Team No.- 147 A

IN **T**HE **I**NTERNATIONAL **C**OURT **O**F **J**USTICE

LA **C**OUR **I**NTERNATIONALE **D**E **J**USTICE

PEACE **P**ALACE, **T**HE **H**AGUE

NETHERLANDS

2009 **G**ENERAL **L**IST **N**O. …….

THE **I**NDEPENDENT **R**EPUBLIC OF **A**ZANIA

APPLICANT

v.

THE **R**EPUBLIC OF **E**NRODA

RESPONDENT

ENTRE **L**A **R**EPUBLIQUE **I**NDEPENDANTE **D**' **A**ZANIA

DEMANDERESSE

v.

ET **L**A **R**ÉPUBLIQUE **D**' **E**NRODA

DÉFENDEUR

The **C**ase **C**oncerning the **D**ifferences **B**etween **A**zania and **E**nroda **R**egarding the **I**nterpretation **o**f **R**azvana **F**ree **T**rade **A**greement.

MEMORIAL **F**OR **T**HE **A**PPLICANT // **M**ÉMOIRE **D**E **L**A **D**EMANDERESSE

SECOND **G**NLU **I**NTERNATIONAL **M**OOT **C**OURT **C**OMPETITION, 2010.

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ABBREVIATIONS

1. §: Section
2. ¶: Paragraph
3. Art.: Article
4. CBD: Convention on Biological Diversity
5. CTRA: Carbon Tax Regulation Act, 2008.
6. Doc.: Document
7. DSU: understanding on Rules and Procedures Governing the Settlement of Disputes.
8. E.C.: European Community
9. Ed.: Edition
10. Enabling Clause: Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, GATT Document L/4903, 28 November 1979, BISD 26S/203.
11. Envt.: Environment
12. G.A. Res.: General Assembly Resolutions.
13. G.A.O.R.: General Assembly Official Records
14. I.C.J.: International Court of Justice
15. I.L.C.: International Law Commission
16. I.L.M.: International legal Materials
17. MFN: Most Favoured Nation, in the WTO, the principle of treating trading partners equally.
18. Mtg.: Meeting
19. n.: Note
20. NAT. RES. J.: Natural Resources Journal
21. No.: Number
22. p.: Page
23. P.C.A.: Permanent Court of Arbitration
24. P.C.I.J.: Publications of the Permanent Court of International Justice
25. pp.: Pages
26. R.I.A.A.: Report of International Arbitral Awards
27. RFTA: Razvana Free Trade Agreement
28. SCMA: Razvana Agreement on Subsidies and countervailing measures.
29. Supp.: Supplementary
30. UNCLOS.: United Nation Convention on the Law of the Sea
31. UNCTAD: United Nations Conference on Trade and Development.
32. UNFCCC: United Nations Framework Convention on Climate Change.
33. VCLT: Vienna Convention on the Law of Treaties
34. Vol.: Volume
35. WTO: World Trade Organisation.

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STATEMENT OF JURISDICTION

The Independent Republic of Azania and the Republic of Enroda have submitted this dispute to the International Court of Justice pursuant to a Special Agreement *(Compromis)*, dated July 15, 2009. This Court's jurisdiction is invoked under Article 36(1) read with Article 40(1) of the Statute of the International Court of Justice, 1950. Under Article 40, paragraph 1 of the Statute of the International Court of Justice, States may bring cases before the Court "either by the notification of the special agreement or by a written application addressed to the Registrar. The Parties shall accept any Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

The Appellant have the honour to transmit an original of the *Compromis* for submission to the International Court of Justice of the differences between the Applicant and the Respondent concerning the interpretation of The Razvana Free Trade Agreement, signed in New Delhi, India on August 1, 2009.

STATEMENT OF FACTS

BACKGROUND

1. Independent Republic of Azania (hereinafter referred as Azania) is a small developing country in the continent Razvana. Its economy depends mainly on export of natural resources, primarily iron ore and diamonds. Commercial exploitation of natural resources started as late as 1950. Republic of Enroda (hereinafter referred as Enroda) is a large developed and industrialized state with extremely limited natural resources on the west of Azania. It was the largest exporter of iron & steel and polished diamonds in the early 20th century, despite of limited natural resources. ¶¶1-2.

2. Azania was a monarchial state till 1940 and witnessed large scale violence and corruption on it's transition to democracy, because of one party rule of Azanian Democratic Party (ADP). This was overthrown in 1975 national elections when Azanian Student's for Economic Self Reliance (ASESR) completely routed ADP by getting absolute majority. ASESR introduced the Industrial Policy in 1976 to increase number of industries in primary sector to 10 times its present number and domestically consume the natural resources being exported at cheap price to Enroda. The per capita income which was abysmally low increased 3 times within 10 years. ¶¶ 5-11.

RELEVANT INTERNATIONAL AGREEMENTS

3. Both the countries are parties of the UN and parties to statute of ICJ, UNFCCC and Kyoto Protocol. Both countries along with other nation states of Razvana concluded the RFTA in 1997 to regulate the regional trade within the continent. Preamble to the *Compromis* and ¶¶ 3-4.

MEASURES RELATED TO TRADE

4. Azania's exports of steel competed with exports from Enroda in 3rd country markets by the year 1992. The manufacturing cost of Enroda increased due to domestic environmental regulations and to restore Enrodean supremacy in International steel market FTZ was introduced in 2000, by which inputs were imported without payment of customs and other applicable duties. This increased exports of Enroda by 5 times and displaced Azanian steel from international as well as its domestic market. ¶¶16-20

5. Azanian Commission was petitioned in January 2007 to initiate CVD investigations against steel imports and was found that exemptions given to imprts of iron ore and other inputs constituted prohibited export subsidies and had caused injury to domestic industry of Azania. A CVD of 60 – 80 % was introduced on three exporters of steel products from Enroda. In response, Enroda forwarded a diplomatic note requesting Azania to enter into consultations regarding the imposition of CVD. The consultations made little headway. ¶¶21- 23

MEASURES RELATED TO GHG EMISSION

6. Azania declared as 3rd largest emitter of GHG by World Environment Conservation Agency in 2000 and asked to take remedial steps. Azania ratified UNFCCC as non-annex I member and introduced the Climate Change Executive Order, 9288 in 2003 to limit GHG emission from vehicles. Enroda imposed carbon tax on domestic producers in 1996 in light of environmental regulations. The tax was increased by 25% from 1996 levels in 2005. ¶¶ 13-17

7. Enroda passed the Carbon Tax Regulation Act (CTRA) on 25.11.2008 imposing border tax on imports from Annex A countries equivalent to the level of carbon tax charged to the domestic industry of the like products. Azania described CTRA as a disguised barrier to trade, a violation of scheduled commitments undertaken by Enroda and a reaction to the imposition of CVD on subsidized steel from Enroda. Azania forwarded a diplomatic

note to negotiate a settlement on this issue but it failed as both the parties were adamant on their stand. ¶¶ 24-26

PROCEDURE

8. As the dispute failed to resolve between Azania and Enroda, parties submit under article 40 (1) of the ICJ statute under special agreement on March 2009 pursuant to article 36 of the ICJ Statute. ¶ 27
   Hence this present dispute.

QUESTIONS PRESENTED

I. THE DUTY EXEMPTIONS ON IMPORT OF RAW MATERIALS FOR THE STEEL INDUSTRY IS A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES AND THE IMPOSITION OF A COUNTERVAILING DUTIES IS CONSISTENT WITH THE PROVISIONS OF THE AGREEMENT.

