MYKOLAS ROMERIS UNIVERSITY

LAW FACULTY

DEPARTMENT OF INTERNATIONAL LAW

VILIJA VĖLYVYTĖ

ACQUISITION OF SOVEREIGNTY, RIGHT OF PEOPLES TO SELF-DETERMINATION, AND PROTECTION OF BILATERAL INVESTMENT: A HYPOTHETICAL CASE STUDY

Master Thesis

Supervisor

Andrius Bambalas

Consultant

Prof. Dr. Lyra Jakulevičienė

VILNIUS, 2010

MYKOLAS ROMERIS UNIVERSITY

LAW FACULTY

DEPARTMENT OF INTERNATIONAL LAW

ACQUISITION OF SOVEREIGNTY, RIGHT OF PEOPLES TO SELF-DETERMINATION, AND PROTECTION OF BILATERAL INVESTMENT: A HYPOTHETICAL CASE STUDY

Master Thesis

International Law Joint Program

Consultant

Prof. Dr. Lyra Jakulevičienė

… … … … … … … … …

(signature)

2010 05

Supervisor

Andrius Bambalas

… … … … … … …

(signature)

2010 05

Reviewer

… … … … … … … … …

(signature)

2010

Author

Vilija Vėlyvytė

… … … … … … …

(signature)

2010 05 24

VILNIUS, 2010

TABLE OF CONTENTS

INTRODUCTION

Scope of the thesis. The thesis represents a legal analysis of a hypothetical case concerning the Windscale Islands examined at Philip C. Jessup International Law Moot Court Competition 2010. One of the prerequisites for the competition is to provide the written submissions on the dispute by both the Applicant and the Respondent. This thesis in particular represents the submissions of the Respondent. Therefore, the facts presented and the applicable international legal rules analyzed are from the standpoint of the Respondent with the intent to reason and prove their position. Consequently, the conclusions are formulated as rigorous, one-sided statements aimed to summarize Respondent's main arguments and support the hypotheses raised for the benefit of the Respondent. Thus, this study does not provide an exhaustive analysis of the research objects or completely solve the research problems. Rather, it provides a thorough and detailed analysis of those elements of the research objects and problems that are particularly relevant to support the Respondent's position in the hypothetical case.

Relevance of the topics. The hypothetical case introduces three legal topics. The **first topic** discussed is the acquisition of sovereignty over territory. This topic might seem obsolete in contemporary international law. However, it has newly emerged since the discovery of valuable natural resources, oil in particular, in non-self-governing territories. That raised a number of territorial disputes that were actually linked to oil.

The clash has emerged between historical claims over territory and claims based on administration of non-self-governing territories pursuant to Article 73 of the Charter of the United Nations (hereinafter – UN). One of the best-known conflicts of this kind is the dispute between the UK and Argentina regarding the Falkland Islands. Britain's recent decision to begin drilling for oil in close proximity to the islands has sparked an angry response in Argentina, whose government claims sovereignty over the Falklands. In order to determine which claim prevails, an in-depth examination of the situation has to be conducted on the case by case basis. Similarly, the setup of the hypothetical case analyzed herein illustrates a territorial dispute between two states – Aspatria (Applicant) and Rydal (Respondent).

The **second topic** is the right of peoples to self-determination. The relevance of the topic is reflected in political reality – while most states are multinational, some nations demand new states of their own. However, independence, or unilateral secession, as the result of the exercise of the right to self-determination, contradicts the principle of territorial integrity of states, the counterpart of the principle of sovereign equality of states. The UN Charter, however, in Chapter I "Purposes and Principles" includes two opposing principles – the right of peoples to self-determination and the territorial integrity of states.

The secession movements following the collapses of authoritarian regimes at the end of the 20th century (the Eastern Europe, the Balkans), and especially the recent events in Kosovo, witness great tensions between the values of peace based on the principles of sovereign equality and territorial integrity, and the right to self-determination as one of the fundamental human rights. The *status quo* is not viable because it clearly cannot achieve its own declared purposes – it cannot guarantee the territorial integrity of states, it is extremely reluctant to recognize the self-determination of peoples, and, consequently, it presides over massive violations of human rights. While the Advisory Opinion concerning Kosovo is still pending before the ICJ, the hypothetical case analyzed here illustrates the conflict between the two values and requires finding an effective way to reconcile the Islander's claim for independence with Aspatria's territorial claim.

The **third topic** is the protection of bilateral investment. International investment law has witnessed an explosive growth over the last 50 years principally caused by a proliferation of bilateral and regional investment treaties, and a dramatic rise in litigation under such treaties. This in turn led to the articulation by arbitral tribunals of principles which confirmed and extended notions that favored movement of foreign investment and their treatment in accordance with external standards. It also restrained governmental interference with such investment significantly by considerably expanding the notion of compensable taking to include disproportional regulatory takings. The pronouncements of arbitral tribunals are extensive; however, not coherent in explaining the standard notions commonly used in bilateral investment treaties. The hypothetical case describes a complex bilateral investment scheme, which requires assessment of arbitral practice and a clarification of the most controversial concepts used in bilateral investment protection regulation.

Research problems. There are three problems raised in this thesis. The **first problem** concerns issues related to competing claims for acquisition of sovereignty over territory. There is still inconsistency in the sources of international law regarding determination of the acts that are sufficient to gain sovereignty over a *terra nullius* territory, as well as determination of the critical date until which any acts performed are taken into account. Controversies also appear in scholarly writings and in state practice regarding legal significance and relevance of the *uti possidetis juris* principle in boundary disputes.

The **second problem** concerns the scope and beneficiaries of the right of peoples to self-determination. First, the sources of international law are not uniform in determining who is entitled to the right of self-determination. Second, international law does not explicitly describe how the peoples' right to self-determination should be exercised, and what the practical result of such exercise would be, i.e. the limits are not clearly set. The most controversial topic in the legal writings is the question of legality of unilateral secession.

The **third problem** is related to protection of investment under bilateral investment treaties. It mainly concerns interpretation and practical application of those treaties. Since there is no multilateral agreement on protection of foreign investment, standard terms typical to most bilateral investment treaties are interpreted and applied by different arbitral tribunals. This results in diverse incoherent pronouncements by arbitral tribunals explaining those standard terms. Hence, there is a number of legal notions in international investment law that lack a clear-cut explanation, e.g. definition of investment, the content of different standards of treatment granted to foreign investors, and the distinction between indirect expropriation and state's legitimate regulatory powers.

Value of the research:

- ***theoretical*** **–** conventional and customary international law regarding the research topics will be examined in the context of its temporal development;
- ***practical*** –
  - an in-depth analysis of the jurisprudence of the International Court of Justice and the arbitral tribunals regarding the research topics will be conducted, and the current trends and patterns of court practice will be identified;
  - the work may be used by students as a model memorial of the Respondent in preparation for the annual Philip C. Jessup International Law Moot Court Competition.

Research objects. Three different objects can be distinguished in the thesis:

- acquisition of sovereignty by way of effective occupation;
- right of peoples to self-determination as a legal basis for independence;
- protection of investment under bilateral investment treaties.

Research subject-matter. Considering the scope of the thesis, the subject-matter of the first object, acquisition of sovereignty by way of effective occupation, includes: occupation and cession (in terms of legal act of recognition) as modes of acquisition of sovereignty over territory, legal value of the act of discovery, the notion of effective occupation, evaluation of competing claims over a territory, and application of *uti possidetis juris* principle.

The subject-matter of the second object, the right of peoples to self-determination as a legal basis for independence, encompasses: content of the right to self-determination, beneficiaries of the right to self-determination in the post-colonial context, as well as in contemporary international law, and the extent of its actual exercise (ultimate goal – creation of an independent state).

The third object, the protection of investment under bilateral investment treaties, combines the

issues of international customary and conventional regulation on foreign investment: the standing to bring a claim on behalf of a state's national (the prerequisites of diplomatic protection), definition of investment, the content of national standard and of fair and equitable standard of treatment, definition of indirect expropriation and the distinction between indirect expropriation and legitimate public policy measures.

Aims and tasks of the thesis. By analyzing international legal regulation concerning the issues that form the research objects and applying it to the facts of the hypothetical case, the thesis seeks to prove the position of the Respondent. In particular, the thesis has the following aims and tasks in respect of each research object.

The **first aim** is to establish conditions for the acquisition of sovereignty through occupation in the context of the facts of the case. In order to achieve this aim, the following tasks must be fulfilled:

1. to apply proper modes of acquisition of sovereignty to the facts of the case and show that Rydal has effectively occupied the Islands;
2. to estimate legal value and scope of application of the *uti possidetis juris* principle with the intent to show that application of *uti possidetis juris* benefits Respondent's position.

The **second aim** is to determine the requirements for the exercise of the right of peoples to self-determination as a legal basis for independence: who are the beneficiaries, and what is the scope of the right to self-determination. In order to achieve this aim, the following tasks must be fulfilled:

1. to measure the scope of application of the right of peoples to self-determination in respect to the non-self-governing territories;
2. to determine whether contemporary international law allows unilateral secession as a practical result of the exercise of the right to self-determination.

The **third aim** of the thesis is to evaluate the actions of Aspatria and Rydal from the point of view of international obligations undertaken by both states under the bilateral investment treaty (hereinafter – BIT) concluded between them. In order to achieve this aim, the following tasks must be fulfilled:

1. to determine and apply the definition of investment to the facts of the case on the basis of bilateral investment treaty concluded between Aspatria and Rydal;
2. to analyze arbitral practice on the national, as well as the fair and equitable standard of treatment, and to determine the content of these standards;
3. to analyze arbitral practice on expropriation, and to draw distinction between indirect expropriation and legitimate state's regulatory measures.

The following ***hypotheses*** are raised with respect to the aims and tasks of the research in the context of the hypothetical case:

- Sovereignty over the disputed territory in question, the Windscale Islands, belongs to Rydal.

- The inhabitants of the Windscale Islands have a right to self-determination and may exercise it as a legal basis for the creation of an independent state.
- Rydal's rejection of the bid submitted by MDR Limited Corporation, an enterprise of Aspatrian nationality, did not violate the Aspatria-Rydal BIT.
- Rydal has standing to invoke the Aspatria-Rydal BIT in the exercise of diplomatic protection on behalf of its national corporation ROCO for the seizure of Aspatrian corporation's ALEC assets, and the seizure of such assets was a violation of the BIT.

Scope of research and bibliography. The research topics have been widely discussed in the writings of highly qualified publicists. The present thesis mostly refers to the legal writings of: I.Brownlie, A.Cassese, J.Crawford, Ch.Schreuer, R.Dolzer, R.Higgins, L.Oppenheim, M.N.Shaw, B.Simma and M.Sornarajah. Legal studies of different organizations and scholarly institutions were also used in the research, e.g. Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, "Fair and Equitable Treatment Standard in International Investment Law" (OECD), ""Indirect Expropriation" and the "Right to Regulate" in International Investment Law" (OECD).

Organization of the thesis. The thesis is divided into three parts corresponding to the three research objects. The summary of the facts of the hypothetical case is presented before the substantial analysis of the research objects. The first part analyzes sovereignty issues. It applies the proper modes of acquisition of sovereignty over territory to the facts of the case and evaluates the legal status of competing territorial claims. The second part covers the issues concerning the right of peoples to self-determination. It determines whether the inhabitants of the Windscale Islands are entitled to self-determination and, if so, what the proper exercise of the right to self-determination would be in the circumstances of the case. The third part analyzes investment issues. It clarifies the definition of investment and determines the content of national, as well as fair and equitable, standards of treatment under Aspatria-Rydal bilateral investment treaty. It draws the distinction between indirect expropriation and state's regulatory powers. Additionally, it examines the standing (*jus standi*) issues – the right to bring a claim on the basis of both international customary law and the bilateral investment treaty.

Research methods. In order to provide an in-depth analysis of the research problems and to fulfill the aims and tasks of the research, theoretical and empirical research methods are used. Theoretical methods used in the research include systematic analysis, comparative and linguistic methods. Empirical method used in the research includes the analysis of the sources of international law, as listed in Article 38 of the Statute of the International Court of Justice – customary and conventional international law, as well as the general principles of law. The rules of custom or treaty are determined by analyzing the subsidiary sources of international law, such as judicial decisions and the writings of highly qualified publicists.

STATEMENT OF FACTS OF THE HYPOTHETICAL CASE

The Windscale Islands (hereinafter – the Islands) are an archipelago lying approximately 500 miles from the Republic of Aspatria – a developed country, a former colony of the Kingdom of Plumbland. The Islands were first discovered uninhabited in 1777 by the Kingdom of Rydal – a developed country located approximately 7,500 miles from the Islands.

In 1778, the Kingdom of Plumbland discovered the Islands. On behalf of Plumbland, Aspatrian Lieutenant Ricoy and his crew established a fort and settlement named Salkeld on one of the islands. In 1799 the crew left the Islands. Historians say that the Islands were used by pirates, slave-ships, and other seafarers during the period Ricoy and his men were in Salkeld.

In 1813, a naval ship of Rydal under the command of Admiral Aikton was wrecked on one of the smaller islands in the archipelago. Aikton's nautical charts indicated the Islands belonged to Rydal. He and his crew built a settlement named St. Bees. By 1816, Admiral and his men had explored most of the other islands in the archipelago, began to cultivate the land and domesticate wild equine species.

When a slave ship drifted into the harbor at St. Bees, Admiral Aikton declared the slaves free, since slavery had been abolished in Rydal. In 1817, a ship of Aspatria landed in the Islands. Admiral Aikton informed the Commander that he and his men must leave at once or be subject to arrest; the ship departed. 1819, the Queen of Rydal appointed a Governor to the Islands.

