Team No. - 147 R

IN THE INTERNATIONAL COURT OF JUSTICE

LA COUR INTERNATIONALE DE JUSTICE

PEACE PALACE, THE HAGUE

NETHERLANDS

2009 GENERAL LIST NO. …….

THE INDEPENDENT REPUBLIC OF AZANIA

APPLICANT

v.

THE REPUBLIC OF ENRODA

RESPONDENT

ENTRE LA REPUBLIQUE INDEPENDANTE D' AZANIA

DEMANDERESSE

v.

ET LA RÉPUBLIQUE D' ENRODA

DÉFENDEUR

The Case Concerning the Differences Between Azania and Enroda Regarding the Interpretation of Razvana Free Trade Agreement.

MEMORIAL FOR THE RESPONDENT // MÉMOIRE DE LA DEFENDEUR

SECOND GNLU INTERNATIONAL MOOT COURT COMPETITION, 2010.

TABLE OF CONTENTS

List of Abbreviations……………………………………………………………………….IV

Index of Authorities……………………………………………………………...….V

Statement of Jurisdiction ……………………………………………………………XIII

Statement of Facts ……………………………………………………………..........XIV

Questions Presented………………………………………………………………....XVI

Summary of Arguments ……………………………………………………………XVIII

Arguments Advanced………………………………………………………………1-25

I. THE DUTY EXEMPTIONS ON IMPORT OF RAW MATERIALS FOR THE STEEL INDUSTRY IS NOT A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES AND THE IMPOSITION OF COUNTERVAILING DUTIES IS INCONSISTENT WITH THE PROVISIONS OF THE AGREEMENT ……………………………...……1-11

[A]. THE DUTY EXEMPTION ON IMPORT OF RAW MATERIALS FOR THE STEEL INDUSTRY IS NOT A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES ………………………………….1-6

[A].1. ***Exemptions on raw material from import duty does not constitute subsidies prohibited under the Razvana Agreement on Subsidies and Countervailing measures……..1***

[A].2. ***The subsidy provided by Enroda does not confer benefit and it is thus a non-actionable subsidy………..………………………………………………3***

[A].3. ***Subsidy provided by Enroda is not specific subsidy and therefore, it is not prohibited by SCM Agreement…………………………………………..….3***

[A].4. ***Exemptions granted to the FTZ units by the Enroda is not conditional on export performance…………………………………………………………4***

[A].5. ***The Duty Draw Back scheme provided by Enroda is in consonance with Annex II of SCM Agreement……………………………………………….5***

[A].6. ***FTZ Act does not provid excess remission to the producers as duty exempt raw materials imported into the FTZ was used for the manufacture of destined export……………………………………………………………6***

[B]. THE COUNTERVAILING DUTIES IMPOSED BY AZANIA IS NOT IN CONSONANCE WITH RFTA ……………………………………………….6-11

[B].1. ***Anti Dumping Duties imposed by Azania violates art. VI of GATT……....6***

[B].2. ***The importation of steel by Enroda has not caused any injury to the industries of Azania………………………………………………………8***

[B].3. ***No serious threat is caused to Azania under Art. 6.3 of SCMA……………9***

[B].4. ***Azania steel industries has not retarded materially……………………….10***

[B].5. ***Azania cannot impose anti dumping on the basis of all three kinds of injury suffered by its industries..…………………………………………………….10***

[B].6. ***Anti dumping and Countervailing duty imposed by Azania is not in consonance with RFTA…………………………………………………10***

II. THE IMPOSITION OF A BORDER TAX IS JUSTIFIED UNDER THE GENERAL EXCEPTIONS TO THE RAZVANA AGREEMENT ON TRADE IN GOODS…………12-25

[A]. BORDER TAX IS JUSTIFIED BY THE GENERAL EXCEPTIONS TO RFTA ON TRADE IN GOODS…………………………………………………12-18

[A].1. ***It is justified by Art 20 (b) of the RFTA on Trade in Goods……………….12***

[A].2. ***It is justified by Art 20 (g) of the RFTA on Trade in Goods……………….14***

[A].3. ***It is justified by the chapeau of Art 20 of the RFTA on Trade in Goods…15***

[B]. AZANIA HAS VIOLATED IT'S INTERNATIONAL OBLIGATIONS AND CTRA IS JUSTIFIED AS PER CUSTOMARY PRINCIPLES OF INTERNATIONAL LAW…………………………………………………19-21

[B].1. ***Azania has breached it's obligation under UNFCCC and hence CTRA is justified……………………………………………………………….19***

[B].2. ***Azania has breached it's obligation under Kyoto Protocol and hence CTRA is justified……………………………………………………………..19***

[B].3. ***It is against the precautionary principle and it is a binding obligation……20***

