

GNLU INTERNATIONAL MOOT COURT COMPETITION

2009

BENCH-MEMORANDUM

The Case Concerning Andrena-Rubena Free Trade Agreement

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¹ Detailed structure and explanatory notes, CPC description, available at <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Top=2&Lg=1>

1. Overview of Key Facts

- The Respondent (Rubena) is an important destination for outsourcing. In 2008 it amounted to 27% of their GDP. The Rubena Outsourcing Activity Act (ROAA) sets up of an Outsourcing Activity Protection Agency (OAPA) which conducts periodic and surprise checks to ensure that the organizations engaged in outsourcing activities meet the highest standards of confidentiality.
- SBI Ltd. (in Andrena) entered into a contract with IPL Ltd. (in Rubena). The agreement involved exchange of confidential information. IPL fully met the security and privacy norms of SBI.
- Pursuant to speculations relating to stealing of client information, law suits were filed in the High Court of South East Andrena in which SBI, IPL and all the other companies engaged in such activities were named as respondents. The High Court imposed a fine of US\$ 1,000,000 on IPL. IPL's appeal is pending before the Supreme Court of Andrena.
- Andrenian Senate made stringent changes to laws related to outsourcing. It mandates Andrenian Companies to use the Secure Information System (SIS) or any system based on similar technology, if they outsource their work.
- The SIS requires a special permit from the Department of Export Administration of Andrena and it has a license fee of US\$ 64,000 per user. SBI and IPL were unsuccessful in obtaining this license at a reasonable price.
- This led to SBI terminating their contract with IPL. Rubena was greatly affected by it as it resulted in immediate job loss of 20,000 persons and the expected potential job loss of 600,000 persons. In turn the Respondent increased the custom duties on major products imported from the Claimant by 150%.
- The deteriorating relationship between the two countries led to the unrest and growth of terrorism in the minority Rubenan community in Andrena.
- Mr. Rafid illegally downloaded data from the system of IPL and Protech and threatened to release it in the international market.
- Suits were filed in Andrena against SBI & IPL claiming damages for breach of privacy. SBI sued IPL in Rubena for breach of contract and confidentiality clauses. This suit was dismissed on account of remoteness of damages.

- Rubena denied having any links with Mr. Rafid. However, in a confidential inquiry by them, it was found that Mr. Rafid had exchanged certain e-mails and documents with the intelligence agency in Rubena just before the incident of security breach.
- Andrena and Rubena suspended trade relations and both countries dispatched several thousand troops to their shared border. The Anrenian drones which went in search of Mr.Rafid hit two villages and 152 people died and 300 were injured. A 700 year old temple, declared by the UNESCO as a World Heritage was also destroyed.
- Andrena and Rubena agreed to submit the case before the ICJ. A day later the crack code for the SIS was posted on one of the Rubenan websites along with the alleged loopholes.

2. Chronology of Events

1 st January 1999	Andrena-Rubena Free Trade Agreement (ARFTA) came in force
26 th February 2000	SBI(Andrena) and IPL(Rubena) entered into the contract for outsourcing of work
2006	Nationalist Democratic Party (NDP), a hardliner against outsourcing, came into power in Andrena
March 2007	Andrena Times reported that between March 2006 and September 2006 sensitive client information was stolen from Protech BPO
September 2007	The Claimant adopted ASISA and also bought suitable changes in AEAR.
13 th September 2007.	SBI terminated the contract with IPL
14 th September 2007	Demanded the immediate repeal of the Andrena Secure Information Systems Act (ASISA)
January 2008	Consultations between the Claimant and the Respondent under the ARFTA
March 2008	Rubenan Parliament enacted RPHSA which increased the export duties on goods from Andrena

15 April 2008	Government of Andrena sent a diplomatic note to Rubena, demanding immediate repeal of RPHSA
April 20, 2008	Mr. Rafid, after illegally downloading this data from the system in IPL and Protech threatened to release this data in the international market.
August	The Claimant and the Respondent suspended trade relations
23 August 2008	The parties agreed to submit the case before the ICJ
17 September 2008	Compromis between the two parties was submitted to the ICJ
18 September 2008	Crack code for Secure Information System was posted on One of the Rubenan websites

3. Legal Background

a) Agreements and Treaties

(i) Related to violations of the trade agreement

General Agreement on Tariffs and Trade, 1994(**GATT Agreement**), Article XXIV.