In 1814, war broke out between Rydal and Plumbland over matters unrelated to the Islands. In 1819, with war between Rydal and Plumbland intensifying, an independence movement had emerged in Aspatria. The self-proclaimed commander of the movement, Colonel Alejandro Diaz, took advantage of the reduction in Plumbland's armed presence and successfully attacked the garrison at the capital of Aspatria. Colonel Diaz and his supporters drafted and signed a Declaration of Independence in 1819. Diaz was elected the first President of Aspatria. The King of Plumbland declared Diaz and anyone supporting him to be traitors who would receive the "harshest of penalties".

Plumbland was losing the war with Rydal and sued for peace. According to the terms of the Treaty of Great Corby, signed in 1821, Plumbland, *inter alia*, acknowledged Rydal's sovereignty over the Islands and irrevocably transferred any sovereignty that Plumbland possessed in the Islands to Rydal.

In 1827 the Queen of Rydal received the Aspatrian Ambassador and recognized the independence of Aspatria. The Ambassador noted that, upon the independence of Aspatria, the Islands devolved to Aspatria from Plumbland under the principle of *uti possidetis juris*. Rydal's Foreign Minister rejected all of Aspatria's assertions recalling that Rydal had first occupied the Islands. In 1839 King of Plumbland,

weary of conflict, recognized the independence of Aspatria, and subsequently, Aspatria's sovereignty over the former territory of Aspatria, excluding the Islands.

Meanwhile, a succession of Rydalian governors of the Islands exercised control over the whole archipelago. In 1903, with the population of the Islands growing steadily, Rydal established a consultative Assembly to allow the Islanders to express their views to the Governor on matters of day-to-day administration of the Islands.

In 1945, Rydal joined the United Nations. It designated the Islands a non-self-governing territory and has fulfilled its obligations under article 73 of the Charter. In 1947, Rydal gave the Islands a constitution, which confirmed Rydalian sovereignty over the Islands, but gave control over day-to-day governance, including the exploitation of natural resources, to the Assembly of the Islands, subject to the approval of the Governor – King's representative appointed by Rydal.

In 1985, with trade steadily increasing between Aspatria and Rydal, states signed a Treaty Concerning the Encouragement and Reciprocal Protection of Investment (hereinafter – Aspatria-Rydal BIT or BIT).

The Rydalian Oil Company (hereinafter – ROCO), incorporated in Rydal, is a multi-national energy corporation with worldwide gross revenue of more than US$150 billion in 2007. ROCO's corporate structure includes the A & L Exploration Corporation (hereinafter – ALEC), incorporated in Aspatria. ROCO owns 80% of the shares in ALEC.

In 1991, the Natural Resources Act (hereinafter – NRA) was passed in Aspatria, *inter alia* making it a criminal offence for an Aspatrian company to "take any action inconsistent with an exclusive government license or patent concerning natural resources." The NRA also restricted licenses for the exploitation of energy resources in Aspatria to locally incorporated companies. Following the enactment of the NRA, ROCO has channeled its Aspatrian business through ALEC.

In 1997, oil was discovered in the basin around the Islands. The discovery of oil energized a growing independence movement on the Islands, led by a group calling itself Islanders Longing for Sovereignty and Autonomy (hereinafter – ILSA). In the 2002 and 2006 elections, members of ILSA were elected to the Assembly of the Islands in growing numbers.

Felix Monte de Rosa is the richest man in Aspatria. His company, MDR Limited, is an Aspatrian corporation engaged in the business of energy resources. In 2003, MDR Limited petitioned the Aspatrian government for an exclusive license to extract oil from the basin around the Islands. At a press conference promoting the petition, Monte de Rosa declared it to be his patriotic responsibility to make sure that Aspatrian oil is extracted by the Aspatrian people for the Aspatrian people. The petition was approved.

In 2006, upon the approval of Rydal, Assembly of the Islands organized the bidding procedure for

the right to exploit the oil reserves within the Islands. Assembly's First Minister Craven issued a public call for bids and instructed companies with the bidding requirements. A final decision would be made by a majority vote of the Assembly, subject to the assent of the Governor of the Islands, Lucy Black.

The Assembly received only two bids – ROCO's and MDR's Limited. Both of them satisfied the official bidding requirements. In October 2007, by a vote of 20 to 15, MDR's bid was approved by the Assembly. An ILSA spokesman explained his group's dissenting votes by comparing MDR's bid to the "classic story of Troy". Governor Black announced that she was withholding her signature and invited the Assembly to reconsider. On 14 November 2007, the Assembly approved the ROCO bid, by a vote of 22 to 13.

On 16 November 2007, the Public Prosecutor of Aspatria filed criminal charges against ALEC under the NRA for materially participating in the ROCO bid and thus interfering with an exclusive Aspatrian license over energy resources. All assets of ALEC within Aspatrian territory were seized for the period of criminal proceedings, pursuant to the Aspatrian criminal code. According to reports from several independent international NGOs, most criminal cases in Aspatrian courts take between four and six years to conclude, with another two to three years for appeals. ALEC promptly appealed the decision to seize assets. The decision remained unchanged.

Meanwhile, the Assembly of the Islands passed a resolution declaring that the Islanders had the right to determine their own future and that a plebiscite should be held. In the event the vote favored independence, the resolution called upon Rydal to provide all necessary assistance in the progression to independence. A plebiscite was held on 6 December 2008. 76% of the Islanders had voted for independence; the voter turnout was 93%.

1. ACQUISITION OF SOVEREIGNTY BY WAY OF EFFECTIVE OCCUPATION

The purpose of the first part of the thesis is to show that Rydal has gained sovereignty over the Windscale Islands. According to the *fabula* of the case, Rydal seeks to take steps giving effect to independence for the Islands. International law permits taking such actions on two occasions: first, in case the sovereignty over the territory in question belongs to the state willing to declare that territory's independence, i.e. in case the Islands belong to Rydal, or second, the inhabitants of the Islands are entitled to independence as the expression of their right to self-determination. The second case, the one related to the right of peoples to self-determination, is the subject of the second part of the thesis.

This part intends to show that sovereignty over the Islands belongs to Rydal. First, Rydal has effectively occupied the Islands. Second, the Kingdom of Plumbland recognized the sovereign rights of Rydal over the Islands by the Treaty of Great Corby. Third, Aspatria's later contentions as to the validity of the Treaty of Great Corby are without merit.

1.1. Effective occupation

To gain sovereignty over a land *res nullius*, a State must fulfill two requirements: to discover the land and to exercise effective control over it.[1]

1.1.1. Discovery of the Windscale Islands

By act of discovery Rydal gained the inchoate title and a privilege to effectively occupy the Islands within a reasonable time.

Rydal was the first to discover the Islands in 1777 and expressed its intention to occupy them by putting the flag of Rydal and a stone carved with a declaration asserting the sovereignty over the Islands. Discovery has the effect of notifying other states that the claimant state has a prior interest in the territory, an *inchoate* title, which "acts as a temporary bar to occupation by another State"[2] for such a period as is reasonably sufficient for effectively occupying discovered territory.[3]

In order to determine the reasonable time for Rydal to occupy the Islands, the important factors are

---

[1] Oppenheim, L./ed. R.F.Roxburgh. *International Law. Peace.* – London: Longmans, Green and Co, 1920. Vol. I, 3rd edn. (hereinafter - Oppenheim). P. 385, 386.

[2] Oppenheim (n 1), P. 386.

[3] Ad-hoc arbitration, *Island of Palmas case (United States v. The Netherlands),* 2 RIAA, 1928 (hereinafter – *Palmas* case), P. 829, 846.

their geographical location as well as non-habitation, and the absence of competing claims over them. Windscale Islands are located approximately 7,500 miles from Rydal. In the late eighteenth century the means of travel in sea were only ships, thus the remote location of the Islands posed a serious difficulty to reach them from Rydal. Also, the Islands were totally uninhabited, therefore Rydal did not have the need to instantly start their administration. Moreover, until 1818 Rydal was unaware of any competing claims over the Windscale Islands on behalf of Plumbland, thus, again, it did not have the pressing need to proceed with the occupation instantly.

Rydal started actual occupation of the Islands in 1813 – 35 years from its discovery. Given the mentioned circumstances, it is a reasonable time for Rydal to proceed with an actual occupation.

1.1.2. Effective control over the Windscale Islands

Rydal has effectively controlled the Islands until Aspatria presented a competing claim in 1827.

The exercise of effective control is the crucial element to prove sovereignty by occupation.[4] What acts precisely amount to effective control depends in each instance upon all the relevant circumstances of the case, including the nature of the territory involved, the amount of opposition (if any) that such acts on the part of the claimant state have aroused, and international reaction.[5] The remoteness of the Islands coupled with the fact that they were absolutely desolated, makes it unreasonable to look for intensive exercise of authority. Still, since the discovery of the Islands Rydal indicated the Islands as part of its territory in nautical charts.

From 1813, with the establishment of the first settlement, St. Bees, Rydal had been continuously performing the actual *effectivités* in the Islands. It started with building the first harbor and developed into taking control over most of the archipelago. By 1816, Rydalians had explored most of the territory of the Islands, including the abandoned settlement of Salkeld. They cultivated the land and domesticated native equine species.

Furthermore, the exercise of state authority is one of the important elements evidencing effective occupation.[6] Rydal's legislation has been effected and jurisdiction exercised in the Islands. When a slave ship from the State of Sodor landed in 1815, Admiral Aikton declared the slaves free and offered refuge to the crew and former slaves, so exercising state functions. The effectiveness of state control is manifested

---

[4] I.C.J., *The Minquiers and Ecrehos case, Judgment of November 17th, 1953, I.C.J. Reports, 1953* (hereinafter – *Minquiers* case), p. 47, 68-70.

[5] *Minquiers* case (n 4), P. 68-70.

[6] I.C.J., *Kasikili/Sedudu Island (Botswana/Namibia,) Judgment, I. C. J. Reports 1999,* p. 1045, 1105, para. 98.

by the fact that third states obeyed the rule of Rydal. Captain and crew of the said slave ship, together with the former slaves, swore loyalty to the Queen of Rydal. Also, when a ship of Aspatria landed to the Islands in 1817, Admiral Aikton informed the Commander of the ship that he and his men must leave or be subject to arrest. Commander Crook chose to depart.

Eventually, assessment of the effectiveness of Rydal's occupation comes to the comparison of its actions with the ones of Aspatria, performed on behalf of Plumbland at that time. In many cases tribunals have "been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries".[7] First, the legal significance of *effectivités* depends upon the existence or not of a legal title to the territory. Where there is such a valid legal title, this will have pre-eminence and *effectivités* may play a confirmatory role. However, where the *effectivités* are in contradiction to the title, they will play an essential role.[8] Rydal was the first to discover the Islands and thus possessed the *inchoate* title, which means that the intensity of state activity required will obviously be less for Rydal than for competing claimant.[9]

Moreover, geographical conditions were more favorable for Aspatria to domesticate the Islands, since the Islands are located 7,000 miles closer to Aspatria than to Rydal. Despite that, the extent and level of control exercised had been greater on the part of Rydal than Aspatria. Contrary to Rydal, Aspatria never exercised its authority in the Islands: the Islands were used by pirates, slave-ships, and other seafarers during the period the crew of Aspatrian ship was in Salkeld, which was later found by Rydal abandoned.

A competing claim over the Islands on behalf of Plumbland arose to the knowledge of the Queen of Rydal in 1818. Manifesting its effective authority over the Islands the Queen of Rydal sent a new ship to the Islands and established the governance of the Islands in 1819. Later on in 1821 Plumbland renounced its claim to the Islands by the Treaty of Great Corby. Aspatria expressed is claims over the Islands on its, rather than Plumbland's behalf, in 1827. However, the Islands had been effectively occupied by Rydal by that time.

To sum it up, Rydal has effectively occupied the Islands, because it was the first to discover the Islands and it effectively controlled them until Aspatria presented a competing claim. By act of discovery

---

[7] *Palmas* case (n 3), P. 829, 840; P.C.I.J., *Eastern Greenland case (Denmark v. Norway),* Series A/B, No. 53, 1933, P. 22, 46; Ad-hoc arbitration, *Clipperton Island case (France v. Mexico)*, 26 AJIL, 1932, P. 390; *Minquiers* case (n 4), P. 47, 68-70.

[8] I.C.J., *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, 586, para. 63; I.C.J., *El Salvador/Honduras case, ICJ Reports*, 1992, p. 351, 398, para. 61.

[9] Brownlie, I. *Principles of Public International Law*. – Oxford: Oxford University Press, 1979. 3rd edn. (hereinafter - Brownlie). P.137.

Rydal gained an *inchoate* title to the Islands. It started the actual occupation of the Islands within reasonable time after the discovery. Rydal exercised state authority in the Islands until the critical date, when Plumbland's competing territorial claim arose to the knowledge of Rydal.

1.2. Recognition by the Kingdom of Plumbland

The Kingdom of Plumbland recognized the sovereign rights of Rydal over the Islands and transferred its sovereign rights, if any, by the Treaty of Great Corby.

The recognition of a party directly involved in a territorial dispute is a very important factor in providing evidence of the effectiveness of control.[10] In the Treaty of Great Corby dated 1821, Plumbland recognized that Rydal possesses sovereignty over the Islands. Bilateral recognition of Rydal's sovereignty over the Islands on behalf of Plumbland is important as evidence of effective control.