[B].4. ***Azania has not exercised due diligence……………………………………..21***

[B].5. ***Azania has violated its duty to co-operate………………………………….21***

[C]. BORDER TAX IS NOT A VIOLATION OF MARKET ACCESS COMMITMENTS…………………………………………………………22-25

[C].1. ***It does not violate RFTA on Trade in Goods……………………………...22***

[C].2. ***Enroda can impose trade restrictions unilaterally…………………………24***

[C].3. ***Enroda can impose extra-territorial laws…………………………………...25***

PRAYER / CONCLUSION ……………………………………………………………..26

ABBREVIATIONS

1. §: Section
2. ¶: Paragraph
3. Art.: Art.
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. Envt.: Environment
11. G.A. Res.: General Assembly Resolutions
12. G.A.O.R.: General Assembly Official Records
13. I.C.J.: International Court of Justice
14. I.L.C.: International Law Commission
15. I.L.M.: International legal Materials
16. MFN: Most Favoured Nation, in the WTO, the principle of treating trading partners equally
17. Mtg.: Meeting
18. n.: Note
19. NAT. RES. J.: Natural Resources Journal
20. No.: Number
21. p.: Page
22. P.C.A.: Permanent Court of Arbitration
23. P.C.I.J.: Publications of the Permanent Court of International Justice
24. pp.: Pages
25. R.I.A.A.: Report of International Arbitral Awards
26. RFTA: Razvana Free Trade Agreement
27. SCM Agreements: Agreement on Subsidies and countervailing measures
28. Supp.: Supplementary
29. UNCLOS.: United Nation Convention on the Law of the Sea
30. UNCTAD: United Nations Conference on Trade and Development.
31. UNFCCC: United Nations Framework Convention on Climate Change
32. VCLT: Vienna Convention on the Law of Treaties
33. Vol.: Volume
34. 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 Art. 36(1) read with Art. 40(1) of the Statute of the International Court of Justice, 1950. Under Art. 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 Respondent 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) which 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* submitted to the ICJ 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 it was found that exemptions given to imports 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 immediate consultations regarding the imposition of CVD. The consultations made little headway. ¶¶21- 23

MEASURES RELATED TO GHG EMISSION

6. Azania was 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 due to international pressure 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 art. 40 (1) of the ICJ statute under special agreement on March 2009 pursuant to art. 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 NOT A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES AND THE IMPOSITION OF COUNTERVAILING DUTIES IS INCONSISTENT WITH THE PROVISIONS OF THE AGREEMENT

[A]. THE DUTY EXEMPTION ON IMPORT OF RAW MATERIALS FOR THE STEEL INDUSTRY IS NOT A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES

[A].1. ***Exemptions on raw material from import duty does not constitute subsidies prohibited under the Razvana Agreement on Subsidies and Countervailing measures***

[A].2. ***The subsidy provided by Enroda does not confer benefit and it is thus a non-actionable subsid***

[A].3. ***Subsidy provided by Enroda is not specific subsidy and therefore, it is not covered by SCM Agreement***

[A].4. ***Exemptions granted to the FTZ units by the Enroda is not conditional on export performance***

[A].5. ***The Duty Draw Back scheme provided by Enroda is in consonance with Annex II of SCM Agreement***

[A].6. ***FTZ Act does not provided excess remission to the producers as duty exempt raw materials imported into the FTZ was used for the manufacture of destined export***

[B]. THE COUNTERVAILING DUTIES IMPOSED BY AZANIA IS NOT IN CONSONANCE WITH RFTA

[B].1. ***Anti Dumping Duties imposed by Azania violate art. VI of GATT***

[B].2. ***The importation of steel by Enroda has not caused any injury to the industries of Azania***

[B].3. ***No serious threat is caused to Azania under Art. 6.3 of SCMA***

[B].4. ***Azania steel industries has not retarded materially***

[B].5. ***Azania cannot impose anti dumping on the basis of all three kinds of injury suffered by its industries.***

[B].6. ***Anti dumping and Countervailing duty imposed by Azania is not in consonance with RFTA***

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 JUSTIFIED BY THE GENERAL EXCEPTIONS TO RFTA ON TRADE IN GOODS

[A].1. ***It is justified by Art 20 (b) of the RFTA on Trade in Goods.***

[A].2. ***It is justified by Art 20 (g) of the RFTA on Trade in Goods***

[A].3. ***It is justified by the chapeau of Art 20 of the RFTA on Trade in Goods***

[A].3.1 *It is not a disguised restriction on International Trade*

[A].3.2 *It is not a counter measure against the imposition of CVD*

[A].3.3 *Arguendo, counter measure is a justified principle of international law*

[B]. AZANIA HAS VIOLATED IT'S INTERNATIONAL OBLIGATIONS AND CTRA IS JUSTIFIED AS PER CUSTOMARY PRINCIPLES OF INTERNATIONAL LAW

[B].1. ***It is justified by UNFCCC and Kyoto Protocol***

[B].2. ***It is against the precautionary principle and it is a binding obligation***

[B].3. ***Azania has not exercised due diligence***

[B].4. ***Azania has violated its duty to co-operate***

[C]. BORDER TAX IS NOT A VIOLATION OF MARKET ACCESS COMMITMENTS

[C].1. ***It does not violate RFTA on Trade in Goods.***

[C].1.1 *It does not violate Art 3 of RFTA on Trade in Goods*

[C].1.2 *There lies no discrimination in application of border tax*

[C].1.3 *It does not violate Article 4 of RFTA*

[C].2. ***Enroda can impose trade restrictions unilaterally***

[C].3. ***Enroda can impose extra-territorial laws***

SUMMARY OF ARGUMENTS

I. THE DUTY EXEMPTIONS ON IMPORT OF RAW MATERIALS FOR THE STEEL INDUSTRY IS NOT A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES AND THE IMPOSITION OF COUNTERVAILING DUTIES IS INCONSISTENT WITH THE PROVISIONS OF THE AGREEMENT.