[A]. THE DUTY EXEMPTION ON IMPORT OF RAW MATERIALS FOR THE STEEL INDUSTRY IS A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES.

[A].1 ***Exemption granted by Enroda constituted prohibited subsidies under the Razvana Agreement on Subsidies and Countervailing Measures.***

[A].2 ***The benefits given to the manufacturer of Steel is in anticipation of export and export earnings.***

[A].3 ***The Government's contributions under the FTZ, Act 2000 were in the nature of a grant.***

[A].4 ***The Subsidy provided by Enroda is specific subsidy***

[A].5 ***Enroda FTZ Act is not in consonance with RFT agreement***

[A].6 ***The duty draw back scheme provided by Enroda is in not in consonance with Annex II of SCM Agreement***

[B]. THE COUNTERVAILING DUTIES IMPOSED BY AZANIA IS IN CONSONANCE WITH RFTA

[B].1. ***Art. III of RFTA provides for imposition of countervailing duties.***

[B].2. ***Azanian industry has suffered injury within the meaning of article 5 of SCM Agreement.***

[B].3. ***The specific subsidy provided by Enroda can be countervailed by Azania.***

II. THE IMPOSITION OF A BORDER TAX ON IMPORTS IS IN VIOLATION OF THE MARKET ACCESS COMMITMENTS UNDERTAKEN BY ENRODA AND IS NOT JUSTIFIED BY THE GENERAL EXCEPTIONS TO THE RAZVANA AGREEMENT ON TRADE IN GOODS

[A]. BORDER TAX IS NOT JUSTIFIED BY THE GENERAL EXCEPTIONS TO RFTA ON TRADE IN GOODS

[A].1. ***It is not justified by Art 20 (b) of the RFTA on Trade in Goods***

[A].2. ***It is not justified by Art 20 (g) of the RFTA on Trade in Goods***

[A].3. ***It is not justified by the chapeau of Art 20 of the RFTA on Trade in Goods***

[A].3.1 *Enroda's CTRA Constitutes Arbitrary and Unjustifiable Discrimination and Violates the WTO's Fundamental Principle of Liberalized Trade.*

[A].3.2 *It is a disguised restriction on International Trade*

[A].3.3 *It is a counter measure against the imposition of CVD*

[B]. AZANIA HAS COMPLIED WITH ITS INTERNATIONAL OBLIGATIONS

[B].1. ***Azania has complied with UNFCCC***

[B].1.1 UNFCCC recognizes the principle of differential responsibility.

[B].1.2 *States have the sovereign right to exploit it's own natural resources pursuant to its own developmental and environmental policies.*

[B].2. ***Azania has acted in consonance with Kyoto Protocol***

[B].3. ***Azania is not bound by the precautionary principle and it is not a binding obligation***

[B].4. ***CTRA is against the principle of Sustainable Development***

[C]. BORDER TAX IS IN VIOLATION OF MARKET ACCESS COMMITMENTS-- ***The Trade restriction is an Arbitrary and Unjustifiable Measure that Violates the Explicit Terms of the RFTA for Trade in goods***

[C].1. ***Azania's classification as Annex A country of CTRA is unreasonable.***

[C].2. ***CTRA violates Art 3 of RFTA on Trade in Goods***

[C].3. ***It violates Art 4 of RFTA in Trade in Goods.***

[C].4. ***Enroda cannot impose trade restrictions unilaterally***

[C].5. ***Enroda cannot impose extra-territorial law***

[C].6. ***Enroda cannot impose trade restrictions only on the basis of the way the product has been produced.***

SUMMARY OF ARGUMENTS

I. The duty exemptions on import of raw materials for the steel industry is a subsidy prohibited under the Razvana Agreement on Subsidies and the imposition of a countervailing duties is consistent with the provisions of the Agreement.

It is humbly submitted that the duty exemption on import of raw materials for the steel industry is a subsidy prohibited under the Razvana Agreement on Subsidies. Exemption granted by Enroda constituted prohibited subsidies under the Razvana Agreement on Subsidies and Countervailing Measures. The benefits given to the manufacturer of Steel is in anticipation of export and export earnings. The Government's contributions under the FTZ, Act 2000 were in the nature of a grant. The Subsidy provided by Enroda is specific subsidy. Enroda FTZ Act is not in consonance with RFT agreement. The duty draw back scheme provided by Enroda is in not in consonance with Annex II of SCM Agreement

The countervailing duty imposed by Azania is in consonance with RFTA Art. III of RFTA provides for imposition of countervailing duties. Azanian industry has suffered injury within the meaning of Article 5 of SCM Agreement. Thus specific subsidy provided by Enroda can be countervailed by Azania.

II. THE IMPOSITION OF A BORDER TAX IS JUSTIFIED UNDER THE GENERAL EXCEPTIONS TO THE RAZVANA AGREEMENT ON TRADE IN GOODS.

Border Tax is not justified by the General Exceptions to Razvana Agreement on Trade in Goods. It is not justified by Art 20 (b), (g) and justified under chapeau of the Article of the RFTA on Trade in Goods. Enroda's CTRA Constitutes Arbitrary and Unjustifiable Discrimination and Violates the WTO's Fundamental Principle of Liberalized Trade. It is a disguised restriction on International Trade. It is a counter measure against the imposition of CVD.

Border Tax is not in accordance with International Obligations. Azania has not breached its obligation under UNFCCC. UNFCCC talks about differential responsibility. States Have a Sovereign Right to Exploit their Own Natural Resources Pursuant to their Own Environmental and Development Policies, Which Is Recognized by the UNFCCC. Azania has not breached its obligation under Kyoto Protocol. Azania is not bound by the precautionary principle and it is not a binding obligation. Carbon Tax Regulation Act, 2008 is against the principle of sustainable development. Border Tax is in violation of commitments under RFTA.

The countries included in Annex A of Carbon Tax Regulation Act, 2008 is unreasonable. It violates Art 3 of RFTA on Trade in Good. CTRA violates Article 4 of the RFTA. Enroda cannot impose trade restrictions unilaterally. Enroda cannot impose extra-territorial laws. Enroda cannot impose trade restrictions only on the basis of the way the product has been produced.

ARGUMENTS ADVANCED

I. THE DUTY EXEMPTIONS ON IMPORT OF RAW MATERIALS FOR THE STEEL INDUSTRY IS A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES AND THE IMPOSITION OF COUNTERVAILING DUTIES IS CONSISTENT WITH THE PROVISIONS OF THE AGREEMENT.

[A]. THE DUTY EXEMPTION ON IMPORT OF RAW MATERIALS FOR THE STEEL INDUSTRY IS A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES.

[A].1. Exemption granted by Enroda constituted prohibited subsidies under the Razvana Agreement on Subsidies and Countervailing Measures[1].