In addition, the Treaty included the clauses, which were aimed to resolve any conflict that might arise in the future regarding the sovereignty over the Islands. According to the terms of the Treaty, Plumbland "irrevocably" transferred "any sovereignty" it might arguably possess within the Islands deriving from its past settlement in Salkeld. It is accepted in customary law that a treaty should be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[11] The terms "any sovereignty" and "*in* the Islands" used instead of, for example, "the sovereignty it has" and "*over* the Islands" imply at the biggest that Plumbland could have transferred an *inchoate* title to Salkeld. The situation was similarly explained by Max Huber in the analysis of cession effectuated between Spain and the USA in the *Palmas* case.[12]

Thus, Plumbland's recognition of Rydal's sovereignty over the Islands confirms that Rydal had effectively occupied the Islands.

1.3. Validity of the Treaty of Great Corby

Aspatria's later contentions as to the validity of the Treaty of Great Corby are without merit. First, Aspatria was not an independent state at the time when the Treaty of Great Corby was concluded, and therefore, it cannot have an independent claim regarding the validity of the Treaty. Second, even assuming

---

[10] Shaw, M.N. *International Law*. – New York: Cambridge University Press, 2008. 6th edn. (hereinafter – Shaw). P. 521.

[11] *United Nations Vienna Convention on the Law of Treaties,* adopted 23 May 1969, entered into force 27 January 1980, 1155 U.N.T.S. 331// http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf; access time: 2010-03-13. Art. 31; ILC. *Draft Articles on the Law of Treaties with Commentaries*// Yearbook of the International Law Commission. 1966, Vol. II (hereinafter – *Draft Articles on the Law of Treaties*), Commentary to Art. 27.

[12] *Palmas* case (n 3), P. 829, 842.

that Aspatria became independent before the conclusion of the Treaty, it did not inherit the Islands from Plumbland under the principle of *uti possidetis juris.*

1.3.1. Aspatria's claim towards Treaty's validity

In international customary law, a state invoking a claim regarding the validity of the treaty must be a party to that treaty.[13] Aspatria, being a colony of Plumbland at the time of the conclusion of the Treaty of Great Corby, cannot have an independent claim towards the Treaty's validity.

Aspatria was not independent at the time of the conclusion of the Treaty of Great Corby. First, in the nineteenth century the recognition of state's independence was crucial for it to become an international person, especially in the cases when it broke off from the mother state by way of a revolution.[14] Second, it is impossible to speak of the effectiveness of Aspatria's independence at the time of the conclusion of the Treaty of Great Corby, because there were no indications of its capability to acquire rights and obligations under the international law.

As regards the first point, prof. Lassa Oppenheim emphasized that "a State is, and becomes, an International Person through recognition only and exclusively" and it is generally agreed that a new State prior to its recognition cannot claim any right under the international law. [15] Prof. James R. Crawford reaffirmed this when generalizing the common practice concerning the recognition of independence in the nineteenth century: "only those entities recognized as states and accepted into international society, were bound by international law and were international persons."[16] Prof. Oppenheim underlined the extreme importance of the recognition in the cases when a state breaks off from the mother state by way of a revolution.[17] The formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law.[18]

It is clear that the independence is achieved when the mother state recognizes it. According to the

---

[13] *Draft Articles on the Law of Treaties* (n 11), Commentary to Art. 39.

[14] Ibid, Para. 17.

[15] Oppenheim (n 2), P. 134, 135.

[16] Crawford, J.R. *The Creation of States in International Law.* – New York: Oxford University Press, 2006. 2nd edn. (hereinafter - Crawford). P. 15.

[17] Oppenheim (n 2), P. 137.

[18] The International Committee of Jurists entrusted by the Council of the League of Nations. *Report with the task of giving an Advisory Opinion upon the legal aspects of the Aaland Islands questions*// Official Journal of the League of Nations, Special Supplement No.3, October, 1920, P. 6.

facts of the hypothetical case, Plumbland recognized Aspatria's independence in 1941. Admittedly, the metropolitan recognition is not necessary in some cases "provided that the local entity was effectively independent, and the military opposition of the metropolitan state had all intents and purposes ceased".[19] However, neither of these criteria was satisfied at the time of the Treaty of Great Corby conclusion. Aspatria was not effectively independent for the reasons explained below and Plumbland became unable to retake Aspatria no earlier than 1823.

The criterion of effectiveness brings to the second point – Aspatria was not effectively independent at the time of the Treaty of Great Corby conclusion, because there are no indications of its ability to create rights and undertake obligations under the international law. The facts of the case indicate that up until 1827 it had no diplomatic relations with any state. Furthermore, although there was a Government of the new entity, there are no indications of its ability to independently make decisions. In addition, since Aspatria is claiming the fact of independence, it has to prove it. The jurisprudence of the ICJ upholds the principle of *actori incumbit onus probandi*: the party seeking to establish a claim has the burden of proving it. The ICJ has held on a number of occasions that the party asserting a fact as a basis of its claim must establish it.[20] Therefore, absent to the contrary indications, it should be presumed that Aspatria was not effectively independent at the time of the Treaty of Great Corby conclusion.

Finally, although Aspatria's independence later was recognized by other states, this recognition does not apply retroactively, thus, it does not mean that independence was achieved as early as the declaration of it – 1819. It is the position of most scholars that there is no rule of retroactivity in the international law with respect to the recognition of the independence.[21] For these reasons Aspatria was not independent in 1821 when the Treaty of Great Corby was concluded.

1.3.2. The principle of *uti possidetis juris*

Aspatria did not inherit the Windscale Islands pursuant to the principle *uti possidetis juris*. First, *uti possidetis juris* was not a norm of international law at the time of the relevant events described in the facts of the hypothetical case, and the principle does not apply retroactively. Second, even if the principle *uti possidetis juris* applies, it does not entail the transfer of the Islands to Aspatria, because Aspatria did not

---

[19] Crawford (n 16), P. 378.

[20] I.C.J., *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore),* Judgment of 23 May 2008, para. 45; I.C.J., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 204; I.C.J., *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction, I.C.J. Reports 1984,* p. 392, 437, para. 101.

[21] Brownlie (n 9), P. 93; Kelsen, H. *Principles of International Law.* – New York, 1996, 2nd edn. P. 398.

exercise effective authority over them.

Uti possidetis juris was not a norm of international law at the time of the relevant events of the present case and it does not apply retroactively. The principle that the boundaries of the newly independent former colonies follow the former colonial frontiers (*uti possidetis juris*) developed towards the beginning of the nineteenth century as a practice in the Spanish America.[22] It became a norm of international law of general application only around the time of the general decolonization of the African Continent.[23] Thus, in 1819 when Aspatria declared its independence, the principle was still developing and solely in the region of Latin America, where Spanish colonies were situated. Therefore, Aspatria could not invoke the principle that had not existed under international law.

Furthermore, the principle *uti possidetis juris* does not apply retroactively. Thus, it does not apply to the case of Aspatria, which occurred long before the principle has evolved as a norm of international law. Admittedly, Judge Huber in the *Palmas* case explained that while the creation of a right is subjected to the law in force at the time the right arises, the existence of it should also follow the conditions required by the evolution of law.[24] However, Judge Torres Bernardez in the *Maritime Delimitation* case referred specifically to the *uti possidetis* and held that there is nothing "in the State practice or *opinio juris* to suggest that the acceptance of *uti possidetis juris* as a norm of general application implied any intent to give the norm retroactive effect, so as to make it applicable also to any act or fact which took place [...] before the generalization of *uti possidetis juris*."[25]

Consequently, the principle of *uti possidetis juris* did not apply to the case of Aspatria, because it was not at that time a norm of a general application and its later evolvement to a principle of international law does not affect the situation. Especially when even now the principle of *uti possidetis juris* is by no means mandatory.[26]

Even if the principle *uti possidetis juris* applies, it does not entail the transfer of the Islands to Aspatria, because Aspatria did not exercise effective authority over them. The ICJ explained in the *Frontier dispute* case that "[t]he principle of *uti possidetis* freezes the territorial title".[27] To determine the territorial title a state must indicate "*colonial effectivités*" - the conduct of the administrative authorities as

---

[22] Brownlie (n 9), P. 83.

[23] I.C.J., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* Dissenting Opinion of Judge Torres Bernardez (hereinafter – Bernardez), p. 40, 407, para. 428.

[24] *Palmas case* (n 3), P. 829, 845.

[25] Bernardez (n 23), P. 408, Para. 430.

[26] Brownlie (n 9), P. 133.

[27] I.C.J., *Frontier Dispute, Judgment (Burkina Faso/Republic of Mali)*, I.C.J. Reports 1986, p. 554, 568, para. 30.

proof of the effective exercise of territorial jurisdiction in the region during the colonial period.[28] The *effectivités* "play an essential role in showing how the title is interpreted in practice."[29] Moreover, in the cases when the title is disputed or unclear "it is particularly appropriate to examine the conduct of the new States in relation to the islands during the period immediately after independence."[30]

There are no indications of Aspatria's *effectivités* in the Islands neither prior, nor after the alleged independence. After it left Salkeld in 1799, there was no return to the Islands by Plumbland or its Viceroyalty Aspatria. The only actions by Aspatria with regard to the Islands were claims and unsuccessful attempts to take Salkeld. However, these acts do not qualify as *effectivités,* because the demonstration of *effectivités* must consist "in the actual display of State activities, such as belongs only to the territorial sovereign".[31] There are no signs that Aspatria exercised territorial jurisdiction over the Islands prior or after the alleged independence. Therefore, in any case the application of *uti possidetis* would not entail the transfer of the Islands to Aspatria.

In conclusion, sovereignty over the Windscale Islands belongs to Rydal for three reasons. First, Rydal has effectively occupied the Islands by the act of first discovery and further effective control over them. Second, the Kingdom of Plumbland recognized the sovereign rights of Rydal over the Islands by the Treaty of Great Corby. Third, Aspatria's later contentions as to the validity of the Treaty of Great Corby are without merit and has no impact on Plumbland's recognition of Rydal's sovereignty over the Islands, because Aspatria was not effectively independent at the time of the conclusion of the Treaty and it did not inherit the Islands under the principle of *uti possidetis juris*.

---

[28] Ibid, P. 586, Para. 63.

[29] Ibid.

[30] I.C.J., *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, I.C.J. Reports 1992*, p. 351, 558-9, para. 333.

[31] *Palmas case* (n 3), P. 839.

2. RIGHT OF PEOPLES TO SELF-DETERMINATION AS A LEGAL BASIS FOR INDEPENDENCE

This part of the thesis seeks to show that the inhabitants of the Islands (hereinafter – the Islanders) can declare independence of the Islands as a legitimate expression of their right to self-determination under international law. The Islanders have a right to self-determination, because Windscale Islands are a non-self-governing territory administered by Rydal, and non-self-governing territories are the beneficiaries of the right to self-determination under Article 73 of the Charter of the United Nations. Even assuming that the Islands belong to Aspatria, rather than to Rydal, the Islands are, so called, *in effect* a non-self-governing territory and, therefore, are entitled to independence as an expression of the right to self-determination. Finally, the Islanders have expressed their free will to exercise their right to self-determination as a basis for the creation of an independent state.

2.1. The beneficiaries of the right to self-determination

Under Article 73 of the Charter of the United Nations, non-self-governing territories are the beneficiaries of the right to self-determination and can exercise this right as a legal basis for the creation of an independent state. Additionally, international law grants the right to self-determination for territories that have become *in effect* non-self-governing territories. The following subchapters explain why the Islands are either a non-self-governing territory, or *in effect* a non-self-governing territory, and as such is entitled to self-determination as a basis for independence.

2.1.1. Windscale Islands as a non-self-governing territory

Windscale Islands are a non-self-governing territory, and Aspatria's sovereign claims towards the Islands are irrelevant due to the specific legal status that is accorded to non-self-governing territories in international law.

The Islanders have a right to self-determination, because Windscale Islands are a non-self-governing territory. Non-self-governing territories have the right to self-determination under the Charter of the UN, which proclaims the exercise of this right as one of the principles of the UN[32], setting the framework of self-determination in respect to non-self-governing territories in Chapter XI: "territories whose peoples

[32] *Charter of the United Nations*, 1945 (hereinafter – *UN Charter*)// http://www.un.org/en/documents/charter/; access time: 2010-03-13. Art. 1(2).

have not yet attained a full measure of self-government".[33]

A non-self-governing territory is a territory geographically separate and politically subordinate to the state administering it and it has the right to exercise self-determination.[34] Windscale Islands are a non-self-governing territory and have been treated by Rydal as such. Rydal designated the Islands a non-self-governing territory and has fulfilled its obligations under Art.73 of the Charter by regularly transmitting reports on the Islands to the Secretary-General. In addition, the UN has authorized the participation of special delegation from the Islands to Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

The principle of self-determination as enshrined in the UN Charter of is applicable to *all* non-self-governing territories, as emphasized by the ICJ in *Namibia* Advisory Opinion.[35] Thus, the Islanders are entitled to take immediate steps to reach "full measure of self-government" by emerging "as a sovereign independent State" through expression of the will of the peoples of the Islands by democratic means.[36]

Additionally, Aspatria's sovereign claims towards the Islands are irrelevant due to the specific legal status of the Islands. The non-self-governing status and entitlement to the exercise of self-determination does not depend on the consent of involved states, even administering power and makes any territorial claims towards it irrelevant. The *Western Sahara* case reaffirmed this point.[37] Moreover, Judge Dillard expressed the view that self-determination remains in all cases the "cardinal principle", which cannot be overridden by territorial claims of third States.[38]

Consequently, a claim by a third state to the non-self-governing territory is legally significant only in exceptional cases, when the claim is clearly established.[39] In the *Pulau* case, Judge ad hoc Franck stated that "historic title, [...] cannot – except in the most extraordinary circumstances – prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the

---

[33] Ibid, Arts. 73 and 74; Simma, B. *The Charter of the United Nations: A Commentary*. – New York: Oxford University Press, 1994.