It is submitted that the exemption on raw material from import duty does not constitute subsidies prohibited under the Razvana Agreement on Subsidies and Countervailing Measures. Subsidy provided by Enroda is not specific subsidy and therefore, it is not covered by SCM Agreement. Concession granted to the FTZ units by the Enroda is not conditional on Export performance. The duty draw back scheme provided by Enroda is in consonance with Annex II of SCM Agreement. FTZ Act does not provid excess remission to the producers as duty exempt raw materials imported into the FTZ was used for the manufacture of destined export. The countervailing duty imposed by Azania is not in consonance with RFTA. Subsidized import of steel from Enroda is not less than normal price of steel product in Azania. The importation of steel by Enroda has not caused any injury to the industries of Azania. Azania steel industries has not retarded materially. Azania cannot impose anti dumping on the basis of all three kinds of injury suffered by its industries. Anti dumping and Countervailing duty imposed by Azania is not in consonance with RFTA.

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

Border Tax is justified by the General Exceptions to RFTA on Trade in Goods. It is justified by Art 20 (b), (g) and *chapeau* of the RFTA on Trade in Goods. It is not a disguised restriction on International Trade. It is not a counter measure against the imposition of CVD. It is justified as counter principle of international law. Border Tax is justified by UNFCCC and Kyoto Protocol. It is against the precautionary principle and it is a binding obligation. Azania has not exercised due diligence to take environmental protective measure and therefore Enroda has a duty to impose such restrictions.. Azania has violated its duty to co-operate. Border Tax is not a violation of market access commitments. It does not violate Art 3 of RFTA on Trade in Goods. Enroda can impose trade restrictions unilaterally. Enroda can impose extra-territorial laws.

ARGUMENTS ADVANCED

I. THE DUTY EXEMPTIONS ON IMPORT OF RAW MATERIALS FOR THE STEEL INDUSTRY IS NOT A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES AND THE IMPOSITION OF COUNTERVAILING DUTIES IS INCONSISTENT WITH THE PROVISIONS OF THE AGREEMENT.

[A]. THE DUTY EXEMPTION ON IMPORT OF RAW MATERIALS FOR THE STEEL INDUSTRY IS NOT A SUBSIDY PROHIBITED UNDER THE RAZVANA AGREEMENT ON SUBSIDIES.

[A].1 *Exemption on raw material from import duty does not constitute subsidies prohibited under the Razvana Agreement on Subsidies and Countervailing Measures.*[1]

Duty exemption on goods destined for exports are accepted norms of international trade and is recognized by international trade organizations such as the World Trade Organization and indeed the RFTA[2]. WTO Agreement on Subsidies and Countervailing Measures excludes from the definition of "subsidy" the core fiscal benefit provided by FTZs – an exemption from duties and taxes on goods exported from FTZs[3]. FTZs as such have not been the subject of any GATT/WTO dispute settlement proceeding, and SEZ programs have not been criticized as WTO inconsistent in WTO trade policy reviews[4]. Goods can be made tax free for export purposes, which is permissible under WTO stipulations.[5] Art. 3.4 of Razvana Agreement on Trade in Goods[6] permit the member states to provide assistance to member states.

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[1] *Canada (Measures Affecting the Export of Civilian Aircraft) (Unreported, March 12, 1999) (WTO)* ¶ 9.112

[2] *See* art. XVI of GATT and the Agreement on Subsidies and Countervailing Measures[full citation ILM number and all] (hereinafter SCM Agreement)

[3] Stephen Creskoff & Peter Walkenhorst, Implications of WTO Disciplines for Special Economic Zones in Developing Countries, WPS 4892, available at The World Bank Poverty Reduction and Economic Management Network International Trade Department, April 2009, available at www.wto.org/doc (last accessed on 5th December, 2009)

[4] *See*, Trade Policy Review Report by the Secretariat, China, WT/TPR/S/199 (16 April 2008), pp. 56,80,87 and Table A.III.5.

[5] *See* Taxmann's Law Relating to Special Economic Zones, 3rd revised edition, New Delhi, September 2006 at p. 1.3

[6] *See* Razvana Agreement on Trade in Goods (here in after RFTA), Annexure I of Facts on Record, Art.. 3.4

Mere assertion of a claim by Azania does not amount to proof.[7] It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions that the burden of proof rests upon the party whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[8] In the instant case, Azania has failed to prove that Enroda Free Trade Zone Act, 2000 is not in conformity with RFTA.[9]

The exemption of production goods incorporated in end products that are subsequently exported to other countries, from duties and indirect taxes is based on SCM Agreement.[10] Zones outside the "customs territory" of the country where they are physically located are recognized by multilateral agreement and customary international law. Duties and indirect taxes are normally not applied in these "free areas[11]". The grant of exemption on import duties in the Free Trade Zone is subject to the condition that the Unit shall execute a Bond-cum-Legal Undertaking, with regard to its obligations regarding proper utilization and account of goods and regarding achievement of positive net foreign exchange earnings.[12] Every Unit and Developer is required under the Act to maintain proper accounts of goods procured from the domestic market of Enroda, and disposal of goods manufactured, by way of exports, sales or supplies in the domestic tariff area or transfer to Free Trade Zone.[13] Art. 3.1(a) provides that subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I are prohibited export subsidy.