The provision of goods and services for the use in the production of exported goods on terms more favorable than those commercially available on the world markets to exporters is a prohibited export subsidy.[2] Article 1.1(a) provides that a subsidy exists when ""there is a financial contribution by a government or any public body within the territory of a Member" that confers *a benefit*[3]. Under art.1(a)(2), a subsidy exist where there is any form of income or price support in the sense of Article XVI of GATT 1994 and that results in benefit. Aircraft Panel in *Canada Aircraft case* held that the ordinary meaning of the word ""benefit" does not include any notion of net cost to the government, and stated:

In order to determine whether a financial contribution (in the sense of Article 1.1(a)(i) confers a ""benefit", i.e. an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution. Accordingly, a financial contribution will only confer a ""benefit", i.e. an

[1] *See* Annexture I of Fact on Record; Razavana Agreement on Subsidy and Countervailing Measures (from here onwards SCMA).
[2] *See* Annexture I of SCM Agreement, *Supra Note 1*.
[3] *See*, Art. 1 of SCM, *Supra Note 1*.

advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market. [4] By 1992 exports of steel from Azania had started to compete with exports from Enroda in third country markets,[5] because Enroda had provided for duty free raw materials to the manufacturer of steel. Had Enroda not provided for such measure, the manufacturer of Enroda would never be able to sell steel at such a low price.

Aircraft Panel held that, a ""financial contribution" by a government or public body confers a "benefit", and therefore constitutes a "subsidy" within the meaning of Article 1 of the SCM Agreement, when it is provided on terms that are more advantageous than those that would be available to the recipient on the market. The subsidy provided by the Enrodian government has made the manufacturer “better off” than it would have been, and that the appropriate basis for comparison in this regard is the marketplace in third world countries where the goods produced by Enroda are replacing the goods of Azania because of its cheap rate.

[A].2. The benefits given to the manufacturer of Steel is in anticipation of export and export earnings.

Enroda Free Trade Zones Act, 2000 provides a subsidy, within the meaning of Article 1 of the SCM Agreement, in that it provides exemption to domestic producer to import raw materials without paying import duties, which confers benefit[6]. The export credits granted for the purpose of supporting and developing, directly or indirectly, Enroda's export trade are expressly contingent in law on export performance.[7] Direct subsidy contingent on export performance is prohibited subsidy[8].

The Panel in *Canada Aircraft Case* noted that footnote 4 to the SCM Agreement states that subsidies are contingent in fact when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises

4 *See Canada (Measures Affecting the Export of Civilian Aircraft)*, WT/DS70/R, 14 April 1999. ¶ 9.112.
5 *See* ¶ 16 , Fact on Record.
6 *See* ¶ 20 , Fact on Record.
7 *See* ¶ 18 , Fact on Record.
8 *See Prohibited* by SCMA *Art.* 3.1(a) and Annex I(a), *Supra Note 1.*

which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision[9]. The sole object of Enroda FTZ Act was to restore Enrodian supremacy in steel market and because of which it permitted its domestic manufacturer to import raw materials without paying export subsidy.[10] It is clear that such assistance would not have been granted to the domestic manufacturer but for anticipated exportation or export earnings. Panel has found that, under the SCM Agreement, a Panel may focus on the ""export orientation" of the recipient of the subsidy. Therefore, applying this decision, it is aptly clear that the whole purpose of FTZ is export oriented and the concession provided to domestic manufacturer

Factual evidence does not demonstrate that had there been no expectation of export sales (i.e. ""exportation" or ""export earnings" ""ensuing" from the subsidy, the subsidy would not have been granted. This implies a strong and direct link between the grant of the subsidy and the creation or generation of export sales[11]. That is, we consider that the ""but for" test is concerned principally with export sales[12]. Thus, the closer a subsidy brings a product to sale on the export market, the greater the possibility that the facts may demonstrate that the subsidy would not have been granted but for anticipated exportation or export earnings[13]. In this light, Panel held that subsidies that assist companies in bringing specific products to the (export) market satisfy the "but for" test.[14]

In *Australia-Automotive Leather II case*[15], where the measure at issue was a grant by the Australian government to a firm on the condition that it meet specified sales targets, the Panel concluded that the grant was, in fact, contingent on exporting, as international sales constituted the only means by which the firm could meet the sales targets. The panelists referred to this link as one between the grant of the subsidies and the government's "anticipation" of exportation. In

[9] *See Canada (Measures Affecting the Export of Civilian Aircraft) (Unreported, March 12, 1999) (WTO)[*hereinafter *Aircraft Report]*.
[10] *See*, ¶¶ 19-20 , Fact on Record.
[11] *See* Panel ruling on *Canada (Measures Affecting the Export of Civilian Aircraft) (Unreported, March 12, 1999) (WTO*)., *Supra Note* 9.
[12] *See Supra Note* 9.
[13] *See Supra Note* 9.
[14] *See Aircraft Report, Supra Note* 9, ¶ 9.339.
[15] *See Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, WT /DS126/R, adopted 16 June 1999, DSR 1999: III, 951.

the instant case, too, the benefit provided to the exporters can result in restoring the supremacy of Enroda in steel market only when the goods are sold at less than the market value.

The decision in *US-FSC*[16] showed that it does not matter for export contingency that foreign produced goods are also eligible for a certain subsidy. Instead, it does matter that among the domestically produced goods; only those that are exported are eligible. More importantly, Members are not required to make a case regarding any adverse effects to successfully challenge export subsidies violations; instead, they are only required to establish the existence of a violation expressly prohibited.[17]

[A].3. The Government's contributions under the FTZ, Act 2000 were in the nature of a grant.

There is direct relationship between the subsidy given on the importation of raw materials and the benefits accruing to the manufacturer in Enroda. In *US–Softwood Lumber IV case*[18]it was held that "Where a subsidy is conferred on input products and the countervailing duty is imposed on processed products, the initial recipient of the subsidy and the producer of the eventually countervailed product may not be the same. In such a case, there is a direct recipient of the benefit—the producer of the input product. When the input is subsequently processed, the producer of the processed product is an indirect recipient of the benefit—provided it can be established that the benefit flowing from the input subsidy is passed through, at least in part, to the processed product.[19]

In the instant case, the steel manufactured from the raw material which is available at subsidies rate is sold at less than the market value in Azania and the third world countries market.[20] Cost of production of the iron and steel industry decreased significantly while exports increased by almost five times over the next five years[21]. The Enrodean Steel manufacturer of a financial

[16] *See* Case No. WT/DS108, 1985, E.C.R II-34.
[17] *See* SCM Agreement, *Supra Note* 1, art. 4.1.
[18] *See* Doc WT /DS257/AB/R, ¶ 143.
[19] *See* Doc WT /DS257/AB/R, ¶ 143.
[20] *See* ¶ 20 , Fact on Record.
[21] *See Supra Note* 20.

contribution is better off than it would otherwise have been without contribution made by the subsidy provided by government. Therefore, this grant by the government is a subsidy conferring a benefit.

Enroda subsidies to FTZ businesses that export most of their production, with no *de jure* government requirement to export is illegal.. Article 3.1(a) and footnote 4 to the SCMA provide that an export subsidy exists "when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to" exports. In *Australia-Automotive Leather II* (DS126) (1999), the recipient was required to meet sales goals that exceeded the domestic market and 90% of the product was exported. The Panel found that payments under a grant contract were prohibited subsidies because payments were in fact tied to export performance.

[A].4. The Subsidy provided by Enroda is a specific subsidy

Under art.1(a)(2), a subsidy exist where there is any form of income or price support in the sense of Article XVI of GATT 1994 and that results in benefit. Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific[22]. FTZ provides that the subsidy provided will be given only to the FTZ industries.[23] There has been predominant use of raw material by those enterprises which has resulted in disproportionately large amounts of subsidy to those enterprises, and there is nothing in the Act which can ensure use of exempted raw material with finished goods. A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. [24] Any subsidy falling under the provisions of Article 3 shall be deemed to be specific[25]. It has already been submitted that the subsidy results in benefit under art. 3 and so, therefore, it is specific subsidy and prohibited under SCMA.