[34] UNGA Res 1541 (XV), *Principles which should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73 of the Charter*, 15 December 1960 (hereinafter – UNGA Res 1541). Principle V.

[35] I.C.J., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, I.C.J. Reports 1971, p. 16, 31, para. 52.

[36] UNGA Res 1514 (XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960 (hereinafter – UNGA Res 1514). Para. 1; UNGA Res 1541 (n 34). Principle VI.

[37] I.C.J., *Western Sahara Advisory Opinion, I.C.J. Reports 1975* (hereinafter - Western Sahara), p. 12, 68, para. 162.

[38] I.C.J., *Western Sahara Advisory Opinion, I.C.J. Reports 1975,* Separate Opinion of Judge Dillard, p. 12, 122.

[39] Crawford (n 16). P. 644.

exercise of bona fide self-determination."[40] Aspatria's claim that the Islands belong to it under the rules relating to acquisition of territory is, therefore, irrelevant to granting the right of self-determination to the Islanders under Chapter XI of the Charter.

Thus, the Islanders have a right to self-determination, because Windscale Islands are a non-self-governing territory, and Aspatria's territorial claims towards the Islands are irrelevant due to the specific legal status that the non-self-governing territories are entitled to under Chapter XI of the UN Charter.

2.1.2. Windscale Islands as *in effect* a non-self-governing territory

Even assuming that Aspatria, and not Rydal, holds the sovereignty over the Windscale Islands, the Islanders still have a right to secede from Aspatria on the basis of self-determination. The Windscale Islands are, so called, *in effect* a non-self-governing territory and as such have a right to self-determination. The Islands have no ties with Aspatria and have become *in effect* a non-self-governing territory – entity "part of the metropolitan state, [that has] been governed in such a way as to make them *in effect* non-self-governing territories."[41]

First, the Islands have stable, representative and effective Government. They have their own Constitution and are governed by the Assembly, which is entitled to day-to-day governance. The Assembly effectively makes decisions, concerning the matters of the Islands, for example, the exploitation of natural resources.

Second, Aspatria does not exercise any control over the Islands, and it hasn't been exercising any powers over the Islands since it left them in 1799. As Judge Franck held in the *Pulau* case "[m]odern international law does not recognize the survival of a right of sovereignty based solely on historic title."[42] Thus, even if Aspatria had any control over the Islands in the eighteenth century, it eventually lost it.

Third, the Islands are economically independent. The Islanders have a right to exploit their natural resources that have been found within 200 nautical miles from the baseline, thus, in their continental shelf.[43] The potential oil wealth is a basis for the Islands' viability as an independent state. One of the main reasons why the right to secession was not favorable in the *Aaland Islands* case was that: "the Archipelago [had] not the certain resources which would enable it to bear all the expenses both of internal

---

[40] I.C.J., *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, Separate Opinion of Judge Franck (hereinafter - Franck), p. 575, 652, para. 2.

[41] Crawford (n 16), P. 126.

[42] Franck (n 40), P. 657, Para.15.

[43] *United Nations Convention on the Law of the Sea* (UNCLOS), adopted 10 December 1982, entered into force 16 November 1994, 1833 U.N.T.S. 396// http://untreaty.un.org/cod/avl/pdf/ha/uncls/uncls_e.pdf; access time: 2010-03-13. Arts. 76-77.

administration and communications with abroad".[44] This is not the case of the Windscale Islands.

Finally, the Islands' population forms a group of people distinct from Aspatrians and is of sufficient size to be an independent political community. The majority of the Islanders are of Rydalian heritage. Admittedly, Aspatria has been treating the Islanders as its citizens. However, there are no indications of the Islanders wish to identify themselves as Aspatrians. On the contrary, they have expressed their distrust of Aspatria and refusal to be identified with it on several occasions. Absent the essential subjective link, it is impossible to talk about effective citizenship.

Consequently, the absence of any effective ties between Aspatria and the Windscale Islands, as well as lack of Aspatrian control over the Islands rendered the Islands *in effect* non-self-governing, even assuming that Aspatria obtained the sovereignty over the Islands in the seventeenth century.

Contemporary international law does not exclude the possibility of unilateral secession on the basis of self-determination. The right to self-determination applies also in the non-colonial context and in special circumstances can be a basis for the unilateral secession. Art. 1(1) of the Covenant on Civil and Political Rights declares that "[a]ll peoples have the right of self-determination".[45] The Human Rights Committee recalled that "under article 1 of the Covenant, that principle applies to all peoples and not merely to colonized peoples."[46] The conclusion that the principle of self-determination is of a universal application, was made by the International Law Commission (hereinafter – the ILC).[47] Furthermore, the scholars agree that "there is nothing in international law that prohibits secession".[48] Thus, the right to self-determination can be applied outside the colonial context and in certain special circumstances (as, for example, when the state becomes *in effect* non-self-governing) can form a basis for the unilateral secession.

Therefore, the Islands are allowed to declare independence under international law upon the will of the inhabitants of the Islands, because the fact that the Islands are *in effect* a non-self-governing territory makes their case exceptional with regard to unilateral secession.

---

[44] League of Nations Commission of Rapporteurs. *Report: The Aaland Islands Question (on the Merits)//* League of Nations Council Document B7 21/68/106, 1921. P. 324.

[45] *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171// http://www2.ohchr.org/english/law/ccpr.htm; access time: 2010-03-13 (hereinafter - ICCPR). Art. 1.

[46] Human Rights Committee. *Concluding Observations on Azerbaijan*// CCPR/C/79/Add.38; A/49/40, 1994, Para. 4.

[47] ILC. *Report of the Commission to the General Assembly on the work of its fortieth session//* Yearbook of the International Law Commission, 1988, Vol. II, Part Two (UN, New York, 1990) UN Doc A/CN.4/SER.A/1988/Add.l (Part 2), P. 64, Para. 266.

[48] Higgins, R. *Problems and Process: International Law and How We Use It.* – New York: Oxford University Press, 1994. P. 125; Summers, J. *Peoples and International Law*. – Leiden: Koninklijke Brill NV, 2007. P. 335; Crawford (n 16), P. 390.

2.2. Expression of a will to be independent

The Islanders have expressed their free will to exercise their right to self-determination as a basis for independence. For the exercise of the right to self-determination as a basis for independence it is crucial that first, peoples concerned are represented by a liberation movement or other group; second, they have freely expressed their will to be independent.

"[A]s far as external self-determination is concerned, there must be a liberation movement or another type of body representative of the whole people."[49] The Islanders are represented by ILSA, which declared independence as an ultimate goal. ILSA has been constantly supported by the Islanders as its members have been elected to the Assembly in growing numbers.

Furthermore, as the ICJ held in the *Western Sahara* case, the right to self-determination "requires a free and genuine expression of the will of the peoples concerned".[50] Prof. Sir Ian Brownlie emphasized "the method by which States must reach decisions concerning peoples: heeding their freely expressed will."[51] The Islanders have clearly expressed their will to be independent, when the great majority of them (76%) voted in favor of independence in the plebiscite. Consequently, the Islanders can properly exercise their right to self-determination as a basis for independence.

In conclusion, the Islanders are entitled to independence as an exercise of their right to self-determination, because the Windscale Islands are a non-self-governing territory or *in effect* a non-self-governing territory. The Islands are a non-self-governing territory administered by Rydal under Article 73 of the Charter of the United Nations and as such is entitled to political independence. Aspatria's sovereign claims towards the Islands are irrelevant due to the specific legal status that is accorded to the non-self governing territories in international law. Even assuming that Aspatria, rather than Rydal, holds sovereignty over the Windscale Islands, the Islanders still have a right to secede from Aspatria on the basis of self-determination, because international law does not exclude the possibility of unilateral secession in exceptional cases, and the Islands is indeed an exceptional case, since they have become *in effect* a non-self-governing territory.

---

[49] Cassese, *A. Self Determination of Peoples, A Legal Reappraisal, Hersh Lauterpacht Memorial Lectures.* – Cambridge: Cambridge University Press, 1995. P. 146-147.

[50] Western Sahara (n 37), P. 32, Para. 55.

[51] Brownlie (n 9), P. 63.

3. PROTECTION OF INVESTMENT UNDER BILATERAL INVESTMENT TREATIES

This part of the thesis covers the legal issues of protection of bilateral investment. It presents two lines of argumentation. First, Rydal did not violate the bilateral investment treaty concluded between Aspatria and Rydal by rejection of MDR's Limited – the national of Aspatria – bid submitted in order to obtain the license to explore and exploit the natural oil resources in the Islands. Second, Rydal has standing to present its claim regarding Aspatria's breach of the Aspatria-Rydal BIT, and Aspatria violated the BIT by seizing the assets of ALEC – an Aspatrian corporation owned 80% by a Rydalian investor.

3.1. Rydal's obligations under the BIT in relation to rejection of MDR's bid

The rejection of MDR's bid did not constitute a breach of Rydal's obligations under the Aspatria-Rydal BIT. There are two main arguments proving that Rydal did not breach the BIT. Firstly, MDR's bid and alleged license to explore and exploit the natural resources of the Islands are not protected by the BIT. Secondly, Rydal has not violated its obligations of national, fair and equitable treatment and non-discrimination under Articles IV or V of the BIT.

3.1.1. Definition of investment

Neither MDR's bid nor the alleged license constitutes investment protected under the BIT.

3.1.1.1. A bid as the investment

A bid is not an investment under the BIT. The BIT defines "investment" as every asset of an investor that has the characteristics of an investment.[52] An "asset" is an item that is owned and has value.[53] The BIT specifically includes enterprises, shares, and licenses as types of investments.[54] Each of these implies actual property rights, tangible or intangible, rather than anticipation or preparation.

Rydal's interpretation of the BIT is consistent with the reasoning of investment tribunals interpreting the "characteristics of an investment" to require: regularity of profit and return, substantial commitment, duration, and assumption of risk.[55] None of these characteristics encompass potential investors, a fact that

---

[52] Annex II, Definitions.

[53] Garner, B. (Ed.) *Blacks's Law Dictionary.* – St. Paul: West, a Thomson business, 2004. 8 edn.; P.C.A., Case No.AA280, *Romak v. Uzbekistan*, UNCITRAL, Award, 26 Nov. 2009 (hereinafter - *Romak)*, Para. 177.

[54] Annex II, Definitions.

[55] *Romak* (n 53), Para. 207; ICSID Case No.ARB/00/4, *Salini v. Morocco*, Jurisdiction, 23 July 2001, Para. 52; Ad-hoc

has led both arbitral decisions and publicists to deny pre-investment conduct the status of an actual investment.[56] Arbitral tribunals are reluctant to recognize an investment "until the contract has been signed or at least approved and acted upon."[57] For instance, in *Mihaly,* a tribunal found that pre-investment or preparatory expenditures were not investments.[58]

The preparation of MDR's bid proposal is not an investment, because it was not subsequently awarded a contract. MDR's case parallels the *F-W Oil* decision, where F-W Oil bid on a contract to exploit oil, but negotiations over a final contract broke down.[59] Ruling that the investor had been prevented from acquiring a future investment, but had no existing legal rights, the tribunal dismissed the case.[60] The tribunal concluded that an invitation to bid is not an offer, and thus a response from a bidder has no contractual effect.[61]

Thus, MDR's bid constitutes pre-investment conduct, rather than the investment itself, and therefore, it is not protected under the BIT.

3.1.1.2. Aspatrian license as the investment

MDR's license obtained from Aspatria to explore and exploit the Islands' natural resources is not an investment. Aspatria's alleged license to MDR has no legal weight in Rydal. The BIT only applies to "licenses, authorizations, permits, and similar rights *conferred pursuant to applicable domestic law*."[62] Investments generally must be in accordance with the law of the host State.[63] Thus, Rydal's laws govern investments in the Islands, and MDR's Aspatrian license was not in accordance with those laws. Rydal directly informed MDR that it did not recognize the validity of the concession granted by the Aspatrian government. Therefore, MDR had no legitimate expectation of protection for that concession.

Whereas the BIT protection applies exclusively to investments, the rejection of MDR's bid and the non-recognition of MDR's alleged license, neither of which constitute an investment, does not trigger the

---

arbitration, *Mytilineos v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, Para. 115.

[56] Dolzer, R., Schreuer, Ch. *Principles of International Investment Law.* – New York: Oxford University Press, 2008 (hereinafter - Dolzer). P. 71.

[57] ICSID Case No.ARB/02/6, *SGS v. The Philippines*, Jurisdiction, 29 January 2004, Para. 132.

[58] ICSID Case No.ARB/00/2, *Mihaly v. Sri Lanka*, Award, 15 March 2002, Paras. 60-61.

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

[60] Ibid, Paras. 125, 213.

[61] Ibid, Para. 168.

[62] Annex II, Definitions.

[63] Ad-hoc arbitration, *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (hereinafter - *Saluka*), Para. 204.

protection standards assured by the BIT.

3.1.2. Violation of national standard of treatment

The rejection of MDR's bid did not violate the national standard of treatment assured by Article IV of the BIT, because the bidding process did not favor local investors as compared to foreign ones, and MDR's bid was not submitted in "like circumstances" with ROCO's bid.