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[7] *See United States - measure affecting imports of woven wool shirts and blouses from India (Wool Shirts and Blouses)*, *Supra Note* 7, p. 323 at 335.

[8] *See Supra Note* 7.

[9] *See Supra Note* 5 and 7.

[10] *See* SCM Agreement , *Supra Note* 2 , at Annex 1(h).

[11] *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Mar. 16, 1998 U.N. Doc. FCCC/CP/1997/7/Add.1, reprinted in 37 I.L.M 22, at Specific Annex D.

[12] *See* Enroda Free Trade Zone Act, 2000, (here onwards FTZ Act) Annexure II of Facts on record, §. 16(a) of.

[13] *See Supra Note* 12, §. 16(b).

[A].2 *The subsidy provided by Enroda does not confer benefit and thus it is a non actionable subsidy.*

In the absence of a definition of "benefit" in the SCM Agreement, during the negotiations, there was disagreement over the appropriate criteria for valuing a subsidy and measuring a "benefit".[14] The SCM Agreement reflects, in effect, an agreement to leave the "gaps and ambiguities to be decided in a future negotiation."[15] Here this Court should interpret and apply the negotiated text. The SCM Agreement makes a fundamental distinction between prohibited and non-prohibited subsidies. The drafters did not intend to prohibit all subsidies to exporters. Rather, they structured the SCM Agreement so that most subsidies granted to exporters would be actionable, rather than prohibited. The proper categorization of a subsidy depends on the nature and trade effect of the subsidy, not on whether the recipient is an exporter. A subsidy is "contingent … in fact … upon export performance" when the facts and circumstances are such that the recipient will reasonably know that there is a requirement to export, or to undertake export development, for the recipient to benefit from a subsidy. In FTZ Act, no such provision has been provided.

[A].3. *Subsidy provided by Enroda is not specific subsidy and therefore, it is not prohibited by SCM Agreement.*

Any subsidy which is prohibited by SCMA has to be a specific subsidy. Art. 3.1(a) provides that subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I are prohibited export subsidy[16]. Nowhere in FTZ Act is it provided that exemption of raw material will be given only when the manufacturing unit fulfills certain export target. Art. 3.1(a) states that "the mere fact that a subsidy is granted to enterprises which export, shall not for that reason alone be considered to be an export subsidy within the meaning of this provision".[17]

Where the legislation pursuant to which the granting authority operates, establishes objective criteria governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other

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[14] *See Canada - Measures Affecting the Export of Civilian Aircraft*, *Supra Note* 1, Canada's appellant's submission, ¶ 108.
[15] *See Supra Note* 14.
[16] *See* SCM Agreement, *Supra Note* 2, art. 3.1(a).
[17] *See* SCM Agreement, *Supra Note 2*.

official document, so as to be capable of verification. [18],[19] The grant of exemption on import duties on imports of raw material and inputs utilized in the manufacturing process by a manufacturing unit in the Free Trade Zone is subject to the condition that the Unit shall execute a Bond-cum-Legal Undertaking, with regard to its obligations regarding proper utilization and account of goods and regarding achievement of positive net foreign exchange earnings[20]. Every Unit and Developer is required under the act to maintain proper accounts of goods procured from the domestic market of Enroda, and disposal of goods manufactured, by way of exports, sales or supplies in the domestic tariff area or transfer to Free Trade Zone.[21] Any determination of specificity under the provisions of this Art. shall be clearly substantiated on the basis of positive evidence[22]. There is nothing in the Act which establishes that the manufacturing units are granted subsidy on the subjective criteria and therefore, it fulfils the test of Art. 2.1 of SCMA, which means that the subsidy is not specific. Art. 8.1(b) provides that subsidies which are specific within the meaning of Art. 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below will be non actionable subsidy. Exemption of import charged by Enroda fulfils all these conditions and therefore, it is non actionable subsidy.

[A].4. ***Exemption granted to the FTZ units by the Enroda is not conditional on Export performance.***

There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent. *De jure* export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument. Proving *de facto* export contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is "contingent in fact upon export performance". Instead, the existence of this relationship of contingency, between the subsidy and export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case[23].

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[18] *See* SCM Agreement, *Supra Note* 2,art. 2.1(b).
[19] *See* SCM Agreement, *Supra Note* 2, art. 2.4.
[20] *See* Enroda Free Trade Zone Act, 2001, *Supra Note* 12, *§*. 16(a).
[21] *See* Enroda Free Trade Zone Act, 2001, *Supra Note* 12, *§*. 16(b)
[22] *See* SCM Agreement, *Supra Note* 2, Art 2.4.
[23] *See Canada (Measures Affecting the Export of Civilian Aircraft) (Unreported, March 12, 1999) (WTO)* , *Supra Note* 1, ¶ 9.112.