Marrakesh Agreement Establishing the World Trade Organization (**WTO Agreement**), Preamble, Article II (2)

- Teams may wish to rely on the above provisions, for example, in assessing the legal status of various documents mentioned below including free trade agreement between Andrena and Rubena (ARFTA).
- Teams may refer to the above provisions in order to understand their trade obligations in general as they are the member of WTO.

Free Trade Agreement between Andrena and Rubena (**ARFTA**), Preamble, Articles 2, 3, 7, 9-13, 15 and 16

- The current dispute is a lot about the obligations under the FTA. Teams have to refer to the provisions of ARFTA to understand their mutual obligations to provide *free market access* for goods and services to each other.(Preamble, Articles 2, 3, 7, and 13)
- Teams have to refer to the exceptions under the FTA which allow parties to suspend their trade liberalization commitment under certain circumstances. (Articles 9-12).
- Reference has to be made to the procedure established under the agreement in event of any matter or dispute which arise out of the agreement. (Article 15 and 16).

General Agreement on Trade in Services (**GATS Agreement**), Article V

- Aforesaid provision permits any WTO Member to enter into agreements, such as the ARFTA, to further liberalize trade in services on a bilateral basis.
- Violation of the market access commitments under GATS can be argued.

Understanding the Rules and Provisions of Dispute Settlement Understanding (**DSU**)

- Apart from the ICJ statute, teams may also rely on the various provisions of the DSU in relation to Respondents preliminary objection.

(ii) Related to the violations of international laws.

- Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact). Washington, 15 April 1935.
- Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954
- Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.
- Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.
- Resolutions of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999

b) Classification of Services under the GATS Agreement

- In the present case the outsourcing of work by the Applicant to Rubena comes under the *Business Process Outsourcing services (BPO)*. This *BPO services* can be classified under the GATS Agreement either under the head of ‘*Computer and related services*’ or ‘*telecommunication.*’
- Due to the advancement of technology, the distinction between many of sectors mentioned in the GATS Agreement is now blurred and it is possible that they overlap in some circumstances.
- On-line database services can come under both *IT enable services* and *Telecommunication Services*. *IT enable services* comes within the scope of the *Computer and related services*
- The GATS Services Sectoral Classification List document² includes *computer related services* as a subsector of business and professional services.
- This subsector designated 1B in the List, includes five sub-categories services:
(a) consultancy services related to the installation of computer hardware,

² MTN.GNS/W/120, 10 July 1991

(b) software implementation services, (c) data processing services (d) database services (e) other.

- **Classification under the United Nations Provisional Central Product Classification (CPC):³**

Table: 1 Computer Related Services: CPC description of the GATS Sectoral classification list entries

W/120	CPC	CPC description
Bc	843/8431	Data processing Services :
	8432	Data-processing and tabulation services
	8433	Time sharing services
	8439	Other data processing services
Bd	844	Database services
Be	849	Other computer services
	8491	Data preparation services
	8499	Other computer services

- Many of the sources of data and information drawn upon for this chapter deal with *computer related services* in the context of the information technology (IT) industry. The IT industry can also be classified under the *telecommunication services*. There may be a fine line of distinction between certain on-line computer services and telecommunication services.
- There are 14 sub sectors within telecommunication services as provided by GATS Services Sectoral Classification List document. Online data interchange services; data processing services etc. are included within telecommunication services.
- The GATS Agreement directly addresses the progressive liberalization of computer related services and other IT-related services sectors.

³ Detailed structure and explanatory notes, CPC description, available at <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Top=2&Lg=1>

- Secure Information System (based on 128 bit encryption) or any system based on similar technology, which has to be mandatory used as per the laws of Andrena, is an information technology product.
- It should be noted that the WTO Agreements to eliminate tariff and non-tariff barriers on information technology products and are also of great importance to these services. The information technology product in the present case is SIS technology. Its mandatory use and the high price of the license is not in consonance with the objective of elimination of tariff and non-tariff barriers on such products.
- *Telecommunication services* might appear to overlap with the *Computer Related Services* under certain circumstances. Given the interplay between the two sectors listed activities, it may not be clear when telecommunications services, computer services, or both are being supplied.
- The services outsourced by SBI and other companies from Andrena to Rubena can be classified under either of the heads.

4. Breach of Privacy and Data Protection

GATS Agreement, Article XIV(b)(ii) – Protection of Privacy of Data

- Andrena should defend its measures under Article XIV(b)(ii) of the GATS Agreement. This provision allows members to take necessary measures related to protection of privacy of data.
- Andrena may also justify its measure under Article XIV*bis*(1)(b) of GATS and Article 13(2)(b) and (c) of ARFTA. It allows member to take measures for protection of its security.
- Since there is limited WTO jurisprudence on this point teams can have some flexibility in their arguments
- Teams may rely on jurisprudence developed in international law to argue the case for data protection and protection of privacy.