3.1.2.1. Requirement of "no less favorable" treatment

MDR received no less favorable treatment than ROCO. Article IV of the BIT requires Rydal to accord foreign investors, including Aspatrian nationals, "treatment no less favorable than it accords, in like circumstances, to its own investors."[64] In order to determine whether an investor received less favorable treatment than other investor(s), there's a necessity to identify the relevant subjects of comparison, taking into account the relevant treatment of each subject, as well as taking into account whether any factors justify possible deviation.[65]

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

First, the selection of the bids procedure did not favor domestic investors. Minister Craven announced the bid-selection process, including the requirement of the Governor's assent, before bidders applied. Moreover, coordination with the Governor is consistent with the Islands' Constitution. The possibility that Governor Black might withhold her assent existed for any bidding party. The fact that Governor Black chose to exercise her prerogative based on her assessment of the Islands' long-term viability interests is a valid exercise of her role, and not proof of discrimination.

Moreover, the Assembly retained the final decision. While Black chose not to ratify MDR's bid, she did not express unconditional unwillingness, but rather invited the Assembly to reconsider its original decision. After reconsideration, it was the Assembly itself, and not Governor Black, that adopted a final

---

[64] Annex II, Art. IV.

[65] Ad-hoc arbitration, *Pope and Talbot, Inc. v. Canada*, NAFTA, Award in Respect of Damages, May 31, 2002, 41 ILM 1347 (hereinafter – *Pope*); Ad-hoc arbitration, *S.D. Myers, Inc. v. Canada*, Partial Award, 12 November 2000, 40 ILM 1408 (hereinafter – *S.D. Myers*).

decision in favor of ROCO's bid.

Second, The Assembly of the Islands had a margin of appreciation to evaluate the bids based on a variety of criteria. Although Minister Craven did not specify the exact standards that would be used to judge the proposals, criteria for evaluating the bids often include comparative economics, including costs and expenses, relevant experience, and social considerations.[66] A State inviting bids retains some subjective discretion in evaluation.[67] While an inviting State is obligated to consider all conforming bids fairly, the basis of consideration may vary based on the nature of the contract and the local practices of the inviting State.[68] Finally, as a matter of policy, it makes sense to take into consideration the practical impact of the selection of one bid over another because often time's public policy considerations warrant taking more into account than the simple fact that both companies drill for oil.

Third, the reasons expressed by the Governor and the Islanders as a justification to prefer ROCO's bid over MDR's were valid and legitimate. In the absence of specific evidence of the economic implications of the two bids, discrimination is not indicated here.[69] While one member of the Assembly suggested the MDR bid was economically superior, others indicated that they preferred ROCO's on its merits. The percent of net proceeds promised by each bid cannot establish economic superiority without knowledge of whether the parties would incur similar costs and extract similar quantities of oil. ROCO had already mapped and explored the oil reserves before under the request of Rydalian government, which may lower its costs of production.

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

3.1.2.2. Notion of investors in "like circumstances"

Public interest considerations justify taking account MDR's nationality in the bidding process. The BIT ties the requirement to accord no-less-favorable treatment on the condition of establishing the "like circumstances"[70], in which the bidders must appear to be. The North American Free Trade Agreement

---

[66] Sader, F. *Attracting Foreign Investment into Infrastructure: Why is it so Difficult?* – Washington: World Bank, 2000. P. 115-116.

[67] *F-W* (n 59), Paras. 169-170.

[68] Ibid.

[69] ICSID Case No.ARB(AF)/00/1, *ADF v. United States*, NAFTA, Award, 9 January 2003 (hereinafter - *ADF*), Para. 157.

[70] Annex II, Art. IV.

(hereinafter – NAFTA) employs identical language.[71] NAFTA jurisprudence interprets "like circumstances" as leaving room for differential governmental treatment based upon legitimate host State public interests.[72]

As the administering State of a non-self-governing territory,[73] Rydal has a duty to protect the interests of the Islands. This duty includes an obligation to respect the permanent sovereignty of the Islanders over their natural resources, a "basic constituent of the right to self-determination."[74] Permanent sovereignty may outweigh the interests of investors in natural resources cases.[75]

MDR is wholly-owned by Mr. Monte de Rosa, who declared: "the Islands belong to Aspatria, and the oil belongs to Aspatria." Given that he does not purport to recognize the self-determination of the Islands, Mr. de Rosa is unlikely to respect the Islands' permanent sovereignty over natural resources. Oil is the primary resource on the Islands, and will be crucial to their economic and political viability as an independent state. Rydal has an obligation to ensure the Islands are not deprived of the means of their subsistence. Therefore, Rydal is justified in considering whether Monte de Rosa's patriotism might interfere with that goal.[76]

Thus, MDR Limited's bid was not submitted "in like circumstances" with the ROCO bid. The ROCO bid was submitted amid the backdrop of a successful working relationship with the Rydalian government. The MDR Limited's bid was tainted by public inflammatory statements made by Monte de Rossa. With MDR came the possibility of interference with sensitive sovereignty questions and the self-determination rights of the Islands' inhabitants. Given the disparate circumstances of the two bids, Rydal did not violate Article IV of the BIT by rejecting the MDR Limited bid.

---

[71] *North American Free Trade Agreement, 1992,* 32 I.L.M. 605// http://www.nafta-sec-alena.org/en/view.aspx?x=343; access time: 2010-04-15. Art. 1102.

[72] U.N. Conference on Trade and Development (UNCTAD). *Investor-State Disputes Arising from Investment Treaties: A Review*, 2005 (hereinafter – UNCTAD, Review)// http://www.unctad.org/Templates/Download.asp?docid=6968&lang=1&intItemID=2310; access time: 2010-04-10. P. 34; UNCTAD. *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, 2007 (hereinafter UNCTAD, Trends)// www.unctad.org/en/docs/iteiia20065_en.pdf; access time: 2010-04-10. P. 37; *Pope* (n 65). Paras. 73-82; *S.D. Myers* (n 65), Para. 249.

[73] *UN Charter* (n 32). Art. 73.

[74] UNGA Res 1803 (XVII), *Permanent Sovereignty over Natural Resources*, 14 December 1962. Preamble.

[75] Sornarajah, M. *The Settlement of Foreign Investment Disputes.* – The Hague: Kluwer Law International, 2000 (hereinafter - Sornarajah). P. 330.

[76] *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, entered into force 3 January 1976, 993 U.N.T.S. 3 (hereinafter - ICESCR)// http://www2.ohchr.org/english/law/cescr.htm; access time: 2010-03-13. Art. 1.

To sum up, Rydal did not breach the national treatment standard assured by the BIT, because it treated MDR no less favorably than a national investor, and MDR's bid was not submitted "in like circumstances" with the ROCO bid.

3.1.3. Violation of fair and equitable standard of treatment, and non-discrimination clause

The rejection of MDR's bid did not violate fair and equitable standard of treatment, and the non-discrimination requirement, assured by Article V of the BIT, because this article applies only to investments, and MDR did not make any. Even assuming that investment has been made, Rydal acted in a non-discriminatory manner and in accordance with fair and equitable standard of treatment: Rydal's actions were just, transparent and did not breach the legitimate expectations of MDR.

3.1.3.1. Scope of Article V of the BIT

Article V of the BIT applies only to "investments" and not to "investors." Since MDR's bid is not an investment, Article V does not apply in this case.

3.1.3.2. Customary law standard of fair and equitable treatment

Even assuming that MDR made an investment protected by Article V, the said article was not violated by Rydal, because MDR has received fair and equitable treatment. Article V provides no protection beyond that accorded by customary international law,[77] consistent with the interpretation of similarly-worded provisions.[78]

Custom delineates a minimum standard of treatment of aliens. The traditional definition of this standard defines violation as treatment that is outrageous or in bad faith.[79] Though custom has evolved, the threshold for a violation of FET is still high.[80] Tribunals interpreting the customary standard refer to conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory… or involves a lack of due process."[81] The facts do not suggest any treatment of MDR that meets this threshold.

---

[77] Annex II, Art.V.

[78] NAFTA Free Trade Commission, *Statement of 31 July 2001*// http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en; access time: 2010-05-01.

[79] Mexico-United States General Claims Commission, *USA (L.F. Neer) v. Mexico*, 4 R.I.A.A. 60, 1926 (hereinafter - *Neer*).

[80] *ADF* (n 69), Paras. 124-125, 178-186; Organisation for Economic Co-operation and Development (OECD). *Fair and Equitable Treatment Standard in International Investment Law*// Working Papers on International Investment, 2004, P. 11.

[81] ICSID Case No.ARB(AF)/00/3, *Waste Management. v. Mexico*, Award, 30 April 2004 (hereinafter – *Waste Management)*, Para. 98.

3.1.3.3. Transparency and legitimate expectations

Fair and equitable treatment is also discussed in relation to transparency and an investor's legitimate government-induced expectations.[82] Rydal's actions were transparent and have not violated the legitimate expectations of MDR.

Some scholars[83] and tribunals[84] agree that the standard assumes that the parties will act at least with transparency. WTO agreements[85] and arbitral tribunals[86] agree that the core element of transparency is that all relevant national laws be made publicly available.

Rydal acted with transparency throughout the bidding process. After the oil was discovered, First Minister Craven publicly disclosed the contents of the plan, including the procedure to submit a bid. When Governor Black invited the Assembly to reconsider its recommendation, she held a press conference to announce her intentions. Rather than concealing concerns about MDR's past statements, Rydal acted with transparency throughout the bidding process thereby satisfying any transparency requirement. Although Rydal did not divulge the bid-judging criteria, there is no authority that suggests that a state must disclose that a potential investor's inflammatory public remarks prior to the bidding process might result in the rejection of the bid.

Fair and equitable treatment is frequently discussed in connection with an investor's legitimate government-induced expectations.[87] MDR could reasonably expect the bidding process to be open, transparent, competitive, and in accordance with the procedures outlined by Craven. The facts of the case indicate that the promised process was followed, votes were open and public, and relevant parties openly expressed their views and concerns. Neither the Islanders nor Rydal made any additional promises upon which MDR could reasonably rely, regardless of MDR's own speculations or conclusions. Only a "breach of representations made by the host State" is relevant to fair and equitable treatment expectation-based analysis.[88]

Thus, Rydal did not breach fair and equitable standards of treatment, because it acted with transparency throughout the bidding process and followed the promised process so ensuring the legitimate

---

[82] *Waste Management* (n 81).

[83] Muchilinski, P. *International Investment Law.* – New York: Oxford University Press, 2008. P. 628.

[84] *Saluka* (n 63); ICSID Case No.ARB(AF)/00/2, *Tecnicas Medioambientales TECMED. v. Mexico,* Award, 29 May 2003 (hereinafter - *Tecmed*); ICSID Case No.ARB/01/7, *MTD Equity Sdn. Bhd. v. Chile*, Award, 25 May 2004.

[85] *E.g. General Agreement on Tariffs and Trade (GATT)*// 33 I.L.M. 1154. 1994. Art. 3, 15.

[86] *Saluka* (n 63).

[87] *Waste Management* (n 81); *Tecmed* (n 84).

[88] *Waste Management* (n 81), Para. 98.

expectations of MDR.

3.1.3.4. Violation of non-discrimination clause

Article V of the BIT also expressly requires that the parties act with non-discrimination.[89] Although neither the BIT nor international law have defined "discrimination," the ICJ, in *ELSI*, found that discrimination can be established only if there was (i) an intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national.[90] Other arbitral panels have found that state behavior is discriminatory when (i) similar cases are (ii) treated differently (iii) without reasonable justification.[91]

Under both standards, Rydal's actions were not discriminatory. The MDR Limited bid was not rejected due to MDR Limited's nationality. On the contrary, the bid was rejected because of the threat MRD Limited posed to the sovereignty of the Islands. As the bid was not rejected due to MDR Limited's nationality, the rejection of the bid did not violate Article V.

To conclude, the rejection of MDR's bid did not violate Article V of the BIT. This article applies only to investments, and MDR did not make any. Even assuming that investment has been made, Rydal acted in a non-discriminatory manner and in accordance with fair and equitable standard of treatment. Rydal's actions were just and not arbitrary – elements of fair and equitable treatment standard in customary international law. The bidding process was transparent and did not breach the legitimate expectations of MDR: the publicly announced bidding procedures were followed, votes were open and public, and relevant parties openly expressed their views and concerns.

3.2. Rydal's affirmative claim regarding seizure of assets

This subsection of the third part of the thesis examines and supports Rydal's affirmative allegation of a BIT violation by Aspatria, namely that the seizure of ALEC's assets was a violation of the Aspatria-Rydal BIT, and that Rydal has standing to invoke the BIT to protect the assets of a Rydalian enterprise in Aspatria.

Rydal has standing to present a claim on behalf of ROCO, because ROCO is Rydal's national and ROCO exhausted the local remedies in Aspatria. This effectively means that both requirements for the

---

[89] Annex II, Art. V.

[90] I.C.J., *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989,* p. 15 (hereinafter- *ELSI*), paras. 61-62.

[91] *Saluka* (n 63), Para. 313; ICSID Case No.ARB/02/1, *LG&E Energy Corp. v. Argentine Republic*, Award, 3 Oct. 2006, Para. 146.

exercise of diplomatic protection are satisfied. Rydal has standing under the BIT to protect the investment of its national ROCO having shares in ALEC, a company incorporated in Aspatria. Alternatively, Rydal has standing to protect ALEC by substitution under customary international law.

Aspatria violated its BIT obligations by expropriating ROCO's investments and failing to accord them fair and equitable treatment.

3.2.1. Standing to protect ROCO's Aspatrian investments

In order for a state to present a claim in court on behalf of an individual in the exercise of diplomatic protection, two customary law requirements must be fulfilled: the individual concerned must be a national of the respective state and the individual must first exhaust local remedies in the state responsible for the alleged injury.