[22] *See* SCMA, *Supra Note* 1, Art. 2.1.
[23] *See* Enroda Free Trade Zones Act, 2001 [hereinafter FTZ, Act], Annexure II of Fact on Record, Sec. 2.
[24] *See* SCMA, Supra 1, Art. 2.2
[25] *See* SCMA, Supra 1, Art. 2.3.

Subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in Art. 8 para 2(a), 2(b) or 2(c), than it is becomes non actionable subsidy. The impugned subsidy does not meet any condition mentioned in Art. 8.2, so this Court can conclude that it is an actionable subsidy.

[A].5. *Enroda FTZ Act is not in consonance with RFTA*

FTZ provided excess remission to the producers as there is nothing in the act which ensures that duty exempt raw materials imported into the FTZ was used for the manufacture of destined exports. S. 16(d) of Free Trade Zones Act, 2000 provides that manufacturing units shall not be required to co-relate every import consignment with its exports, transfer to other units in the FTZ, sales in the DTA and balance in stock[26].

[A].6. The duty draw back scheme provided by Enroda is in not in consonance with Annex II of SCM Agreement

The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product[27]. Duty drawback by Enroda constitutes an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product.

There is no existence of any verification system or procedure which enables Enroda to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is no drawback of import charges in excess of those originally levied on the imported inputs in question[28]. Where there are

[26] *See* FTZ Act, *Supra Note* 23, S. 16 (d).
[27] *See SCM* Agreement, *Supra Note* 1, List – II of **Annex II: Guidelines on Consumption of Inputs in the Production Process,**
[28] *See Supra Note* 27.

no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy[29]. Cheap exports from Enroda started to displace steel manufactured in Azania not only from third country markets but also the domestic market in Azania[30]. This is an evidence to show that the only reason why the Enrodean manufacturer were able to sell the goods below market price was that drawback given by government on raw materials exceed the quantity of similar products exported. Also, sec. 16 of FTZ, makes it clear that the exempted raw materials were not only used for destined export but were also used by domestic manufacturer which resulted in high export from Enroda.[31]

[B]. THE COUNTERVAILING DUTIES IMPOSED BY AZANIA IS IN CONSONANCE WITH RFTA

[B].1. Art. III of provides for imposition of countervailing duties.

Para 2(b) provides that any anti-dumping or countervailing duty can be imposed in consistently with the provisions of this Agreement. Anti dumping measures can be imposed as duty exemption given to FTZ enterprises of Enroda has an adverse effects on Azania as it has caused: (1) injury to a domestic industry manufacturing like products that occurs in the territory of Azania[32]; (2) "serious prejudice" by export displacement in a third country market[33]; and (3) "nullification or impairment" of benefits accruing under RFTA, such as when improved market access from a bound tariff reduction is counteracted by subsidization.

[29] *See Supra Note* 27.
[30] *See* ¶ 20 , Fact on Record.
[31] *See* ¶ 21, Fact on Record.
[32] *See* ¶ 22, Fact on Record.
[33] *See* ¶ 20, Fact on Record. 20.

[B].2. Azanian industry has suffered injury within the meaning of article 5 of SCM Agreement.

The importing country is only entitled to levy an Anti-dumping duty when there is material injury to a domestic industries or at least a threat of such an injury[34]. Subsidies cause adverse effects if any Injury is caused to the domestic industry of another Member or there is nullification or Impairment of benefits accruing to other Members or Serious prejudice to the interests of another Member.[35] In the instant case, Azanian manufacturer is suffering because Enrodean manufacturer has dumped its goods in Azania and also in third world countries by selling it at below market price.

Serious Prejudice is caused if the total ad valorem subsidization of a product exceeding 5 percent.[36] Serious prejudice in the sense of paragraph (c) of Article 5 of SCM may arise in any case where one or several of the following apply: (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member[37]; (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market[38]; (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market[39]; (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodityas compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted[40]. Cheap exports from Enroda started to displace steel manufactured in Azania not only from third country markets but also the domestic market in Azania[41].

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[34] BISD S/8. 1955.
[35] *See* SCM Agreement, *Supra Note* 1, *Art.* 5.
[36] *See* SCMA, *Supra Note* 1, art. 6.1.
[37] *See* SCMA, *Supra Note* 1, art. 6.3.
[38] *See Supra Note* 37.
[39] *See Supra Note* 37.
[40] *See* SCMA, *Supra Note* 1, art. 6.3
[41] *See* ¶ 20, Fact on Record.

Change in relative shares of the market" shall include any of the following situations: *(a)* there is an increase in the market share of the subsidized product; (*b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; *(c)* the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy[42]. The Export from Enroda has increased only after the Government has started providing subsidy which has resulted in increase in market share of export from Enroda.

[B].3. ***The specific subsidy provided by Enroda can be countervailed by Azania.***

Once a panel has established that a government measure is a financial contribution that provides a benefit and falls within the scope of Article 3, then that measure is automatically specific. Erodean subsidy is a specific subsidy both in law and in fact destined to foster exportation of the subsidized product. In practice, such subsidies can either be countervailed or challenged as illegal measures. Prohibited Subsidies under Article 3 of ASCM are, *ipso iure*, regarded as specific. And there is no need to conduct a specificity test.[43] Under art. 28.1 prohibited subsidies inconsistent with RFTA are to be brought in conformity with the provisions of this Agreement, but no such steps has been taken by Enroda and so, Azania can impose countervailing duties on Enroda.

[42] *See* SCMA, *Supra Note* 1, art. 6.4.
[43] *See Van* Banel and Bellis, Module on Export Promotion Scheme in Develping Country, 9.08.09.

II. THE IMPOSITION OF A BORDER TAX IS JUSTIFIED UNDER THE GENERAL EXCEPTIONS TO THE RAZVANA AGREEMENT ON TRADE IN GOODS.

[A]. BORDER TAX IS NOT JUSTIFIED BY THE GENERAL EXCEPTIONS TO RAZVANA AGREEMENT ON TRADE IN GOODS[44].

Enroda's argument that the embargo is permitted under the exceptions to performance found in the RFTA, is refuted by the policies and decisions arising from the GATT and the WTO, by virtue of Article 27, clause 2 of the RFTA on settlement of disputes. This provision states that these decisions "shall be considered subsidiary sources of law with respect to the interpretation of this Agreement."[45] Enroda is a party to the RFTA, which expressly endorses the consideration of GATT and WTO decisions. Therefore, a proper interpretation of Article 27 of the RFTA requires an analysis of the WTO's policies and goals that form the basis of these decisions.

The WTO Appellate Body holds that an action is not justified under Article XX unless it satisfies both the chapeau (the introductory clause) and the specific exception.[46] Enroda, as the State invoking an Article XX exception, has the burden to demonstrate that the trade ban satisfies the Article.[47]

[A].1. It is not justified by Art 20 (b) of the RFTA on Trade in Goods.