5. Rubena's claim for violation of ARFTA

a) Agreement on GATS, Article VI: 5-specific commitments should not be nullified or impaired through regulatory requirements.

- Article 3(c)(ii) of ARFTA specifically incorporates certain rights and obligations in the GATS Agreement.
- Article VI of the GATS Agreement allows member states to adopt certain domestic regulations to regulate the supply of services even in case of full market access commitment.
- Rubena should claim that the ASISA and AEAR are '*domestic regulations*' which create unnecessary barrier to trade in services and is inconsistent with Article VI: 5 of GATS. i.e. they are that are not based on objective and transparent criteria or are more burdensome than necessary to ensure quality or could not have been reasonably expected out of the member at the time such commitments have been made – Article VI: 5(a).
- Back office work is a type of Business Process Outsourcing (BPO) and is classified under the category of 'business services' under the GATS Agreement.
- Andrena should argue that under the GATS Agreement, governments remain free to pursue policy objectives even in sectors where they have undertaken full commitments on market access and national treatment. *eg.* Job creation.

b) Agreement on GATS, Article XVII – National treatment

- Rubena should argue measures relating to licensing, and technical requirements discriminate between foreign and domestic suppliers in fact i.e. *de facto* discrimination as significant back office work from Andrena was outsourced to Rubena. Teams may refer to progress report on e-commerce – S/L/74 (para.17)
- Andrena should argue that its measure under ASISA and AEAR is not discriminatory and provides equal treatment to domestic and foreign suppliers in law and in fact (*de jure and de facto*).

c) Others/miscellaneous

- Each party has to progressively eliminate its custom duties as per Article 2 of the ARFTA and therefore RPHSA measure should be claimed by Andrena as violative of such commitment. Para. 4 of the ARFTA also provide that no new custom duties shall be imposed by the parties.
- Rubena could argue that such measure as far as it relates on wines and nuclear fuel processing equipment is concerned is aimed at protecting the health and security of its citizens and would fall under Article XX and XXI (b) (i)of GATT r/w Article 11(1) and Article 11(2) (b)(iii) of ARFTA, which lay down some general exceptions.
- Andrena could argue that ASISA and AEAR would fall within Article 11(2) (b) of ARFTA at it is aimed at protection of its security interest.
- Teams may refer to the progress report on e-commerce adopted by council for trade in services.⁴ Also, Article 7(1)(b) of ARFTA provides that parties should not create any barriers to electronic commerce.
- Rubena could contend the violation of Article 13 of the ARFTA which places a burden on both the parties to foster economic co-operation.
- The GATS Agreement provides for Special and Differential treatment to developing countries under Article IV. Rubena being a developing country could use this provision to its advantage.
- The Working Party on Domestic Regulation (WPDR)⁵ has been reviewing principles that could form a framework for reviewing domestic regulation:
1) Necessity 2) Transparency 3) Equivalence 4) International Standards.

⁴ Progress Report on electronic commerce, adopted by the Council for Trade in Services, 19 July 1999, S/L/74

⁵ Decision on domestic regulation, adopted by the Council for Trade in Services, 26 April 1999, S/L/70

6. Claim against technological requirement

a) TBT Agreement – Preamble, Article 2.2 and Article 2.5

- TBT Agreement governs technical regulations and standards applicable to a product/goods and it does not cover trade in services.
- There is a fine line of distinction in classification of product under *goods* or *services*. It may be assumed that packaged software may be treated as a good. Issues may arise when packaged software is supplied wholly on-line or when it is a customized software, if may be treated as a service.
- Rubena could argue that the SIS software is a good and the imposition of barriers/technical regulation on the export of such software would attract the provisions of TBT Agreement.
- Andrena should contend that the supply of SIS software is a supply of service and is not a good and therefore is outside the scope of TBT Agreement.

b) *Technical regulation* – Annex I - TBT Agreement

The Domestic regulation which lays down product characteristics or their related processes and production methods, *including the applicable administrative provisions*, has to comply with the TBT Agreement.

- Requirement of special permit under the AEAR should be argued by Rubena as violative of Article 2.2 of the TBT Agreement. Special permit requirement is a technical regulation which is an unnecessary barrier to international trade and is prohibited under the agreement.
- Andrena could argue that no country should be prevented from taking measures necessary for the protection of its essential security interest as per the preamble of the TBT Agreement.
- Rubena should argue that AEAR is ‘more trade restrictive than necessary’ to fulfill a legitimate objective as per Article 2.2 of TBT Agreement and is a disguise restriction on international trade.