Rydal in this case has standing to protect ROCO's Aspatrian investments. Rydal may exercise diplomatic protection on behalf of ROCO for the breach of the standard of treatment assured by the Aspatria-Rydal BIT on the basis of the Rydalian nationality of the corporation. Art. 3(1) of the Draft Articles on the Diplomatic Protection (hereinafter – the DADP) states that "[t]he State entitled to exercise diplomatic protection is the State of nationality."[92] The ICJ explained in the *Barcelona Traction* case that international law "attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office".[93] Thus, the ICJ held that for the purposes of diplomatic protection the state of nationality of a company is the state of incorporation. ROCO has been incorporated in and under the laws of Rydal. Therefore, Rydal may exercise diplomatic protection on behalf of ROCO for the breach of the standard of treatment assured by the Aspatria-Rydal BIT.

Additionally, ROCO has exhausted the local remedies in Aspatria. The substance of ROCO's claim was exhausted by ALEC in *ALEC v. Langdale Administrative Court* without opportunity for further appeal. This argument is developed in more detail in the subchapters below.

3.2.1.1. Standing based on the terms of the BIT

Rydal has standing to invoke the BIT based on the express language of the BIT. Investment treaties

---

[92] ILC. *Draft Articles on Diplomatic Protection with commentaries*// Yearbook of the International Law Commission. 2006, Vol. II, Part Two (hereinafter – DADP). Art. 3(1).

[93] I.C.J., *Barcelona Traction Light and Power Company, Limited,* Judgment, I.C.J. Reports 1970 (hereinafter - *Barcelona Traction*), p. 3, 43, para. 70.

expand protection beyond customary diplomatic protection. In response to the ICJ's decision in *Barcelona Traction,* many States opted into investment treaty regimes that extend shareholder protections. [94]

The ICJ recognized that a treaty may confer standing where diplomatic protection otherwise does not. In *Elettronica Sicula* ("*ELSI*"), the United States was able to bring claims under a BIT-like treaty on behalf of its shareholders in Italian Corporations based on the express language of the treaty.[95] The ICJ has recently confirmed that the role of diplomatic protection has "faded" in light of the proliferation of investment treaties directly protecting shareholders.[96] The Draft Articles of Diplomatic Protection refer to investment treaties as a category removed from traditional diplomatic protection.[97]

The Aspatria-Rydal BIT expands the protections of customary international law with regard to standing. ROCO's participation in ALEC, either as the ownership of the enterprise itself or having a shareholding in it, is a protected investment. An "investor of a party" under the BIT includes any national or enterprise that has made an investment in the territory of the other party.[98] As a Rydalian corporation invested in an Aspatrian enterprise, ROCO is an investor.[99] Thus, Rydal may espouse a claim on ROCO's behalf.[100]

ROCO's subsidiary, ALEC, is protected as an enterprise of ROCO.[101] As an 80% owner of ALEC, ROCO both owns and controls ALEC.[102] Tribunals do not require 100% ownership to find that a corporation is a protected enterprise.[103]

Even if ALEC were not a ROCO enterprise, ROCO's shares in ALEC are independently protected by the BIT.[104] Inclusion of shareholders as investors under an investment treaty regime, regardless of control, allows them to protect corporate assets against adverse action by the host State.[105] For example, U.S. corporation GAMI owned 14.18% of GAM, but was entitled to seek remedy for Mexico's

---

[94] UNCTAD Trends (n 72), P. 17; Sornarajah (n 75), P. 329.

[95] *ELSI* (n 90); DADP (n 92), Commentary to Art.11.

[96] I.C.J., *Ahmadou Sadio Dialo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, I.C.J., Judgment of 24th May 2007, p. 18 (hereinafter – *Diallo)*, para. 88.

[97] DADP (n 92), Art. 17.

[98] Annex II, Definitions.

[99] Ibid.

[100] Annex II, Art. XIII.

[101] Ibid.

[102] UNCTAD Trends (n 72), P. 131.

[103] ICSID Case No.ARB/93/1, *American Manufacturing and Trading, Inc. v. Zaire*, Award, 21 February 1997, Para. 15.5.

[104] Annex II, Definition of Investment.

[105] Dolzer (n 56), P. 59.

expropriation of GAM's property, arguing that its investment was indirectly expropriated.

Thus, based on the express terms of the treaty defining "enterprise" and "shares" as investment, Rydal has standing to protect ALEC's assets on behalf of ROCO.

3.2.1.2. Standing based on international customary law

In the alternative, Rydal may espouse a claim on behalf of ROCO to protect ALEC under international customary law through substitution. The ICJ has introduced an exception to traditional diplomatic protection when a State requires domestic incorporation as a prerequisite for business and inflicts harm on a company itself. In such cases the State of the shareholder's nationality may exercise diplomatic protection by substitution.[106] This principle was codified in Article 11(b) of the Draft Articles of Diplomatic Protection,[107] and referenced in *Diallo*, though inapplicable to that case.[108] In *Diallo*, the ICJ did not allow the state of nationality of the shareholders to espouse a claim because the corporation was not incorporated in Zaire as a requirement for doing business.[109] In the present case, this exception applies to ALEC; the NRA explicitly requires companies seeking licenses in the Aspatrian energy sector to be incorporated in Aspatria, and Aspatria has itself caused ALEC's injuries. Having fulfilled both elements of the exception, Rydal has standing to espouse a claim on behalf of ROCO, as a Rydalian shareholder.

Thus, Rydal has standing to present a claim on behalf of its national ROCO either on the basis of the BIT or customary international law.

3.2.2. Exhaustion of local remedies

It is a well-established rule of customary international law that a State may not espouse a claim on behalf of a national unless local remedies have been exhausted.[110] Local remedies have been exhausted in this case.

3.2.2.1. Substance of the claim

ROCO's claim has been substantively exhausted. The ICJ has found that a national has exhausted local remedies if the essence of the claim has been brought before the competent tribunals and pursued as

---

[106] *Barcelona Traction* (n 93), P. 3, 43, Para. 92; DADP (n 92), Commentary to Art. 11.

[107] DADP (n 92), Art. 11(b).

[108] *Diallo* (n 96), Para. 93.

[109] *Diallo* (n 96), Para. 91.

[110] I.C.J., *Interhandel Case*, *Judgment of 21 March 1959, I.C.J. Reports 1959*, p. 6.

far as permitted by local law and procedures, and without success.[111] The rule was reiterated in the DADP.[112] The substance of the U.S. claim in *ELSI* was essentially the same that the American owners brought before Italian courts, and was thus admissible.[113] The substance of ROCO's claim concerns, not ALEC's alleged violation of the NRA, but the seizure of ALEC's property. Immediately after the court granted the application to seize ALEC's assets, counsel for ALEC filed a petition asking that the order be canceled. This claim was exhausted in *ALEC v. Langdale Administrative Court* without opportunity for further appeal. As ALEC has exhausted local resources, Rydal may espouse a claim on behalf of ROCO.

3.2.2.2. Reasonably available local remedies

Remedies need not be exhausted if there are no reasonably available local remedies that can redress the injury.[114] The substance of ROCO's injury under the BIT—the seizure of ALEC's assets—differs substantially from the pending criminal case *Prosecutor v. ALEC*, which will not resolve the seizure of goods. If ALEC is not guilty, Aspatria will return ALEC's assets at the conclusion of the criminal case, but the Aspatrian criminal code does not guarantee interest, lost profits, or compensation for harm to ROCO occasioned by the intermediate seizure. The criminal proceeding cannot provide an adequate forum for treaty-based expropriation allegations. ROCO will be unable to obtain relief through the *Prosecutor v. ALEC*.

To conclude, Rydal satisfies both prerequisites of diplomatic protection, nationality and exhaustion of local remedies, and therefore, has standing to protect ROCO's investment in Aspatria.

3.2.3. Expropriation

Aspatria's seizure of ALEC's property is expropriation in violation of Article VI of the BIT. Neither party to the BIT may expropriate an investment directly or indirectly, except for a public purpose, in accordance with due process of law and on prompt, adequate, and effective compensation.[115] Even if Aspatria has not taken title to ALEC's assets outright, their seizure constitutes expropriation.[116]

---

[111] *ELSI* (n 90), Para. 59.

[112] DADP (n 92), Commentary to Art. 14.

[113] *ELSI* (n 90), Para. 58.

[114] DADP (n 92), Art. 15(a).

[115] Annex II, article VI(a).

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

3.2.3.1. Notion of indirect expropriation

Aspatria's seizure is an indirect expropriation. Indirect expropriation is determined by the effect of government action on the investor, rather than the action's purpose.[117] An action has expropriatory effect when it results in significant economic deprivation of the value of the investor's assets, or of the reasonably-to-be- expected economic benefit of the investment.[118] Aspatria has seized *all* of ALEC's assets within Aspatria, significantly depriving ALEC of "fundamental rights of ownership."[119] ALEC is rendered unable to conduct business at all in Aspatria, as if title had been taken outright.

The seizure further constitutes a *de facto* taking of ALEC's licenses to exploit oil in Northern Aspatria. In *Chorzów Factory,* seizure of a factory constituted an indirect taking of patents and contracts of the company's managers;[120] similarly, in *Middle East Cement*, the *de facto* revocation of a license qualified as creeping expropriation depriving the investor **"**of the use and benefit of his investment."[121] The seizure of ALEC's assets, including the drilling equipment, prevents ALEC from profiting from its concessions, depriving ROCO of steady revenue streams.

3.2.3.2. Relevance of duration of taking

Takings amount to expropriation if they are "not merely ephemeral."[122] In *Wena v. Egypt,* seizure and illegal possession for "nearly a year" was "more than an ephemeral interference in the use of the property"[123] and, therefore, constituted expropriation. Here, ALEC faces the loss of its assets for 4-9 years. The damage may be irrevocable if ALEC is forced to cease business entirely.

Thus, the seizure of ALEC's assets constitutes indirect expropriation, because it substantially deprives ROCO of the value of its investment and lasts for a period, which can not be interpreted as "merely ephemeral".

---

[117] UNCTAD Review (n 72), P. 45; OECD. *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law//* Working Papers on International Investment, 2004 (hereinafter - OECD, Expropriation). P. 15; *Tecmed* (n 84), Para. 116; Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens// reprinted in Louis B. Sohn & R.R. Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 AM. J. INT'L L. 545, 548. 1961.

[118] UNCTAD Review (n 72), P. 46; ICSID Case No.ARB/AF/97/1, *Metalclad v. United Mexican States*, Award, August 30, 2005, Para. 103; ICSID Case No.ARB/02/18, *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction, 29 April 2004, Para. 119.

[119] OECD Expropriation (n 117), P. 11; *Pope* (n 65), Paras. 87-88.

[120] P.C.I.J., *Chorzów Factory*, Series A, No.17, 1928; OECD Expropriation (n 117), P. 4.

[121] ICSID Case No.ARB/19/6, *Middle East Cement v. Egypt*, Award, 12 April 2002, Para. 108.

[122] *Tippetts* (n 116); ICSID Case No.ARB/98/4, *Wena Hotels v. Egypt*, Award, 8 December 2000 (hereinafter - *Wena)*, Para. 98.

[123] *Wena* (n 122), Para. 99.

3.2.4. Distinction between indirect expropriation and regulatory taking

Article VI(b) of the BIT provides that a party to the Treaty may take property of a foreign investor in the legitimate exercise of police power. However, the measures must not be so severe in light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatorily and having been designed to protect legitimate public welfare objectives. [124] Thus, it is insufficient for Aspatria to claim its actions were undertaken for public welfare objectives, if the seizure was not reasonably and proportionately related to a public purpose.

The ICJ has recognized proportionality as a principle of law requiring: fit between the ends sought to be achieved and the means used, the application of the least harmful measures, and that any damage to individuals be proportional to the benefit the State receives.[125]

3.2.4.1. Proportionality requirement

Article VI(b) does not apply in light of the excessive burden imposed on ALEC. Arbitral awards find that measures to protect public interests must be proportionate to their stated objective to avoid expropriation.[126] Investment tribunals frequently cite proportionality analysis from the European Court of Human Rights.[127] The court has applied proportionality to cases of criminal seizure, finding improper balance between the interests of society in investigating criminal activity and the burden born by the affected company—taking into account the duration of seizure and value of the assets.[128]

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

The seizure is so severe in light of its purpose that it cannot reasonably be viewed as having been adopted and applied in good faith, and Article VI(b) of the BIT cannot excuse the expropriation.[129]

Article VI(a) of the BIT provides that neither party may expropriate an investment, "except for a

---

[124] Annex II, Art. VI(b).

[125] I.C.J., *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136;

[126] *Tecmed* (n 84), Para. 122; ICSID Case No.ARB/03/16, *ADC Affiliate Ltd. and ADC&ADMC Management Ltd. v. Republic of Hungary*, Award, 2 October 2006.

[127] Ibid, Para. 122; ICSID Case No.ARB/01/12, *Azurix Corp. v. Argentina*, Award, 14 July 2006, Para. 311.

[128] E.C.H.R. Case No.38238/04 (Sect. 5), *Forminster Enterprises Limited v. the Czech Republic*, 2008, Para. 77.

[129] Annex II, Art. IV(b).

public purpose; in accordance with the due process of law; in a non-discriminatory manner; and on prompt, adequate, and effective compensation."[130]

As argued above, Applicant's actions were discriminatory and not for a public purpose. Also, the Article VI exception requires "prompt, adequate, and effective compensation" for expropriations. As Aspatria's actions were discriminatory, not for a public purpose, the exception under article VI does not apply. Since Aspatria failed to provide prompt, adequate, and effective compensation, its actions constitute illegal expropriation under Article V of the BIT.