Enroda's imposition of Border Tax on the importation of all products manufactured in Azania and other Annex A countries of CTRA cannot withstand the careful scrutiny this Court applies to cases involving international environmental law. This Court has set an "exceptionally high standard" on a state's claim that it justifiably defied a treaty obligation in response to

[44] *See* Annexure I of Fact on Record, RFTA on Trade In Goods [hereinafter referred as RFTA]
[45] *See* Annexure I of Fact on Record, RFTA on Settlement of Disputes, Art 27 (1) and (2), *Supra Note* 44.
[46] *See* Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, 21-24, WT/DS2/AB/R (Apr. 29, 1996).
[47] *See United States – Standards for Reformulated and Conventional Gasoline*, *Supra Note* 46, at ¶¶ 20-21.

environmental concerns.[48]It is the measure and not the policy that has to meet the requirement of Article 20(b).[49]

The policy through which the measure is being pursued must fall within the range of policies designed to protect human, animal or plant life or health. The purpose of CTRA and the reason for the imposition of carbon tax has nowhere been defined. It may be presumed that it is to minimize the damage being caused to the environment because of the GHG emissions. But even then, Enroda's valid objective of safeguarding environment and thereby it's people's life and health does not legitimize to be a measure taken without sufficient consideration of alternatives[50], and is not appropriately tailored to achieve its goal.

Second, the measure must be necessary to protect human, animal or plant life. What is 'necessary' for the purpose of Article 20(b) includes situations where the measure may be the only one available[51] or where it is justified as necessary.[52] The greater the trade restriction and its impact, the harder it is to prove its necessity.[53] The word "necessary" ordinarily means being of essential or indispensable nature.[54] GATT panel invented new schemes for interpreting "necessary", such as the least GATT-inconsistent test[55] and least trade-restrictive test.[56]

Nothing in the overall facts of the instant case or specifically in Enroda's own concessions leads to the conclusion that the measure Enroda adopted (i.e. imposing carbon tax @ 10% and higher) is a necessary choice or choice of last resort for Enroda.

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[48] *See Ida* L. Bostian, *"WATER: III The International Court of Justice Decision Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)"*, COLO. J. INT'L ENVTL. L. & POL'Y 186, 194 (1997 Yearbook).
[49] *See Appellate* Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* WT/DS33/AB/R (Jan. 6, 1997) (adopted May 23, 1997).
[50] *See GATT* Dispute Settlement Panel Report on *U.S. –Restrictions on Imports of Tuna*, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) 155 (1993); available at http://www.american.edu/TUNA.HTM [hereinafter Tuna/Dolphin I].
[51] *See* Gasoline, *Supra Note* 46.
[52] *See Appellate* Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 159 WT/DS161, 169/AB/R (April 19, 1999) [hereinafter *Korea- Beef*].
[53] *See Korea – Beef, Supra Note* 52 at ¶ 163.
[54] *See Corrosion Proof Fittings v. EPA*, Brief amicus curiae of the Government of Canada, May 22, 1990, p. 17.
[55] *See* "*Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*," GATT BISD 37S/200, ¶¶ 74-75, 81. *See* Fredric L. Kirgis, Jr., "*Effective Pollution Control in Industrialized Countries: International Economic Disentives, Policy Responses, and the GATT*," Michigan Law Review, April 1972, pp. 860, 892-893.
[56] *See* Steve Chamovitz, "*Trade Negotiations and the Environment,"* International Environmental Reporter, March 11, 1992, pp. 144-148. *See*, "*United States-Measures Affecting Alcoholic and Malt Beverages*,"[hereinafter US-Alchohol] GATT Document DS23/R, February 7, 1992, at ¶¶ 5.41-5.43 and 5.52.

In Korea Beef, to decide whether a measure is "necessary" under Article XX[57], the party asserting the exception, in this case Enroda, has the burden of demonstrating that alternative measures were not "reasonably available."[58] and it should not have an extremely negative impact on international trade.[59]

The necessity justification requires the state action to defend against a "grave and imminent peril."[60] Enroda emphasizes that the threat to the environment because of air pollution and use of carbon and fossil fuels constitute such peril, but for claim of necessity to be valid, the peril must arise exclusively out of the agreement at issue. This Court had held in Gabcikovo-Nagymaros Project that claimed peril "had…already materialized to a large extent for a number of years, so that it could not…represent a peril arising entirely out of the project."[61] Similarly, Enroda's asserted peril does not arise entirely out of the activities of Azania and other Annex A countries of CTRA. Azania's GHG emissions resulting from the production of imports to Enroda represent only a percentage of world's GHG emissions. The tax violates the main objective of the WTO, the facilitation of international commerce achieved through the elimination of barriers to trade. Enroda's overly broad, yet ineffective measure is incompatible with WTO policy and is not encompassed by the environmental health exception.

[A].2. It is not justified by Art 20 (g) of the RFTA on Trade in Goods.

Exception (g) of the RFTA allows a party to enforce or adopt measures relating to the conservation of exhaustible natural resources. *U.S.- Shrimp-Turtle*[62] made progress, from an environmental perspective, in defining exhaustible natural resources broadly, to include living and non-living resources (including other species) and renewable and non-renewable resources. Second, the law must have been accompanied by domestic level restrictions on management, production or consumption of the resource to be conserved. Finally, the law must be "primarily

[57] *See* Gasoline, *Supra Note* 46, at ¶¶ 161-64, 182.
[58] *See*, Gasoline, *Supra Note* 46 at ¶ 182.
[59] *See Gasoline, Supra Note 46.*
[60] *See Gasoline , Supra Note 46.*
[61] *See* Gasoline Report, *Supra Note 47.*
[62] *See Appellate* Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 177, WT/DS58/AB/R (Oct. 12, 1998).

aimed at" the conservation objectives; it must show "a close relationship between means and ends."

Border Tax was imposed on all imports coming from Annex A countries of CTRA without exception. The act nowhere states the purpose of imposing the carbon tax and hence the act fails on its pretext as to what was the exhaustible natural resource it was trying to conserve. The tax was imposed on all Annex A countries which included Annex I members of UNFCCC, having the heaviest burden under UNFCCC. They have taken effective steps domestically in compliance of their obligation. Thus, this extra tax on them and the developing countries is totally unfair and uncalled for under UNFCCC. Further, there is no evidence to show that this act would help in lowering the GHG emissions. The trade barrier set up by Enroda will have little or no effect on greenhouse gas emissions. Azania is a small nation in the region, both in terms of size and population.[63] In contrast, Enroda is highly industrial and is the largest nation in the region in terms of size and population. Therefore, the trade embargo created by Enroda is not an effective means to effectuate their supposed goal to combat the negative effects on the environment.

[A].3. It is not justified by the chapeau of Art 20 of the RFTA on Trade in Goods.

A law passing the tests above must pass the tests in the chapeau of Article XX. The three tests in the chapeau to be met are whether, in its application, the measure is arbitrarily discriminatory, unjustifiably discriminatory or constitutes a disguised restriction on trade.

In U.S.-Shrimp-Turtle case,[64] a number of criteria were defined to pass the test of chapeau, like: a state cannot require another state to adopt specific environmental technologies or measures; the difference in the conditions prevailing in those other countries must be seen; countries should attempt to enter into negotiations with the exporting state(s) before enacting unilateral trade measures and foreign countries affected by trade measures should be allowed time to make adjustments.

[63] *See* ¶ 1, Facts on Record.
[64] *See* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* ¶ 134, *Supra Note* 62.

Enroda's CTRA on imports on all Annex A countries is a method to impose its domestic environmental standards on all other countries. Enroda imposed equal tax on all countries, whether it be a Annex I country or a developing country like Azania. Further, no attempt to negotiate terms were made with the Annex A countries before imposing CTRA and no time period allowed to the states to make specific adjustments.