In order to be a ""prohibited subsidy" under the SCM Agreement, the financial assistance must be conditional, in law or in fact, on the exportation of goods. The view that a measure should not be classified as an export subsidy simply because it is a financial contribution to a firm with high export propensity was expressed by both the Panel and the Appellate Body in *Canada-Aircraft*.[24] The assistance provided to the manufacturing unit of FTZ are irrespective of any fulfillment of export target. Appellate Body in *US – Wool Shirts and Blouses case* held that it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[25] Azania has failed to prove before imposing anti-dumping measure that the assistance is in nature of prohibited export subsidy and thus, it has not discharged its burden of proof. Brazil maintain the discretion to limit the provision of the exemption of raw material from import charges to circumstances where a benefit was not conferred[26], Brazil was not required by the FTZ Act to provide a "subsidy" within the meaning of Art. 1.1[27]. Therefore, there was no prohibited export subsidy and no violation of Art. 3.1(a)[28]. The fact that the recipient industry has a high "export propensity" is not sufficient to establish export contingency.

[A].5. *The duty draw back scheme provided by Enroda is in consonance with Annex II of SCM Agreement.*

Annex II of the ASCM defines duty drawback as the scheme that "allow(s) for the remission or drawback of import charges on inputs that are consumed in the production of export product". WTO Members may establish duty drawback schemes provided that: 1. Customs duties have been paid on inputs used for the production of the finished product; 2. Amount of drawback does not exceed the amount of duties levied on inputs consumed in the exported good; 3 There is a verification system to check verification the inputs used in the production of the exported good as well as amounts of the inputs concerned. FTZ Act fulfills all three

[24]*Canada–Aircraft, Supra Note 1,* ¶ 9.339.
[25]Appellate Body Report, *US – Wool Shirts and Blouses*, *Supra Note* 7, at p. 14.
[26] *See* FTZ Act, 2000, *Supra Note* 12, §. 15.
[27] *See Brazil- Canada Aircraft case*, *Supra Note* 14.
[28]*See Brazil- Canada Aircraft case*, *Supra Note* 14.

conditions.[29] Drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product.[30]

[A].6. *FTZ Act does not provided excess remission to the producers as duty exempt raw materials imported into the FTZ was used for the manufacture of destined export.*

RFTA permits giving protection to domestic industry if it does not violate any other part of agreement[31]. While there exists no mechanism for absolute correlation of inputs with the end product, the Free Trade Zones Act[32] (FTZ Act) ensures that the importers respect the commitment for exports not only because they are required to do so, but as they are left by the Act with no other choice[33]. FTZ Act provides a procedure to determine inputs consumed in the production of the exported product and its amount. The procedure is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. In the event of a theft of duty exempted raw materials, the manufacturing unit shall pay to the Government a sum commiserate to the duty exemption availed by it[34]. Where manufacturing unit does not utilize the goods or on which exemptions, have been availed or the authorized operations or unable the entrepreneur, shall refund an amount equal to the benefits of exemptions.[35]

[B]. THE COUNTERVAILING DUTIES IMPOSED BY AZANIA IS NOT IN CONSONANCE WITH RFTA

[B].1. *Anti dumping duties imposed by Azania violate art. VI of GATT.*

No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by SCM Agreement[36]. The Panel on *Brazil — Desiccated Coconut* case considered the relevance of Art. 32.1 to the question of

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[29] *See* FTZ Act, *Supra Note* 12, §. 15 and 16.
[30] *See* SCM Agreement, *Supra Note 2.,* List- I, **Annex II: Guidelines on Consumption of Inputs in the Production Process**
[31] *See* RFTA on Trade in Goods, Annexure I, Facts on Record, Art. 3.4.
[32] *See* FTZ Act, *Supra Note* 12.
[33] *See* FTZ Act, *Supra Note* 12, §. 15and 16.
[34] *See* FTZ Act, *Supra Note* 12, §. 16(c).
[35] *See Supra Note 34.*
[36] *See* SCM Agreement, *Supra Note* 2, art. 32.1.

separability of Art. VI of the *GATT 1994* and the *SCM Agreement.*[37] The Panel emphasized that Art. 32.1 makes evident that the *SCM Agreement* is an "interpretation" of the subsidies provisions contained in the *GATT 1994*. The Panel concluded that, as a result, the meaning of Art. VI of *GATT 1994* cannot be established without reference to the provisions of the *SCM Agreement*, since Art. VI of *GATT 1994* "might have a different meaning if read in isolation than if read in conjunction with the *SCM Agreement*", and focused on the phrase "in accordance with the provisions of GATT 1994, as interpreted by this Agreement": "From reading Art. 10 of SCMA, it is clear that countervailing duties may only be imposed in accordance with Art. VI of the GATT 1994 and the *SCM Agreement*. The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Art. VI of the GATT 1994, taken together[38] …"

A contracting party may levy on any dumped product an anti dumping duty, but the Panel Report on *Swedish Anti-dumping Duties* case[39], noted that Art. VI[40] does not oblige an importing country to levy an Anti – Dumping duty whenever there is a case of dumping. Enroda has suffered injury due to the fact that the Azania Government was levying an Anti-Dumping duty on Enroda's steel product although it had not established that the exporter prices of the products were less than the normal value of those products as required in art. VI of the GATT. The Authorities have to ensure a fair comparison between the normal value and export price, to determine the Dumping margin. No such comparison was done before imposing a countervailing duty of sixty percent – eighty percent on three exporters of steel products from Enroda. Art. VI of the GATT therefore required that due allowance should be made in each case in conditions and terms of sale, differences in taxation and for other factors affecting price comparability. The requirement was to be satisfied in two stages, which were: the identification of the factors which affected the price comparability and the establishment of the amount of any differences in the factors in the sales being compared. Explaining fair comparison in *Egypt – Steel Rebar case* noted: art. 2.4 on its face, refers to the comparison of

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[37] Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, at p. 238.