3.2.4.2. Lack of proportionality – violation of fair and equitable treatment standard

Even if Aspatria's seizure were in good faith, the disproportionate burden imposed upon ALEC is a violation of Article V. An assessment of fair and equitable treatment requires examination of the proportionality between the State's aims and the treatment investors receive.[131] Even if the NRA is a legitimate regulation, it cannot lawfully be used to halt ALEC's activities in Aspatria entirely. An injunction would meet the same aim without imposing as great a burden on ALEC. Thus, Aspatria's disproportional actions also violated fair and equitable standard of treatment.

In conclusion, Rydal has standing to protect ALEC's assets, and the seizure of such assets constitutes a violation of Aspatria-Rydal BIT. Rydal has standing to protect the investment of its national ROCO based on the express terms of the treaty defining "enterprise" and "shares" as investment. Alternatively, Rydal has standing under international customary law as the state of the shareholder's nationality, because the NRA explicitly requires companies seeking licenses in the Aspatrian energy sector to be incorporated in Aspatria, and Aspatria has itself caused ALEC's injuries. Local remedies have been exhausted. The seizure of ALEC's assets constitutes indirect expropriation, because it substantially deprives ROCO of the value of its investment and is not "merely ephemeral" in terms of duration. The seizure is so severe in light of its purpose that it cannot reasonably be viewed as having been adopted and applied in good faith, hence, Article VI(b) of the BIT cannot excuse the expropriation. Since expropriation was not compensated, it is a violation of Article VI(a) of the BIT.

---

[130] Annex II, Art. VI(a).

[131] *Tecmed* (n 84), Para. 122.

CONCLUSIONS

All four hypotheses raised in the thesis were confirmed.

The **first hypothesis** that sovereignty over the Windscale Islands belongs to Rydal is supported by the following conclusions:

1. Rydal has gained sovereignty over the Islands by way of effective occupation. By act of first discovery Rydal gained the *inchoate* title, and a privilege, to effectively occupy the Islands within a reasonable time. Rydal has effectively controlled the Islands until Aspatria presented a competing claim. Furthermore, Plumbland recognized the sovereign rights of Rydal over the Islands by the Treaty of Great Corby.
2. Aspatria's contentions as to the validity of the Treaty of Great Corby are without merit. First, at that time Aspatria was still a colony of Plumbland. Second, its argument of *uti possidetis juris* is irrelevant, since this principle was not a part of international law at that time, and in any case, Aspatria would have to show its effective authority over the territory in question, which it did not have.

The **second hypothesis** that the inhabitants of the Windscale Islands have a right to self-determination and may exercise it as a legal basis for the creation of an independent state is supported by the following conclusions:

1. The Windscale Islands are a non-self-governing territory and as such have a right to self-determination under the Charter of the United Nations. Aspatria's claims towards the Islands are irrelevant, because a claim by a third state to the non-self-governing territory may be legally significant only in exceptional cases, when the claim is clearly established. It is not the case of Aspatria's historic claim.
2. Even assuming that Aspatria holds sovereignty over the Islands, the Islanders still have a right to secede from Aspatria on the basis of self-determination. The right to unilateral secession is permitted under international law in exceptional cases. The case of the Windscale Islands is exceptional, because due to Aspatria's lack of control over the Islands, the Islands became *in effect* a non-self-governing territory having stable, effective and representative Government, distinct population and economic independence. Finally, the great majority of the Islanders have expressed their will to be independent in the plebiscite.

The **third hypothesis** that Respondent's rejection of the bid submitted by the MDR Limited Corporation, an enterprise of Aspatrian nationality, did not violate the Aspatria-Rydal BIT is supported by

the following conclusions:

1. MDR's preparation of a bid is not a protected investment, and any grant from Aspatria is not an investment Rydal is obligated to protect.
2. MDR received no less favorable treatment than ROCO. The fact that a domestic investor was awarded a competitive bid cannot evidence discrimination. The Islanders had broad discretion to select a contractor and ultimately selected ROCO's bid for valid reasons and in accordance with the pre-announced requirements.
3. Requiring the Governor's assent is a valid procedural safeguard, and the Governor was entitled to consider Monte de Rosa's prior statements in light of the importance of oil to the Islands. Rydal has violated no legitimate expectations of MDR, and did not treat MDR in any way that violates the threshold of fair and equitable treatment set by customary international law.

The **fourth hypothesis** that Rydal has standing to invoke the Aspatria-Rydal BIT in the exercise of diplomatic protection on behalf of its national corporation ROCO for the seizure of ALEC's assets, and the seizure of such assets was a violation of the Aspatria-Rydal BIT, is supported by the following conclusions:

1. Rydal has standing to represent ROCO's injuries in court because the BIT protects ROCO's investments (shares) in ALEC, which is an enterprise of ROCO. In the alternative, Rydal may represent ALEC through diplomatic protection by substitution.
2. ROCO has exhausted its claim regarding the seizure of ALEC's assets through *ALEC v. Langdale Administrative Court*.
3. Aspatria's seizure of ALEC's assets deprives ROCO of the benefit of its investment in ALEC and constitutes expropriation. The seizure effectively deprives ROCO of the fundamental rights of ownership, and of revenues derived from ALEC's concession rights. Moreover, the seizure is of significant duration and will cause irrevocable harm to ALEC and ROCO.
4. The fact that the value of the assets seized bears no proportion to the aims Aspatria seeks to achieve is evidence of bad faith, and itself constitutes a violation of fair and equitable treatment.

BIBLIOGRAPHY

INTERNATIONAL TREATIES

1. *Charter of the United Nations*, 1945// http://www.un.org/en/documents/charter/; access time: 2010-03-13.
2. *General Agreement on Tariffs and Trade (GATT)*// 33 I.L.M. 1154. 1994.
3. *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171// http://www2.ohchr.org/english/law/ccpr.htm; access time: 2010-03-13.
4. *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, entered into force 3 January 1976, 993 U.N.T.S. 3// http://www2.ohchr.org/english/law/cescr.htm; access time: 2010-03-13.
5. *North American Free Trade Agreement, 1992,* 32 I.L.M. 605// http://www.nafta-sec-alena.org/en/view.aspx?x=343; access time: 2010-04-15.
6. *United Nations Convention on the Law of the Sea,* adopted 10 December 1982, entered into force 16 November 1994, 1833 U.N.T.S. 396// http://untreaty.un.org/cod/avl/pdf/ha/uncls/uncls_e.pdf; access time: 2010-03-13.
7. *United Nations Vienna Convention on the Law of Treaties,* adopted 23 May 1969, entered into force 27 January 1980, 1155 U.N.T.S. 331// http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf; access time: 2010-03-13.

INTERNATIONAL JUDICIAL AND ARBITRAL AWARDS

8. Ad-hoc arbitration, *Clipperton Island case (France v. Mexico)*, 26 AJIL, 1932.
9. Ad-hoc arbitration, *Island of Palmas case (United States v. The Netherlands),* 2 RIAA, 1928.
10. Ad-hoc arbitration, *Mytilineos v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006.
11. Ad-hoc arbitration, *Pope and Talbot, Inc. v. Canada*, NAFTA, Award in Respect of Damages, May 31, 2002, 41 ILM 1347.
12. Ad-hoc arbitration, *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006.

13. Ad-hoc arbitration, *S.D. Myers, Inc. v. Canada*, Partial Award, 12 November 2000, 40 ILM 1408.
14. E.C.H.R. Case No.38238/04 (Sect. 5), *Forminster Enterprises Limited v. the Czech Republic*, 2008.
15. ICSID Case No.ARB/03/16, *ADC Affiliate Ltd. and ADC&ADMC Management Ltd. v. Republic of Hungary*, Award, 2 October 2006.
16. ICSID Case No.ARB(AF)/00/1, *ADF v. United States*, NAFTA, Award, 9 January 2003.
17. ICSID Case No.ARB/93/1, *American Manufacturing and Trading, Inc. v. Zaire*, Award, 21 February 1997.
18. ICSID Case No.ARB/01/12, *Azurix Corp. v. Argentina*, Award, 14 July 2006.
19. ICSID Case No.ARB/01/14, *F-W Oil Interests v. Trinidad and Tobago*, Award, 3 March 2006.
20. ICSID Case No.ARB/02/1, *LG&E Energy Corp. v. Argentine Republic*, Award, 3 Oct. 2006.
21. ICSID Case No.ARB/AF/97/1, *Metalclad v. United Mexican States*, Award, August 30, 2005.
22. ICSID Case No.ARB/19/6, *Middle East Cement v. Egypt*, Award, 12 April 2002.
23. ICSID Case No.ARB/00/2, *Mihaly v. Sri Lanka*, Award, 15 March 2002.
24. ICSID Case No.ARB/01/7, *MTD Equity Sdn. Bhd. v. Chile*, Award, 25 May 2004.
25. ICSID Case No.ARB/00/4, *Salini v. Morocco*, Jurisdiction, 23 July 2001.
26. ICSID Case No.ARB/02/6, *SGS v. The Philippines*, Jurisdiction, 29 January 2004.
27. ICSID Case No.ARB/98/4, *Wena Hotels v. Egypt*, Award, 8 December 2000.
28. ICSID Case No.ARB(AF)/00/2, *Tecnicas Medioambientales TECMED. v. Mexico,* Award, 29 May 2003.
29. ICSID Case No.ARB/02/18, *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction, 29 April 2004.
30. ICSID Case No.ARB(AF)/00/3, *Waste Management. v. Mexico*, Award, 30 April 2004.
31. Iran-US Claims Tribunal, *Tippetts v. TAMS-AFFA Consulting Engineers of Iran*, 6 Cl. Trib. 219, 1984.
32. I.C.J., *Ahmadou Sadio Dialo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment of 24th May 2007, I.C.J.,* p. 18.
33. I.C.J., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. 67.*
34. I.C.J., *Barcelona Traction Light and Power Company, Limited, Judgment, I.C.J. Reports 1970,* p. 3.
35. I.C.J., *El Salvador/Honduras case, I.C.J. Reports, 1992,* p. 351.
36. I.C.J., *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15.
37. I.C.J., *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90.

38. I.C.J., *Frontier Dispute, Judgment (Burkina Faso/Republic of Mali), I.C.J. Reports 1986*, p. 554.
39. I.C.J., *Interhandel Case, Judgment of 21 March 1959, I.C.J. Reports 1959*, p. 6.
40. I.C.J., *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, I.C.J. Reports 1992*, p. 351.
41. I.C.J., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.
42. I.C.J., *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136.
43. I.C.J., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001,* p. 40.
44. I.C.J., *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction, I.C.J. Reports 1984*, p. 392.
45. I.C.J., *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), I.C.J., Judgment of 23 May 2008*.
46. I.C.J., *The Minquiers and Ecrehos case, Judgment of November 17th, 1953, I.C.J. Reports, 1953,* p. 47.
47. I.C.J., *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 575.
48. I.C.J., *Western Sahara Advisory Opinion, I.C.J. Reports 1975*, p. 12.
49. Mexico-United States General Claims Commission, *USA (L.F. Neer) v. Mexico*, 4 R.I.A.A. 60, 1926.
50. P.C.A., Case No.AA280, *Romak v. Uzbekistan*, UNCITRAL, Award, 26 Nov. 2009.
51. P.C.I.J., *Chorzów Factory*, Series A, No.17, 1928.
52. P.C.I.J., *Eastern Greenland case (Denmark v. Norway),* Series A/B, No. 53, 1933.

UNITED NATIONS DOCUMENTS

53. Human Rights Committee. *Concluding Observations on Azerbaijan*// CCPR/C/79/Add.38; A/49/40, 1994.
54. ILC. *Draft Articles on Diplomatic Protection with commentaries*// Yearbook of the International Law Commission. 2006, Vol. II, Part Two.
55. ILC. *Draft Articles on the Law of Treaties with Commentaries*// Yearbook of the International Law

Commission. 1966, Vol. II.

56. ILC. *Report of the Commission to the General Assembly on the work of its fortieth session*// Yearbook of the International Law Commission, 1988, Vol. II, Part Two (UN, New York, 1990) UN Doc A/CN.4/SER.A/1988/Add.l (Part 2).
57. UNCTAD. *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, 2007// www.unctad.org/en/docs/iteiia20065_en.pdf; access time: 2010-04-10.
58. UNCTAD. *Investor-State Disputes Arising from Investment Treaties: A Review*, 2005// http://www.unctad.org/Templates/Download.asp?docid=6968&lang=1&intItemID=2310; access time: 2010-04-10.
59. UNGA Res 1514 (XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960.
60. UNGA Res 1541 (XV), *Principles which should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73 of the Charter*, 15 December 1960.
61. UNGA Res 1803 (XVII), *Permanent Sovereignty over Natural Resources*, 14 December 1962.

TREATISES AND DIGESTS

62. Brownlie, I. *Principles of Public International Law*. – Oxford: Oxford University Press, 1979. 3rd edn.
63. Cassese, A. *Self Determination of Peoples, A Legal Reappraisal, Hersh Lauterpacht Memorial Lectures.* – Cambridge: Cambridge University Press, 1995.
64. Crawford, J.R. *The Creation of States in International Law.* – New York: Oxford University Press, 2006. 2nd edn.
65. Dolzer, R., Schreuer, Ch. *Principles of International Investment Law.* – New York: Oxford University Press, 2008.
66. Higgins, R. *Problems and Process: International Law and How We Use It.* – New York: Oxford University Press, 1994.
67. Kelsen, H. *Principles of International Law.* – New York, 1996, 2nd edn.
68. Muchilinski, P. *International Investment Law.* – New York: Oxford University Press, 2008.
69. Oppenheim, L./ed. R.F.Roxburgh. *International Law. Peace.* – London: Longmans, Green and Co, 1920. Vol. I, 3rd edn.
70. Sader, F. *Attracting Foreign Investment into Infrastructure: Why is it so Difficult?* – Washington:

World Bank, 2000.