[A].3.1 *Enroda's CTRA Constitutes Arbitrary and Unjustifiable Discrimination and Violates the RFTA's Fundamental Principle of Liberalized Trade.*

The imposition of Border Tax contravenes the chapeau's policy against non-discrimination, which is "the main principle on which the rules of the multilateral trading system are founded."[65]Arbitrary discrimination exists where a state's measure is applied in a rigid and inflexible manner.[66] Enroda's decision to impose carbon tax on all imports at a rate higher than 10% on all Annex A nations represents the most rigid and inflexible application of a trade restriction possible. Annex A countries comprises of all nations incuded in Annex I of UNFCCC, developed nations not part of UNFCCC and developing nations in an advance stage of development.[67] This classification is arbitrary and unjustified as Annex I countries and developing nations cannot be treated at par. Further developed nations not part of UNFCCC cannot be forced upon trade restrictions which are in consonance of object of UNFCCC which they have not ratified.

[A].3.2 *It is a disguised restriction on International Trade*

The imposition of CTRA on all Annex A countries without exception would place many nations under undue hardship to compete in international trade. The facts that the manufacturing cost of Enroda had increased marginally due to the imposition of carbon tax[68] and subsequent increase by 25% [69]; Azania's emergence as a competitor of Enroda in exports to 3rd country market[70]and

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[65] *See World* Trade Organization, Trade and Environment at the WTO, 50, at http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/trade_env_e.pdf (last visited Sept. 15, 2009).
[66] *See US- Shrimp, Supra Note* 62.
[67] *See* ¶ 24, Facts on Record.
[68] *See* ¶ 16, Facts on Record.
[69] *See* ¶ 17, Facts on Record.

the subsequent failure to establish Enrodean supremacy in International Steel market by the concept of FTZ[71] because of imposition of CVD[72] were the reason for Enroda to take up this disguised restriction to trade to regain its supremacy in International trade.

Further the national environmental measure of Enroda i.e. CTRA does not qualifies the principle of proportionality.[73] The CVD was imposed on 3 exporters of Steel products from Enroda but the CTRA was imposed on all nations whether they have imposed carbon tax in their domestic state or not and even on developing nations who are eligible to be given differential treatment under the UNFCCC.[74]

[A].3.3 *It is a counter measure against the imposition of CVD*

Article 3(1) of the RFTA on trade in goods states that any Member State can impose on the importation of any product: (*b*) any anti-dumping or countervailing duty applied consistently with the provisions of this Agreement. Thus, the act of Azania to impose a CVD on importation of subsidized steel from Enroda is a justified step under this provision.[75]

The act of Trade Minister of Enroda to call up consultation on the issue of imposition of CVD, which being a failure,[76] the subsequent imposing of Border Tax on the imports from Azania under section 17 of CTRA, 2008 on 25th November clearly suggest that Enroda undertook a counter action. This is also strengthened by the fact that the regulation was imposed all of a sudden, without making any attempt to enter into negotiations before imposing the unilateral measure and it did not even afford any time period to make the adjustments to the affected states. This clearly suggests that it was a reaction of Enroda against Azania's imposition of CVD.

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[70] *See US- Shrimp, Supra Note 62.*
[71] *See* ¶ 18, Facts on Record.
[72] *See* ¶ 22, Facts on Record.
[73] *See* James Cameron and Jonathan Robinson, "The Use of Trade Provisions in International Environmental Agreements," Report for the OECD Environmental Directorate, OECD Document COM/ENV/TD(92)6, February 3, 1992, ¶ 77-83 and 92-94. *See* also Toni R.F. Sexton, "*Enacting National Environmental Laws More Stringent than Other States' Laws in the European Community Re Disposable Beer cans: Commission v. Denmark*," Cornell International Law Journal, 24, no. 3 (1991): 563.
[74] *See Preamble* to United Nations Framework Convention on Climate Change, May 29, 1992, 1771 U.N.T.S. 165, [hereinafter referred as UNFCCC].
[75] *See* ¶ 22, Facts on Record.
[76] *See* ¶ 23, Facts on Record..

[B]. AZANIA HAS COMPLIED WITH ITS INTERNATIONAL OBLIGATIONS.

[B].1. Azania has not breached its obligation under UNFCCC .

Enroda's reliance on UNFCCC[77] as a source of authoritative GHG mitigation law is misplaced as it establishes only a framework of flexible, non-binding commitments.[78] Although UNFCCC is not binding, Azania has abided by it. Interpretation of the UNFCCC is controlled by the Vienna Convention, which in Article 31 requires that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objectives."[79]

[B].1.1 UNFCCC talks about differential responsibility.

Azania is a non Annex I country of UNFCCC.[80]In *Chevron U.S.A., Inc. v. Natural Resources Defense Council* it has been recognized that in the area [of pollution control] the legislative struggle [is] basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs.[81]

UNFCCC says that developing countries such as Azania have special circumstances and may have to bear a disproportionate and abnormal burden under the Convention, giving scope to differentiated responsibility.[82] The policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.[83] The Parties should

[77] *See* UNFCCC, *Supra Note* 74.
[78] *See* Karen Mingst, Essentials of International Relations, 261 (W.W. Norton Co. 2003); *See* also Ranee Khooshie Lai Panjabi, *Can International Law Improve the Climate? An Analysis of the United Nations Framework Convention on Climate Change Signed at the Rio Summit in 1992*, 18 N.C. J. INT'L. & COM. REG. 491 (1993).
[79] *See See* Vienna Convention on the Law of Treaties [hereinafter as VCLT], opened for signature May 23, 1969, 1155 U.N.T.S. 331, *Art.* 31(1).
[80] *See* ¶ 14, Facts on Record.
[81] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 46 U.S. 837, 847 (1984).
[82] *See Art.* 3, ¶¶ 1,2 of UNFCCC, 1992, *Supra Note* 74.
[83] *See Art.* 3, ¶ 4 of UNFCCC, 1992, *Supra Note* 74

cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[84]

Common but differentiated responsibilities and capabilities, implying that while the same objective is pursued, individual actors assume actions according to their (financial and institutional) carrying capacity. Azania being a developing country does not have capacity to minimize the pollution by compromising its industrial needs. However, it has made strict laws regarding the emission of GHG from vehicles.[85] The commercial vehicles manufactured before 1990 have been banned from use with immediate effect. Other commercial and personal vehicles have been given a short time of 1 and 2 years respectively to shift towards CNG and non-compliance of the order made strictly punishable with imprisonment of 2 years and heavy fine of 90,000 Azania Dollars.[86] This order imposes very harsh conditions on Azania as being a developing country only with low per capita income, this order would make them spend extra heavy amounts on their vehicles to convert to CNG and Azania to install CNG stations in its territory.

[B].1.2 States Have a Sovereign Right to Exploit their Own Natural Resources Pursuant to their Own Environmental and Development Policies, Which Is Recognized by the UNFCCC

The UNFCCC recognizes the sovereign right of States to exploit their own resources pursuant to their own environmental and developmental policies.[87] As seen from the facts, it was only in 1976 that industrialization had started in Azania[88] with a view to make Azania economically self

[84] *See Art.* 3, ¶ 5 of UNFCCC, 1992, *Supra Note* 74.
[85] *See Climate* Change Executive Order, 9288[hereinafter CCCE] introduced by Azania in 2003, Annexure III of the Facts on Record, Order 13 of CCCE Order, 9288 and *See* ¶ 24, Facts on Record,
[86] *See* CCCE Order, 9288, *Supra Note* 85.
[87] *See UNFCC*, *Supra Note* 74, at Preamble.
[88] *See* ¶ 10, Facts on Record.

reliant.[89] Industries are in a nascent phase and thus imposition of carbon tax and such other harsh measures on the manufacturers would make their survival difficult. The source of Pollution is both thermal and vehicular pollution and Azania has acted voluntarily to lower its vehicular pollution, on very harsh terms.[90] Thus, regulation on industries would be too early and will affect industrial growth.

