of custom.¹⁹¹ The narrow formulation requires the incorporation of the company in the injuring state as a precondition for doing business there.¹⁹² State practice and *opinio juris*¹⁹³ support this formulation of substitution.

ALEC's assets have been seized by Aspatria, the state of incorporation. The Natural Resources Act ("NRA") effectively requires ALEC to be incorporated in Aspatria in order to do business there. ALEC could not have obtained its Aspatrian licence in 1993 ("northeast licence") had it not been incorporated in Aspatria. ROCO has been forced to channel its Aspatrian business through ALEC due to the NRA.¹⁹⁴

As the exception applies, ALEC's Aspatrian nationality is substituted for ROCO's Rydalian nationality, giving Rydal standing to bring a claim.

¹⁸⁹ *Barcelona Traction*, n85, 40, 48.

¹⁹⁰ *Barcelona Traction*, n85, 72, 131, 191, 240 (Separate Opinions of Judges Fitzmaurice, Tanaka, Jessup, Morelli).

¹⁹¹ *Diallo*, n187, 31.

¹⁹² International Law Commission, *Report of the International Law Commission: Draft Articles on Diplomatic Protection*, UN GAOR, 61st Sess., Supp. No. 10, UN Doc. A/61/10 (2006), art.11(b).

¹⁹³ International Law Commission, *Diplomatic Protection: Comments and Observations Received from Governments*, 58th Sess., UN Doc A/CN.4/561 (2006), 32, 34-35; International Law Commission, *Diplomatic Protection: Comments and Observations Received from Governments - Addendum*, 58th Sess., UN Doc A/CN.4/561/Add.1 (2006), 9-10, 15.

¹⁹⁴ C.41.

3) Further, and in the alternative, Rydal has standing on the basis of ROCO's investment

A fundamental feature of an investment is its extended duration.¹⁹⁵ ROCO has held its shares in ALEC for twenty-four years after the conclusion of the BIT, indicating the long-term nature of its investment. In *S.D. Myers*¹⁹⁶ and *Metalclad*,¹⁹⁷ it was assumed that an investment made prior to NAFTA was an investment for the purposes of that treaty.

4) There is no requirement to exhaust local remedies

The BIT contains no requirement to exhaust local remedies. An importation of customary norms is an amendment of the BIT that can only occur through the procedure contained in Art 40 of the *V.C.L.T.*,¹⁹⁸ to which both states are party.

Even if the requirement does apply, ALEC need only exhaust remedies that are effective and adequate.¹⁹⁹ ALEC has exhausted all administrative remedies.²⁰⁰ The criminal proceedings cannot be considered a 'remedy', as they have not been sought by ALEC and do not redress the injury suffered.

¹⁹⁵ C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001), 140.

¹⁹⁶ *S.D. Myers*, n140.

¹⁹⁷ *Metalclad*, n163.

¹⁹⁸ *V.C.L.T.*, n127.

¹⁹⁹ *Ambatielos Claim (Greece v. United Kingdom)*, [1956] 12 R.I.A.A. 83, 119; *Case of Certain Norwegian Loans (France v. Norway)* [1957] I.C.J. Rep. 9, 39 (Separate Opinion of Judge Lauterpacht); *Diallo*, n187, 26.

²⁰⁰ C.58.

ROCO is deemed to have exhausted local remedies because the essence of the claim has been brought before Aspatrian courts by ALEC.²⁰¹

II. THE SEIZURE IS A VIOLATION OF ARTICLE VI

1) Aspatria has directly expropriated ALEC's assets

A permanent seizure of property is a direct expropriation²⁰² regardless of whether legal title has been transferred.²⁰³

Temporary restrictions on the use of property are effectively permanent where the restriction on the use of the property is significant and “not merely ephemeral”.²⁰⁴ ALEC has been deprived of its assets for two years. This deprivation could extend to six years.²⁰⁵ This is a significant restriction on ALEC's use of its assets. As a result, the seizure is effectively permanent and is a direct expropriation of ALEC's assets.

²⁰¹ *ELSI*, n166, 46; *Diplomatic Protection*, n179, 29.

²⁰² *ELSI*, n166, 71; G.C. Christie, “What Constitutes a Taking of Property Under International Law?” (1962) 38 B.Y.I.L. 307, 322 [Christie].

²⁰³ *Metalclad*, n163, 50; *Glamis Gold, Ltd. v. United States*, Award, 8 June 2009, ¶355 (NAFTA) [*Glamis*].

²⁰⁴ *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran* (1984), 6 Iran-US C.T.R. 219, 225 [*TAMS-AFFA*]; *S.D. Myers*, n140, 1440; Christie, n202, 322.

²⁰⁵ C.59.

2) Alternatively, Aspatria has indirectly expropriated ALEC’s northeast licence and ROCO’s shareholding

The seizure has interfered with ALEC’s use of its licence to such an extent that the “economic value of the property interest [has been] radically diminished”.²⁰⁶ It is a norm of custom that measures having such an effect constitute an indirect expropriation.²⁰⁷ Any decline in the value of ROCO’s shareholding also constitutes an indirect expropriation.²⁰⁸ The submissions below in relation to ALEC’s licence also apply to ROCO’s shareholding.