- Andrena could argue alternatively that its measure is to fulfill the legitimate objective of protection of ‘human safety or security’ and is as per international standards.

7. Claim relating to violation of International Law

a) Preliminary Objection

- There is no express bar on the ICJ to exercise jurisdiction. However, teams may generally raise an objection over adjudication of claim related to ARFTA by ICJ. It can be argued that the WTO Dispute Settlement Body would be a more appropriate forum for resolving matters concerning ARFTA and hence the ICJ should decline to exercise jurisdiction over claims relating to ARFTA.

b) State Responsibility (if any) of Rubena for the actions of Mr. Rafid.

- Actions in relation to Mr. Rafid are limited in International Law as he being a citizen of Andrena, committed a crime in Andrena which had disastrous consequences.
- Applicant can raise this issue with the help of facts stated in the problem such as “This group (Rubenan Community in Andrena) could fall easy prey to any incitement of Violence from Rubena” & “There are Rubenan leaders with dubious links to the Rubenan community in Andrena”
- Further facts such as Rafid sought political asylum in Andrena can also be used to show how Rafid acted as an agent of Rubenan as opposed to a disgruntled, retired citizen from a group that is being allegedly persecuted.
- On the Other hand the Respondents can out rightly claim that they have no connection with Mr. Rafid as the facts in para. 16,17 & 18 do not establish a clear connection between Rubenan and Mr. Rafid.

c) The use of force by both Rubena and Andrena against each other

- Applicants have clearly a case against them as Andrenan Drones shot two missiles which destroyed villages and killed a lot of innocent people along with the destruction of a Temple declared by the UNESCO as a world heritage site. Apart from violating Art.2 (4) of the UN charter (and other provisions/principles) Andrena has also violated a host of treaties and conventions which protect cultural and historical property in times of armed conflict like and other instruments referred earlier.

- Applicant conversely can highlight how big a threat Rafid was to them and how he had actually sought asylum in Rubena. If the applicants can even manage to connect Rafid and Rubena then it would be sufficient to build on that to escape total and complete liability under Art. 2(4) and the host of other treaties.
- It has to be noted that Rubena's actions in shooting down the drones can come as an exception well recognized under the UN Charter as that of Self Defense in times of Armed Attack.
- Andrena could submit that the data theft amounted to use of force albeit in an indirect way. Such a reference to indirect use of force has been a matter of intense debate, however, with the advent of technology and cyber warfare the critics of the indirect use of force theory have been forced to admit that in the 21st century it is possible to wreak havoc in a State without even a single missile or bomb being set off. Conversely only an armed attack can give rise to an action under Article 51 the UN Charter and this has been affirmed by authors and case laws. However, act of data theft to come within the ambit of armed attack it has to be illustrated how such an act can be categorized as an attack against the State of Andrena. This is the Key point which the Applicants would have to establish if they are to justify sending in Drone Aircraft to search for Rafid and the consequential destruction in Rubena.
- This will also involve the issue of Political Asylum which was supposedly granted to Rafid by Rubena. However, this fact is not stated in absolutely certain terms in the Facts thus causal factors come into play to help establish this, such as Rafid being of the oppressed Rubenan minority community and harboring a hatred for his country Andrena, the alleged links of Mr. Rafid with the intelligence community of Rubena also the fact that later it came to light that Rafid was actually a spy of Rubena. Argued together an attempt can be made to create a nexus between Rafid and Rubenan thus making the grant of asylum more likely and plausible.
- In defense of this proposition Rubena will most probably deny its involvement with Mr. Rafid who they will claim is a retired Andrenan counter intelligence

officer who was not happy with his country and in his disgruntlement committed the data theft and as such the entire matter is essentially an Internal Matter of Andrena and the fact that Mr. Rafid committed the data theft on Rubenan soil cannot impute any liability on the State of Rubena.

d) Admissibility of fresh evidences and contentions

- With regard to fresh evidence and the subsequent contention on the basis of such evidence Andrena could question the admissibility of such evidence on the ground that it is unauthenticated and the no new issue can be raised based on such evidences due to lack of prior agreement between parties. Questions and issues before the court are delimited and nothing new should be allowed to be admitted.
- Rubena should argue that fresh evidences should be allowed as it is merely a procedural issue. Refusing the admissibility of it would otherwise affect the final determination of rights and obligations of the parties.