[38] *See* Appellate Body Report on *Brazil — Desiccated Coconut*, *Supra Note* 37, at p. 16.

[39] BISD #S/8. 1955[????????????????].

[40] *General Agreement on Tariffs and Trade,* [hereinafter GATT] Jan. 1, 1995, 1867 U.N.T.S. 187; 33 I.L.M. 1153., 1994, Art. VI, ¶ 2.

export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a comparison shall be fair.[41]

Moreover, the Panel on *Brazil — Desiccated Coconut* concluded that "the concept of 'investigations' as expressed in Art. 32.3 include both procedural and substantive aspects of an investigation and the imposition of a countervailing measure pursuant thereto".[42] Thus the burden of proof lies on Azania to show that the countervailing duty is in accordance with art. VI of GATT and part V of SCMA[43] which Azania has not discharged.

[B].2. *The importation of steel by Enroda has not caused any injury to the industries of Azania.*

A Member may not impose a countervailing measure unless it determines that there are subsidized imports, injury to a domestic industry, and a causal link between the subsidized imports and the injury[44] In *New Zealand – Imports of Electrical Transformers case*[45] the Panel stated if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, under the relevant GATT provisions, in particular Art. XXIII, that its representations be given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the contracting parties. The Panel fully shared the view expressed that it was clear from the wording of Art. VI that no anti dumping duties should be levied until certain fact had been established. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that contracting party should establish the existence of these facts when its action is challenged.

Azania has not provided description of the volume and value of the domestic production of the like product, evidence with regard to the existence, amount and nature of the subsidy in question; evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies. Thus Azania has failed to comply with the mandatory condition imposed by art. 11 of SCMA.[46]

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[41] Panel Report on *Egypt-Definitive Anti-dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, http:// docsonline.wto.org, ¶¶ 7.333-7.334.[Last Visited on 5th December, 2009]

[42]Appellate Body Report, *Brazil – Desiccated Coconut*, *Supra Note* 37, ¶ 229

[43] Panel Report on "*New Zealand – Imports of Electrical Transformers from Finland*" case, L/5814, adopted on 18th July, 1985, 32S/55, 67-68, ¶¶ 4.4, 15.

[44] *See* SCM Agreement, *Supra Note* 2, Part V.

[45] Panel Report on *"New Zealand – Imports of Electrical Transformers from Finland"* case, *Supra Note* 43, ¶¶ 4.4, 15.

[46] *See* SCM Agreement, *Supra Note* 2, art. 11.3.

At the time the ministerial decision was taken the Erodean exporter had not attempted to make any further sales to the Azanian market. Therefore, it is not legal to impose anti – dumping duty. Interpretation in conjunction with Art. 3.1, a determination of the existence of a threat of material injury under Art. 3.6, required an analysis of relevant future developments with regard to the volume, and price effects of the dumped imports and their consequent impact on the domestic industry.[47] Enroda in the early twentieth century has emerged as the largest manufacturer of iron & steel[48] and the profit margin of Enroda were high as the raw material supplied by Azania were at cheap price. Therefore, if thee exist a threat to Azanian industries it was not because of Enroda. Enroda has enjoyed and is enjoying monopoly over the export of steel, so if Azania industry is suffering from any injury, it is because of internal factors and not because of the subsidy provided to Enrodean industry. In view of these facts, the Panel concluded that while the New Zealand transformer industry might have suffered injury from increased imports, the cause of this injury could not be attributed to the imports in question from Finland, which constituted an almost insignificant part in the overall sale of transformers in the period concerned.[49]No meaningful analysis of a number of Art. 3.4 factors, including profits, output, productivity, utilization of capacity, employment, wages, growth or ability to raise capita was done by Azania.

[B].3. ***No serious threat is caused to Azania under Art. 6.3 of SCMA***

Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the circumstances mentioned under Art. 6.7 exist during the relevant period[50]: Art. 6.7(e) provides voluntary decrease in the availability for export of the product concerned from the complaining Member. (Including, *inter alia*, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets). When Azania has imposed a countervailing duty of 60-80% on the goods of Enroda than Enroda has stopped any exportation of goods to Azania and has entered into negotiation with Azania.[51] Till now Enroda is not exporting its goods to Azania as the effect of countervailing duty has increased the market price of Enrodian Steel product in Azanian market and Enroda is not getting any customers for its product.

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[47] Dr. Neeraj Varshney, Anti-dumping Measures Unjder the WTO Regime, (Universal Law Publishers, Ed., 2007) at p. 59.

[48] *See* ¶ 2, Facts on Record.