Rydal concedes that a seizure of property in the exercise of a state’s police powers is not an indirect expropriation. However, where the degree of interference with the investment is not proportional to the purpose of the state measure, the police power is not exercised in good faith and the seizure will be expropriatory and compensable.²⁰⁹ Additionally, a discriminatory measure is not a valid exercise of police powers.²¹⁰ These principles are reflected in Art VI(b) of the BIT.

²⁰⁶ *Glamis*, n203, ¶355.

²⁰⁷ *Starrett Housing Corporation v. Iran* (1984), 4 Iran-US C.T.R. 123, 164; *TAMS-AFFA*, n204, 226; *Compania Del Desarrollo de Santa Elena, S.A. v. Costa Rica* (2000), 39 I.L.M. 1317, 1330 (ICSID) [*Santa Elena*]; *Glamis*, n203, ¶355.

²⁰⁸ *Saluka*, n176, ¶246, 266-267; *GAMI*, n147, 566; *LG&E Energy Corporation v. Argentina* (2006), 46 I.L.M. 40 at 6, (ICSID) [*LG&E*].

²⁰⁹ *Tecmed*, n170, 164; *LG&E*, n208, 64; OECD, Directorate for Financial and Enterprise Affairs, “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law*, Working Paper No. 4, September 2004, 10-11.

²¹⁰ *Amoco International Finance Corporation v. Iran* (1987), 15 Iran-US C.T.R. 189, 231; *Saluka*, n176, ¶255; M. Sornarajah, *The International Law on Foreign Investment*, 2d ed. (Cambridge: Cambridge University Press, 2004), 387.

(a) The degree of interference is not proportional to the purpose

The degree of interference is determined by the economic impact and duration of the seizure.²¹¹

The stated purpose of the seizure was to prevent ALEC from taking action inconsistent with the NRA. This does not justify Aspatria's interference with ALEC's northeast licence.

(i) *The economic impact is substantial*

The seizure must have substantially impaired ALEC's ownership, use and enjoyment of its licence, by rendering it useless.²¹² Without its assets, ALEC is unable to utilise its rights under the licence and generate revenue from the exploitation of oil reserves. The economic impact is substantial, as the licence has been rendered effectively useless.

(ii) *The duration of the seizure renders it permanent*

Temporary measures can be expropriatory.²¹³ The delay in the criminal proceedings²¹⁴ renders the seizure effectively permanent. ALEC is unable to utilise its licence and will lose millions of dollars in revenue.²¹⁵

Thus, the severity of the interference with ALEC's northeast licence is not proportional to the public welfare objectives of the seizure.

²¹¹ *Glamis*, n203, ¶356; *Tecmed*, n170, 162; *LG&E*, n208, 64-65.

²¹² *Glamis*, n203, ¶357; *Tecmed*, n170, 162; *GAMI*, n147, 566; R. Higgins, "The Taking of Property by the State" (1982) 3 R.C.A.D.I. 263, 351.

²¹³ *S.D. Myers*, n140, 1440; *Santa Elena*, n207, 1329-1330; *Christie*, n202, 322.

²¹⁴ C.59.

²¹⁵ C.59.

(b) The seizure was discriminatory

An exercise of police powers is discriminatory if “(i) similar cases are (ii) treated differently (iii) without reasonable justification”.²¹⁶ MDR also participated in the bid process. This was inconsistent with its Aspatrian licence. Aspatria has not taken action against MDR. There is no reasonable justification for the differential treatment of ALEC when MDR has also violated the NRA by participating in the bid.

3) Aspatria’s failure to pay compensation is a violation of Art VI

The seizure is an expropriation requiring compensation. The requirements of public purpose, due process and non-discrimination in Art VI(a) are cumulative; the absence of one renders the expropriation unlawful.²¹⁷ As discussed above,²¹⁸ the seizure of ALEC’s assets was discriminatory. This discriminatory expropriation is *per se* unlawful.²¹⁹

Aspatria must compensate ALEC or ROCO for the value of its investment and loss of profits.²²⁰ This compensation must be “prompt, adequate and effective”.²²¹ Aspatria’s failure to provide compensation is a violation of Art VI(a) of the BIT.

²¹⁶ *Saluka*, n176, ¶313; *Oscar Chinn*, n176, 92; *Restatement*, n165, § 711.

²¹⁷ *Saluka*, n176, ¶ 266; Brownlie, n16, 538-539.

²¹⁸ Memorial, E(II)(2)(b).

²¹⁹ *Libyan American Oil Company v. Libya* (1977), 20 I.L.M. 1, 59; Brownlie, n16, 538-539.

²²⁰ *Case Concerning the Factory at Chorzow (Germany v Poland)* (1928), P.C.I.J. (Ser. A) No. 17, 47 [*Chorzow Factory*].

²²¹ C. Annex 1 (BIT art. VI(a)).

Even if the expropriation is lawful, Aspatria must compensate ALEC or ROCO for the value of its investment.²²² Aspatria's failure to do so is a violation of Art VI(a) of the BIT.