71. Shaw, M.N. *International Law*. – New York: Cambridge University Press, 2008. 6th edn.
72. Simma, B. *The Charter of the United Nations: A Commentary*. – New York: Oxford University Press, 1994.
73. Sornarajah, M. *The Settlement of Foreign Investment Disputes.* – The Hague: Kluwer Law International, 2000.
74. Summers, J. *Peoples and International Law*. – Leiden: Koninklijke Brill NV, 2007.

MISCELLANEOUS

75. Garner, B. (Ed.) *Blacks's Law Dictionary.* – St. Paul: West, a Thomson business, 2004. 8 edn.
76. Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens// reprinted in Louis B. Sohn & R.R. Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens// 55 AM. J. INT'L L. 545, 548. 1961.
77. League of Nations Commission of Rapporteurs. *Report: The Aaland Islands Question (on the Merits)//* League of Nations Council Document B7 21/68/106, 1921.
78. NAFTA Free Trade Commission, *Statement of 31 July 2001*// http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en; access time: 2010-05-01.
79. OECD. *Fair and Equitable Treatment Standard in International Investment Law*// Working Papers on International Investment, 2004.
80. OECD. *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law//* Working Papers on International Investment, 2004.
81. The International Committee of Jurists entrusted by the Council of the League of Nations. *Report with the task of giving an Advisory Opinion upon the legal aspects of the Aaland Islands questions*// Official Journal of the League of Nations, Special Supplement No.3, October, 1920.

ABSTRACT

Vėlyvytė V. Acquisition of Sovereignty, Right of Peoples to Self-Determination and Protection of Bilateral Investment: A Hypothetical Case Study / Master thesis of Joint Master of International Law program. Supervisor Andrius Bambalas, consultant Prof. Dr. Lyra Jakulevičienė. – Vilnius: Mykolas Romeris University, Law Faculty, Department of International Law, 2010. – 55 p.

The thesis represents a legal analysis of a hypothetical case concerning the Windscale Islands examined at Philip C. Jessup International Law Moot Court Competition 2010. It analyzes and determines the content of international legal rules concerning the issues that form the research objects of the thesis and applies those rules to the facts of the hypothetical case from the position of the Respondent. Four hypotheses are raised in the thesis, all of them are confirmed. First, sovereignty over the disputed territory in question, the Windscale Islands, belongs to Rydal. Second, the inhabitants of the Windscale Islands have a right to self-determination and may exercise it as a legal basis for the creation of an independent state. Third, Rydal's rejection of the bid submitted by MDR Limited Corporation, an enterprise of Aspatrian nationality, did not violate the Aspatria-Rydal bilateral investment treaty. Fourth, Rydal has standing to invoke the Aspatria-Rydal BIT in the exercise of diplomatic protection on behalf of its national corporation ROCO for the seizure of Aspatrian corporation's ALEC assets, and the seizure of such assets was a violation of the BIT.

Keywords: acquisition of sovereignty, the right of peoples to self-determination, protection of bilateral investment.

SUMMARY

The thesis represents a legal analysis of a hypothetical case concerning the Windscale Islands examined at Philip C. Jessup International Law Moot Court Competition 2010. It analyzes and determines the content of international legal rules concerning the issues that form the research objects of the thesis and applies those rules to the facts of the hypothetical case from the position of the Respondent.

The thesis has three distinct aims. The first aim is to establish conditions for the acquisition of sovereignty through occupation in the context of the facts of the case. The second aim is to determine the requirements for the exercise of the right of peoples to self-determination as a legal basis for independence. The third aim is to evaluate the actions of Aspatria and Rydal from the point of view of international obligations undertaken under the bilateral investment treaty concluded between them. In respect to the aims of the thesis and considering the scope of the thesis, four hypotheses are raised.

The first hypothesis of the thesis: the sovereignty over the disputed territory in question, the Windscale Islands, belongs to Rydal. The author draws a conclusion that the hypothesis was confirmed. In accordance with customary international law, Rydal's discovery of the Islands as *terra nullius* and subsequent effective control over them entitles Rydal to sovereignty over the Islands. By act of first discovery Rydal gained the *inchoate* title, and a privilege, to effectively occupy the Islands within reasonable time. Rydal has effectively controlled the Islands until Aspatria presented a competing claim.

The second hypothesis of the present thesis: the inhabitants of the Windscale Islands have a right to self-determination and may exercise it as a legal basis for the creation of an independent state. The author draws a conclusion that the hypothesis was confirmed. The inhabitants of the Islands are entitled to independence as the exercise of their right to self-determination under the Charter of the United Nations, because the Islands are a non-self-governing territory administered by Rydal. Even assuming the Islands form part of Aspatria's territory, rather than being part of Rydal, they are nevertheless entitled to independence. The right to unilateral secession as the expression of the right to self-determination is permitted under international law in exceptional cases. The case of Windscale Islands is exceptional, because due to Aspatria's lack of control over the Islands the Islands became *in effect* a non-self-governing territory having stable, effective and representative Government, distinct population and economic independence.

The third hypothesis of the present thesis: Respondent's rejection of the bid submitted by the MDR Limited Corporation, an enterprise of Aspatrian nationality, did not violate the Aspatria-Rydal BIT. The author draws a conclusion that the hypothesis was confirmed. MDR did not make an investment to be

protected under the BIT. MDR received fair and equitable treatment, and the bidding process did not discriminate MDR on the grounds of nationality.

The fourth hypothesis of the present thesis: Rydal has standing to invoke the Aspatria-Rydal BIT in the exercise of diplomatic protection on behalf of its national corporation ROCO for the seizure of Aspatrian corporation's ALEC assets, and the seizure of such assets was a violation of the Aspatria-Rydal BIT. The author draws a conclusion that the hypothesis was confirmed. Rydal has standing to invoke the Aspatria-Rydal BIT in the exercise of diplomatic protection on behalf of its national corporation ROCO, because it has a protected investment, an enterprise or a shareholding, in Aspatria. The seizure of ALEC's assets constitutes illegal expropriation, because it deprived the Rydalian investor of the control and the value of its investment and was not compensated.

ANOTACIJA

Vėlyvytė V. Suvereniteto įgijimas, tautų laisvo apsisprendimo teisė ir dvišalių investicijų apsauga: hipotetinės bylos analizė / Tarptautinės teisės jungtinės programos magistro baigiamasis darbas. Vadovas Andrius Bambalas, konsultantė Prof. Dr. Lyra Jakulevičienė. – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, Tarptautinės teisės katedra, 2010. – 55 p.

Magistro darbas analizuoja 2010-ųjų metų Philip C. Jessup tarptautinės teisės teismo proceso inscenizacijos konkurso hipotetinę bylą. Darbe nustatoma, kaip tarptautinė teisė reglamentuoja klausimus, esančius šio darbo tyrimo objektais. Atitinkamos tarptautinės teisės normos pritaikomos hipotetinės bylos faktams, siekiant pagrįsti ir įrodyti Respondento poziciją byloje. Darbe iškeliamos keturios hipotezės, visos jos pasitvirtina. Pirma, „Windscale“ salų suverenitetas priklauso Raidalui. Antra, Salų gyventojai turi teisę paskelbti nepriklausomybę taip išreikšdami savo, kaip tautos, laisvo apsisprendimo teisę. Trečia, tai, kad Raidalas atmetė „MDR“ paraišką gauti licenciją, nepažeidžia tarp Aspatrijos ir Raidalo sudarytos sutarties dėl dvišalių investicijų apsaugos. Ketvirta, Raidalas gali pareikšti reikalavimą teisme dėl pažeistų „ROCO“, įmonės, įregistruotos Raidale, teisių, susijusių su Aspatrijoje įregistruotos įmonės „ALEC“ turto nusavinimu, ir „ALEC“ turto nusavinimas pažeidė tarp Aspatrijos ir Raidalo sudarytą sutartį.

Pagrindiniai žodžiai: suvereniteto įgijimas, tautų laisvo apsisprendimo teisė, dvišalių investicijų apsauga.

SANTRAUKA

Magistro darbas analizuoja 2010-ųjų metų Philip C. Jessup tarptautinės teisės teismo proceso inscenizacijos konkurso hipotetinę bylą. Darbe nustatoma, kaip tarptautinė teisė reglamentuoja klausimus, esančius šio darbo tyrimo objektais. Atitinkamos tarptautinės teisės normos pritaikomos hipotetinės bylos faktams, siekiant pagrįsti ir įrodyti Respondento poziciją byloje.

Darbas turi tris tikslus. Pirmasis tikslas yra nustatyti teritorijos suvereniteto įgijimo okupacijos būdu sąlygas bylos faktų kontekste. Antrasis tikslas yra nustatyti tautų laisvo apsisprendimo teisės, kaip pagrindo paskelbti nepriklausomybę, įgyvendinimo sąlygas: kam tarptautinė teisė suteikia tautų laisvo apsisprendimo teisę, ir kokios yra šios teisės įgyvendinimo ribos bylos kontekste. Trečiasis tikslas yra įvertinti Aspatrijos ir Raidalo veiksmų teisėtumą remiantis tarp šalių sudarytos dvišalių investicijų apsaugos sutarties nuostatomis.

Darbe iškeliamos keturios hipotezės, visos jos pasitvirtina. Pirma, „Windscale“ salų suverenitetas priklauso Raidalui (Respondentui). Pagal tarptautinę paprotinę teisę, tai, kad Raidalas buvo pirmoji valstybė, atradusi „Windscale“ salas, kai jos buvo *terra nullius,* ir vėliau efektyviai jas kontroliavo iki suvereniteto įgijimui teisiškai svarbios kritinės datos, t.y. dienos, kai Aspatrija (Aplikantas) pareiškė pretenziją į Salas, suteikia Raidalui suverenitetą į „Windscale“ salas.

Antra, Salų gyventojai turi teisę paskelbti nepriklausomybę taip išreikšdami savo, kaip tautos, laisvo apsisprendimo teisę. Salų gyventojai turi teisę paskelbti nepriklausomybę taip išreikšdami savo, kaip tautos, laisvo apsisprendimo teisę remdamiesi Jungtinių Tautų Chartijos 73 straipsniu bei Tarptautiniu ekonominių, socialinių ir kultūrinių teisių paktu.

Trečia, tai, kad Raidalas atmetė „MDR“ paraišką gauti licenciją, nepažeidžia tarp Aspatrijos ir Raidalo sudarytos sutarties dėl dvišalių investicijų apsaugos. Faktas, kad Raidalas atmetė Aspatrijos piliečio paraišką gauti licenciją ištirti ir eksploatuoti „Windscale“ salų gamtinius išteklius, nepažeidė tarp šalių sudarytos sutarties nuostatų, užtikrinančių investicijų apsaugą, nes Raidalo veiksmai nebuvo diskriminaciniai ir užtikrino teisingą ir lygiavertišką paraiškų gauti licenciją vertinimo procedūrą.

Ketvirta, Raidalas gali pareikšti reikalavimą teisme dėl pažeistų „ROCO“, įmonės, įregistruotos Raidale, teisių, susijusių su „ALEC“ turto nusavinimu, ir „ALEC“ turto nusavinimas pažeidė tarp Aspatrijos ir Raidalo sudarytą sutartį. Raidalas gali pareikšti reikalavimą teisme siekdamas apsaugoti Raidalo piliečio investiciją, nes Raidalo piliečio turimos akcijos Aspatrijoje įregistruotoje įmonėje „ALEC“ įeina į investicijos definiciją. Minėtos investicijos nusavinimas, kurio Aspatrija nekompensavo, pažeidžia tarp šalių sudarytą dvišalių investicijų apsaugos sutartį.

ANNEXES

ANNEX 1

RESPONDENT'S SUBMISSIONS IN THE HYPOTHETICAL CASE

Rydal asks the Court to adjudge and declare that:

(1) Rydal is permitted under international law to take steps giving effect to independence for the Windscale Islands because:

   a. sovereignty over the Islands belongs to Rydal; and/or

   b. the Islanders are entitled to independence as an exercise of their right to self-determination.

(2) The rejection of MDR's bid did not constitute a breach of Rydal's obligations under the Aspatria-Rydal BIT.

(3) Rydal has standing to invoke the Aspatria-Rydal BIT to protect the assets of a Rydalian enterprise in Aspatria and the seizure of such assets was a violation of the Aspatria-Rydal BIT.

ANNEX II

TREATY CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

7 November 1985

The Republic of Aspatria and the Kingdom of Rydal (hereinafter referred to as "the Parties"),

Desiring to create favorable conditions for greater economic cooperation between the Parties, in particular, for investments by investors of one Party in the territory of the other Party based on the principles of equality and mutual benefit,

Recognizing that the promotion and reciprocal protection of investments on the basis of this Agreement will be conducive to stimulating entrepreneurship and will increase prosperity in both States,

Hereby agree as follows:

* * *

"Investment" means every asset of an investor that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law.

"Investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party.

* * *

Article IV

Each Party shall accord investments and investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors and to investors of any non-Party.

Article V

Each Party shall accord to investments treatment in accordance with customary international law, including fair and equitable treatment, full protection and security, and non-discrimination.

Article VI

(a) Neither Party may expropriate or nationalize an investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except for a public purpose; in accordance with due process of law; in a non-discriminatory manner; and on prompt, adequate, and effective compensation.

(b) With the exception of measures so severe in light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriation.

* * *

Article XIII

In the event of a dispute arising with respect to the rights conferred by this Treaty, in addition to any arbitration proceeding to which an Investor of a Party may be entitled under this Treaty or by contract, the Party of said Investor's nationality may bring the claim before the International Court of Justice, and the other Party shall accept the personal and subject matter jurisdiction of that Court.