[49] *See* Panel Report on *"New Zealand – Imports of Electrical Transformers from Finland"* case,, *Supra Note 43*, ¶¶ 4.7, 4.9.

[50] *See* SCM Agreement, *Supra Note* 2, art. 6.7.

[51] *See* ¶ 23, Fact on Record.

[B].4. *Azania steel industries has not retarded materially*

At Havana, it was stated that if an industry became economically unprofitable because of dumping, this would be covered by 'retard materially' criteria. Art. 3(a) of the 1967 Agreement on the Implementation of Art. VI provided, inter alia, that in the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example that the plans for an new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered.[52] In Azania many new industries are going to be set up in near future. The per capita income which had been abysmally low increased three times over a short period of ten years[53]. Therefore, the allegation that the industries have suffered injury is completely false. Azanian industries are merely suffering loss of profits which in no case, is equal to material injury of the industries.

[B].5. *Azania cannot impose anti dumping on the basis of all three kinds of injury suffered by its industries.*

Before, deciding to impose an anti dumping duty, Azania should ensure that dumped goods are either causing material injury to an established industry; or Clearly threatened material injury to an established industry or Materially retard the establishment of a domestic industry.[54] The *1993 Panel Report in Korea-Anti-dumping Duties on Imports of Polydactyl Resins from United States case*[55] examined an injury determination by the Korean authorities. The Panel ruled that if KTC had made a finding of injury based simultaneously on all three standards of injury, this would necessarily mean that the KTC's statement was internally contradictory. The KTC could not logically have found that a domestic industry was being injured by dumped imports, and at the same time that the establishment of a domestic industry was materially retarded by those imports.

[B].6. *Anti dumping and Countervailing duty imposed by Azania is not in consonance with RFTA.*

The Appellate Body in *US – CVD Sunset* has confirmed this, stating that "the continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would 'be likely to lead to

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[52] Analytical Index of the Gatt: L/978, adopted on 13th May, 1959, ¶¶ 15, 17.
[53] *See* ¶ 11 of the Facts on Record.
[54] Analytical Index of the Gatt, *Supra Note* 52.
[55] *See* ADP/92, adopted by the Committee on Anti Dumping Practices on 27th April, 1993, ¶ 222.

continuation or recurrence of subsidization and injury.[56] It has also stated "mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient.[57]

The Azania Commission has relied solely on historical dumping margins and import volumes. It has failed to collect any information, which would facilitate a prospective analysis. It has never taken any affirmative action to collect other information. Under Art. 11.3, therefore, the Authorities' likelihood of dumping determination must be based on probable future dumping.

The Commission, however, has never quantified probable dumping margins.

Art. 2 sets forth the requirements for calculating dumping margins and defines how dumping should be determined. Art. 2.1 provides that a product is considered dumped if the export price is lower than its normal value. The difference is the margin of dumping. The existence of dumping could not be determined unless the authorities quantify a dumping margin. The authorities, therefore, could not find dumping without quantifying the margins of dumping. The panel in *EC – Bed Linens* confirmed this, stating "{i}t appears to us that the calculation of a dumping margin pursuant to Art. 2 constitutes a determination of dumping."[58]

The provisions of Art. 2 apply to all "dumping" determinations under the AD Agreement. Art. 2.1 of the AD Agreement defines dumping "for the purpose of this Agreement." The panel in *EC – Bed Linens* also explained that the provisions of Art. 2 "govern the determination of dumping by establishing rules for calculation of dumping."[59] The prospective analysis requirement of Art. 11.3 requires the authorities to take an active role in collecting positive evidence. Such evidence includes the economic conditions of the market as well as the economic conditions of the individual respondents.

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[56] *See United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* WT/DS138/AB/R, at ¶ 54 (7 June 2000), p.88.

[57] *See United States – CVD on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Supra Note* 56, at ¶ 88.

[58] *European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Art. 21.5 of the DSU by India*, WT/DS141/RW at ¶ 6.128 (29 November 2002).

[59] *European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Art. 21.5 of the DSU by India*, *Supra Note* 65, at ¶ 6.128.

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

[A]. BORDER TAX IS JUSTIFIED BY THE GENERAL EXCEPTIONS TO RFTA ON TRADE IN GOODS.

Enroda submits that its trade restrictions are in accordance with the General Exceptions provided in Art. 20 of the RFTA on Trade in Goods, which are congruent to those in Art. XX of the GATT 1994.[60] Decisions by GATT and WTO panels or appellate bodies are to be treated as "subsidiary sources of law with respect to the interpretation" of the terms of the RFTA.[61] Enroda submits that it turned to economic tools in the form of trade measures *only* when efforts of diplomacy had failed.[62] Prior to the restrictive trade measure being taken, Enroda requested that Azania enter into "urgent consultations".[63] Enroda submits even after being a developed nation, it is restricted in the avenues it can pursue because it has limited natural resources.[64]

[A].1. *It is justified by Art 20 (b) of the RFTA on Trade in Goods.*

Enroda submits that its trade restriction in form of CTRA is justified under Art. 20(b) of the RFTA. Two requirements must be met for the measure to be justified under Art. 20(b): the measure must protect human, animal or plant life or health; and must be necessary for this purpose.[65] It is the measure and not the policy that has to meet the requirement of Art. 20(b).[66] The measure is the method that the restricting state is employing to affect its policy.