III. THE SEIZURE IS A VIOLATION OF ART V

As previously submitted,²²³ ALEC is a Rydalian national. ALEC is an investor and its assets are an investment according to the BIT. The following submissions also apply to ROCO.

As submitted above in relation to MDR's bid,²²⁴ Article V contains customary standards of treatment. Aspatria has not afforded ALEC fair and equitable treatment and full protection and security.

1) The threshold for a breach of the minimum standard has been significantly liberalised

State practice and *opinio juris*, in the form of bilateral and multilateral investment treaties,²²⁵ have modified custom such that no special level of conduct is required to breach the minimum standard of treatment.²²⁶ Jurisprudence has recognised that the *Neer*²²⁷ standard no longer reflects custom.²²⁸ As a result, treaty practice and custom have converged and treaty

²²² *Chorzow Factory*, n220, 47.

²²³ Memorial, E(I).

²²⁴ Memorial, D(III).

²²⁵ *ACP-EEC*, n170, art.258(c); *Agreement for the Promotion and Protection of Investments*, Netherlands and Philippines, 27 February 1985, 1488 U.N.T.S. 304, art.3.2; *ECT*, n170, art.10.

²²⁶ *Mondev*, n163, 107-108; *Saluka*, n176, ¶282; *Draft Articles on State Responsibility*, n12, 34.

²²⁷ *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926), 4 R.I.A.A. 60.

²²⁸ *ELSI*, n166, 76; *Waste Management*, n164, 983-984.

jurisprudence now elucidates custom.²²⁹ Therefore, no particular standard must be reached before a breach occurs. Instead “the standard...must be adapted to the circumstances of each case.”²³⁰

2) Aspatria has not afforded ALEC fair and equitable treatment

(a) Aspatria’s conduct is arbitrary, grossly unfair, unjust or idiosyncratic

Arbitrary conduct, as outlined above,²³¹ is a violation of the customary minimum standard.²³²

As the oil reserves in the EEZ of the Islands do not belong to Aspatria, the licence granted by Aspatria to MDR has no effect. As a result, ALEC’s participation in ROCO’s bid could not be inconsistent with the NRA. The prosecution was commenced without any legal basis and was therefore arbitrary.²³³

Alternatively, Aspatria’s seizure of ALEC’s assets is arbitrary. The discretion to prosecute must have been exercised in good faith.²³⁴ Any interference by ALEC with MDR’s licence occurred when the bids were submitted. Between December 2006 and October 2007, ALEC acted inconsistently with any rights under the licence. Aspatria did not enforce the NRA

²²⁹ C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration* (Oxford: Oxford University Press, 2007) 20; S. Schwebel “The Overwhelming Merits of Bilateral Investment Treaties” 32 *Suffolk Transnat’l L. Rev.* 263, 265.

²³⁰ *Waste Management*, n164, 986.

²³¹ Memorial, D(III)(1)(a).

²³² *ELSI*, n166, 76.

²³³ *ELSI*, n166, 76.

²³⁴ Memorial, D(III)(1)(b).

until the point at which it was most detrimental to ROCO's interests. As a result, the discretion was not honestly and reasonably exercised.

(b) Aspatria's conduct is a denial of justice

A denial of justice occurs when a decision leads to "justified concerns as to the judicial propriety of the outcome."²³⁵ The seizure order by the Aspatrian administrative court and the subsequent refusal to revoke the order constitute a denial of justice. The seizure should only have extended to any asset that may have been used in the exploitation of the Islands' reserves. Instead, cash and equipment that were lawfully being used to exploit ALEC's northeast licence were seized. This action goes beyond the scope of the Aspatrian Criminal Code. Thus, there are justified concerns about the judicial propriety of the decision not to revoke the seizure order, which amounts to a denial of justice.

3) Aspatria has not afforded ALEC full protection and security

In *Middle East Cement v. Egypt*,²³⁶ the Tribunal held that a failure to provide direct notification of a seizure of a ship was a breach of full protection and security.²³⁷ Aspatria did not notify ALEC by direct communication of the seizure of its assets, particularly its oil tanker. Thus, Aspatria has breached the requirement of full protection and security in Article V.

²³⁵ *Loewen*, n168, 831; *ELSI*, n166, 76.

²³⁶ *Middle East Cement Shipping Company v. Egypt* (2000), 18 ICSID Rev. - F.I.L.J. 602 (ICSID) [*Middle East Cement*].

²³⁷ *Middle East Cement*, n236, 637.

PRAYER FOR RELIEF

The Respondent requests the Court to adjudge and declare that:

- a) Rydal has sovereignty over the Windscale Islands;
- b) The Islanders are entitled to independence as an exercise of their right to self-determination and Rydal may take steps to give effect to this independence;
- c) The non-admission of MDR's bid was not a violation of Articles IV and V of the BIT by Rydal
- d) Rydal has standing to invoke the BIT to protect ALEC's assets; and
- e) The seizure of ALEC's assets by Aspatria is a violation of Articles V and VI of the BIT.

Respectfully Submitted,

AGENTS OF THE RESPONDENT.