[B].2. Azania has not breached its obligation under Kyoto Protocol

Azania has ratified the Kyoto Protocol and so under an obligation not to defeat the object and purpose of the treaty. The objective of the Kyoto Protocol is to achieve stabilization of greenhouse gases at a level that would prevent dangerous anthropogenic interference with the climate system.[91] To 'defeat' the object and purpose of the treaty means to make performance of the treaty impossible when it comes into force.[92] As there is no authoritative statement from the ICJ or in the Vienna Convention on the test to be applied, Azania submits that it should be one of manifest intent. This involves looking at the act and determining whether the party objectively intended to defeat the object and purpose of the treaty.[93] This test has found support among writers[94] and has been applied in European courts.[95]Article 18 requires States to refrain from 'acts' defeating the object and purpose of the treaty.[96]

Azania has ratified both the UNFCCC and Kyoto Protocol and in its voluntary attempt to fulfill its obligation under the treaty and address the concern of climate change has brought the CCE Order, 9288 of 2003. This decision has been welcomed by the many environmentalist.[97]

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[89] *See* ¶ 6, facts on Record.
[90] *See* ¶ 14, Facts on Record.
[91] *See UNFCCC*, *Supra Note* 74 , at Art 2
[92] *See Martin* Rogoff, "THE INTERNATIONAL LEGAL OBLIGATIONS OF SIGNATORIES TO AN UNRATIFIED TREATY", in THE LAW OF TREATIES 92-227 (2004).
[93] *See Jan* Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 Vand. J. Transnat'l L. 283 (2001).
[94] *See Jonathan* I Chamey, *Entry into Force of the 1982 Convention On The Law Of The Sea,* 35 Vand. J. Transnat'l L. 381 (1995).
[95] *See Case* T-115/94, *Opel Austria v Council*, 1997 E.C.R. II-39; Case C-27/96; *Danisco Sugar AB v Allmanna*, 1997 E.C.R. I-6653
[96] *See Joni* S Charme, T*he Interim Obligation of Art. 18 of the Vienna Convention on the Law of Treaties: making sense of an enigma*, v 21 n 1 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW AND ECONOMICS 71, 102 (1991).
[97] *See* ¶ 14, Facts on record.

[B].3. Azania is not bound by the precautionary principle and it is not a binding obligation.

The precautionary approach is not a customary law as it does not satisfy the two conditions i.e. the acts or rules concerned must amount to settle practice and secondly, those acts or rules must be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (existence of *opinio juris*).[98]

It is not a "settled practice" of states in the form of texts of international instruments, decisions of international courts, decision of national courts, national legislation, diplomatic correspondence, opinion of national legal advisors, and practice of international organizations,[99] and thus fail to prove the existence of precautionary principle as customary international law. Further, It lacks opinio juris. ICJ in Asylum Case held, "The party which relies on a custom of this kind must prove that the custom is established in such a manner that it has become binding on the other party."[100] The decision puts that the party who is alleged to have accepted any practice must have done with a definite and conscious understanding of having an international legal obligation and that "the frequency or even habitual character of the acts is not in itself enough."[101]

As Precautionary principle has failed to rise to the level of customary international law, applicant cannot be held to be under an international obligation.

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[98] *See Statute* of the International Court of Justice, art.38.(b), June 26,1945, 59 Stat. 1031; *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.),* [1986] ICJ Rep. 14 at ¶¶97-9; *Continental shelf (Libya. v. Malta)* [1985] ICJ Rep. 13 at. 29-30, ¶27; *The S.S. Lotus case*, [1927] PCIJ, Series A, No. 10, at 28 [Lotus case]; MALCOLM N. SHAW , INTERNATIONAL LAW, (5TH ED. 2005) at 70.

[99] *See Report* of the International Law Commission to the Genaral Assembly, Ways and means for making the evidence of Customary International law more readily available, 2 Y.B. INTL. L 368-372 (1950).

[100] *See Asylum Case (Columbia v. Peru)* [1950] ICJ Rep. 266.

[101] *See North Sea Continental Shelf (F.R.G./Denmark; F.R.G./Netherlands)* [1969] ICJ Rep. 3 at ¶77.

[B].4. Carbon tax Regulation Act, 2008 [102] is against the principle of sustainable development.

Developing countries have been accorded special status in applicable treaties as well as customary international law.[103] Applicant state is a developing country[104] whose economy is mainly based upon the industrial activity of steel manufacture[105] and provides for one of the largest revenues for the state. Azania has an obligation under international law to ensure its people's right to development.[106] The right to development is a human right by virtue of which every human person is entitled to participate in, contribute to and enjoy economic, social, cultural and political development.[107] It is a right based on the right of self-determination of peoples.[108] Sates have a primary responsibility to create "national and international conditions favourable to the realization of right to development".[109] Azania, therefore, has the obligation to improve its economy and steel industry for the full realization of this fundamental human right.

[C]. BORDER TAX IS IN VIOLATION OF COMMITMENTS UNDER RFTA

The Trade restriction is an Arbitrary and Unjustifiable Measure that Violates the Explicit Terms of the RFTA for Trade in goods. The [GATT] rules constrain attempts by one or a small number of countries to influence environmental policies in other countries not by persuasion and

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[102] *See* Enroda Carbon Tax Regulation Act, 2008; (herein after called CTRA), ¶ 24 of Facts on Record.

[103] *See* U.N. Charter, Pmbl; CBD, Pmbl, Arts.20(4), 20(6); United Nations Conference on the Human Environment, Stockholm Declaration, June 16, 1972, U.N. Doc. A/CONF.48/14 & Corr. 1., Principle 11; Declaration on the Right to Development, G.A. Res.41/128, U.N.G.A.O.R., 97th plen. mtg., Art.4,¶ 2, U.N.Doc.A/RES/41/128 (1986); Resolution on International Development Strategy for the U.N. Second Development Decade, G.A.Res.2626(XXV), U.N.G.A.O.R., 25th Sess., U.N.Doc.A/RES/2626(XXV) (1969).

[104] *See* ¶ 1, Facts on Record.

[105] *See* ¶ 16, Facts on record.

[106] *See Declaration* on the Right to Development**,** G.A. Res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53), U.N. Doc. A/41/53 (1986). *Art.*s 1,2,4,6,7 and 8; Rio Declaration on Environment and Development**,** 31 ILM 874, UNCED Doc A/Conf.151/5/Rev.1 (1992), Principles 1,4 and 5

[107] *See Art.* 1, Declaration on the Right to Development**,** G.A. Res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53), U.N. Doc. A/41/53 (1986). *Art.*s 1,2,4,6,7 and 8; Rio Declaration *Supra Note* 6, Principles 1,4 and 5.

[108] *See 1986* ILA Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order (Seoul Declaration), Principle 6, par.1.

[109] *See* 1986 ILA Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order (Seoul Declaration), *Supra Note* 108, Art 3, ¶1.

negotiation, but by unilateral reductions in access to their markets.[110] Whether in the form of laws that seek "to change another's environmental behaviour" or that "attempt to force other countries to adopt domestically-favoured practices and policies," such measures (according to the report) violate the GATT.[111]

[C].1. The classification of countries in Annex A of Carbon Tax Regulation Act, 2008 is unreasonable.

Annex A countries of CTRA include all Annex I members of UNFCCC, developed nation not part of UNFCCC and developing nations in an advance stage of development.[112] Azania can by no means be included in any of the above three categories as Azania is a non-Annex I country of UNFCCC[113] and a developing nation[114]. Azania cannot be classified as a developing nation (fact sheet states Azania to be developing state) in an advance stage of development as Azania was a monarchial state till 1940[115] and even the transition to democracy witnessed large scale corruption and violence.[116] The Economy was not self reliant till 1975[117] and the industrialization started as late as in 1976. Though the exports from Azania started competing with that of Enroda in 1992, but it was only in 3rd country markets and only with respect to steel.[118] Thus, Azania is still in a nascent phase of development.

[C].2. *CTRA violates Art 3 of RFTA on Trade in Goods*

Article 3 establishes the national-treatment rule. This requires that the products of other countries be treated “no less favorably” than “like products” manufactured in the importing country i.e. the same opportunity to compete in domestic markets. But imposing Border Tax at a rate higher than 10% on the goods coming from Azania will affect the competitive opportunity of the infant

[110] *See* General Agreement on Tarrif and Trade, "Trade and the Environment," in GATT, International Trade 90-91, Volume I (Part III), 1992 [hereinafter GATT Report], p. 22.
[111] *See* GATT Report, *Supra Note* 110, pp. 22-23.
[112] *See* Section 17 of CTRA, *Supra Note* 102, ¶ 24, Facts on Record.24,
[113] *See* ¶ 14, Facts on Record.
[114] *See* ¶ 1, Facts on record.
[115] *See* ¶ 5, Facts on Record.
[116] *See* ¶ 5, Facts on record.
[117] *See* ¶ 6, facts on record.
[118] *See* ¶ 16, facts on Record.

industry of Azania. Further, imposition of tax on Annex I countries of UNFCCC, who themselves undergo regulations relating to GHG emissions are subjected to extra disadvantage and double taxation which affects their competitive opportunity in Enrodean Market. This is a way of affording protection to the domestic industries of like products.[119] It thus violates national treatment rule of RFTA.

[C].3. CTRA violates Article 4 of the RFTA.

The border tax instituted by Enroda on all imports from Azania and other Annex A countries violates both the language and intent of the RFTA. Enroda and Azania signed the RFTA in 1997, which "establishes a free and fair trade area within the Razvana."[120] The trade restriction undermines the RFTA's intent to establish an area of free trade covering the entire Razvana.[121] Enroda is bound by the RFTA and is required by the Vienna Convention on the Law of Treaties to perform its trade obligations in good faith.[122]

Article 4 paragraph 5, prohibits "Quantitative Restrictions." *Article 4, paragraph 1 of the RFTA prohibits the im*position of internal taxes, charges, laws, regulations and requirements to imported or domestic products so as to afford protection to domestic production. *Further, Article 4, Paragraph 2 of the RFTA prohibits imposing* internal taxes or other internal charges in excess of those applied to like domestic products. Enroda's embargo contravenes the explicit language of Article 4 and is an "internationally wrongful act"[123] in violation of the RFTA. The United Nations International Law Commission defines an "internationally wrongful act" as conduct that is attributable to a State that constitutes a breach of an international obligation of the State.[124] Carbon tax places the Annex A countries under extra burden of taxes affecting their competitive advantage, thereby affording an upper hand to the domestic Enrodean products.

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[119] *See Art* 4 (1) of RFTA on Trade in Goods. *Supra Note* 44
[120] *See* preamble of the C*ompromis submitted to the ICJ and* ¶ 4, Facts on record.
[121] *See* ¶ 3, Facts on Record.
[122] *See Vienna* Convention on the Law of Treaties, *Supra Note* 79.
[123] *See*G.A. Res. 56/83, art. 2, U.N. GAOR, 9th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Dec. 12, 2001).
[124] *See Supra Note* 123.

[C].4. Enroda cannot impose trade restrictions unilaterally.

[The GATT] protects trade relations from degenerating into anarchy through unilateral actions in pursuit of unilaterally defined objectives, however valid they may appear.[125] The CTRA, 2008 being a unilateral trade measure undertaken by Enroda is in violation of its scheduled commitments and as a reaction to the justified steps taken by Azania of imposing CVD on subsidized steel from Enroda. The Panel in Tuna-Dolphin case considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.[126] Thus unilateral CTRA, 2008 of Enroda is in violation of RFTA objective.

[C].5. Enroda cannot impose extra-territorial laws.

The UN Conference on Trade and Development adopted a resolution stating that "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."[1] The Rio Declaration repeats this statement.[1] In the Tuna-Dolphin dispute, the GATT panel determined that "extrajurisdictional" trade restrictions were not included within the scope of GATT Article XX (General Exceptions).[127]

RFTA does not permit Enroda to tell Azania what its environment regulation should be. GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country — even to protect animal health or exhaustible natural resources. The term used here is "extra-territoriality[128]. If this was allowed then any country could restrict imports of a product from another country merely because the exporting country has different environmental, health and social policies from its own. The door would be opened to a possible flood of protectionist abuses. This would conflict with the main purpose of the multilateral trading system — to achieve predictability through trade rules.

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[125] *See* GATT Report, *Supra Note* 110, at p. 24.
[126] *See Tuna-Dolphin report , Supra Note* 50, ¶ 5.24.
[127] *See Tuna-Dolphin, Supra Note 50,* at ¶ 5.26-5.28 and 5.31-5.32.
[128] *See Tuna- dolphin, Supra Note 127.*

[C].6. Enroda cannot impose trade restrictions only on the basis of the way the product has been produced.

RFTA does not permit Enroda to take action on the method employed to produce goods. In **Tuna Dolphin case**[129], it was held that that the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations. (But the US could apply its regulations on the quality or content of the tuna imported.) Trade restrictions cannot be applied unilaterally.

Thus, imposing tax on goods from Azania and other Annex I nations of UNFCCC, developed nations not part of the UNFCCC as well as developing nations in an advance stage of development only because these were not subjected to carbon tax or other such environmental measures in their country of origin is not justified.

[129] *See Tuna –Dolphin, Supra Note* 50**.** **(***Not adopted, circulated on 3 September 1991.)*

PRAYER / CONCLUSION

Wherefore, may it please the Court in the light of the questions presented, arguments advanced, and authorities cited, to adjudge and declare that: The Republic of Azania respectfully requests this Honourable Court to:

- **Declare** that the duty exemptions on import of raw materials for the steel industry is a subsidy prohibited under the Razvana Agreement on Subsidies and Countervailing Duties;
- **Declare** that the imposition of Countervailing Duties on Enroda's exporters is inconsistent with the provisions of the Agreement;
- **Declare** that the imposition of a border tax is not justified under the General Exceptions to the Razvana Agreement on Trade in Goods;
- **Declare** that Enroda has breached its market access commitments.

All of which is respectfully affirmed and submitted

AGENTS FOR THE APPELLANT,

REPUBLIC OF AZANIA