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[60] *See* GATT, *Supra Note* 40, Art XX.
[61] RFTA on Settlement of Disputes arising out of RFTA, Annexure I, Facts on record, Art. 27. 2.
[62] *See* ¶ 23, Fact on Record.
[63] *See Supra Note* 55.
[64] *See* ¶ 2 of Fact on Record
[65] ***See* PATRICIA BIRNIE AND ALLAN BOYLE**, INTERNATIONAL LAW AND THE ENVIRONMENT (3RD. ED. 2002)-, at 702; Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, ¶164-175, WT/DS135/AB/R (Mar. 12, 2001), Aadopted Apr. 5 2001 [hereinafter EC-Asbestos]; Appellate Body Report, *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* ¶165, WT/DS161,162-169/AB/R (Dec. 11, 2000), Adopted Jan. 10, 2001 [hereinafter Korea-Beef]; Panel Report, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶75, BISD 375/200 (Feb. 20, 1990) Adopted Nov. 7, 1990; Panel Report, *United States- Section 337 of the Tariff Act of 1930*, ¶159, L/6439-36S/345 (Jan. 16, 1989) Adopted Nov. 7, 1989; Tatjana Eres, "*The Limits of GATT Art. XX: A Back Door for Human Rights?,"* 35 GEO. J. INT'L L. 597, 627 (2003-2004).
[66] Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*" , *Supra Note* 7.

It is for Enroda to determine the level of protection of health that is appropriate[67] and Enroda is under no obligation to quantify the risk to human life or health.[68]

Enroda submits that CTRA shall protect the environment of Enroda by sending an unequivocal message to Azania and other Annex A countries of CTRA that Enroda is suffering as a result of their ineffective environmental regulation. The main issue is whether the damage to Enroda's environment can be attributed to Azania. Enroda submits that at all material times Azania knew - (a) Greenhouse gas emissions significantly cause global warming; (b) Azania is the 3rd largest contributor to global warming in volume and per capita[69]; and (c) Azania had increased its greenhouse emissions by not regulating industries.

The relevant omission is allowing greenhouse gases to go unabated when Azania had a legal obligation to regulate such emissions. In the *Trail Smelter Arbitration*, it was found that no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another.[70] Further, this action satisfies the present exception clause as risks to humans from poor air quality[71], asbestos[72], and cigarettes[73] qualifies as the measures to protect life. Like turtles[74]and salmon,[75] even clean air[76] is "susceptible of depletion, exhaustion and extinction, because of human activities"[77]and is just as "finite"[78] as non-living resources.

The Appellate Body has held that a measure is "necessary" if no GATT-consistent alternative is reasonably available.[79] The Appellate Body has indicated that "[t]he more vital or important [the] common interests or values pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends."[80] Enroda submits that a measure does not have to be efficacious to be necessary and requires just a "sufficient nexus" between the

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[67] Panel Report, *United States – Restrictions on Imports of Tuna,* ¶ 5.32, DS 21/R (Sept. 3, 1991) [hereinafter U.S. - Tuna (Mexico)].

[68] Appellate Body Report, *Australia – Measures affecting importation of Salmon*, ¶ 200, WT/DS18/AB/R (June 12,1998) (adopted Oct. 20, 1998).

[69] *See* ¶ 13 of Fact on Record.

[70] *See Trail Smelter Arbitration (U.S. v. Can)* 3 R.I.A.A. 1911 (1941). Also supported in *Corfu Channel case* (U.K. v. Alb.), 1949 I.C.J. 248 (Dec. 15).

[71] *See* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at ¶¶ 20-21.

[72] *See* EC-Asbestos,*Supra Note 65*, at ¶¶164-175.

[73] *See Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, *Supra Note 65*, ¶75.

[74] *See* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* ¶ 134, WT/SD58/AB/R (Oct. 12, 1998) [hereinafter Appellate Body Reports, US – Shrimp].

[75] *See* Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, (Supra Note 61),* ¶ 4.4.

[76] *See* Appellate Body Report, *US – Shrimp*, *Supra Note 74*, at ¶ 128.

[77] *See US – Shrimp*, *Supra Note 74.*

[78] *See US – Shrimp*, *Supra Note 74.*

[79] *See EC-Asbestos*, *Supra Note 65*, at ¶164-175; *See Korea-Beef, Supra Note 65*, at ¶162-166.

[80] *See Korea-Beef*, *Supra Note 65*, at ¶172.

law and the environment of the enacting state and trans-boundary impacts on air and water and impacts on non-renewable sources of energy such as coal, oil and other fossil fuels provides sufficient nexus.[81] The panel in *Korea- Various Measures on Beef* allowed for methods that may not be indispensable *per se* but will still be necessary, if, upon weighing the series of factors that have brought about the restriction, the effect of the restriction can be justified.[82] The Appellate Body's subsequent decision in *EC Asbestos* added that an alternative measure may still be reasonably available even if there are administrative difficulties in implementation.[83]

In the instant case, the objective pursued by the measure is the preservation of human and animal life and health and the environment. The value pursued is vital and important. Enroda draws the Court's attention to the aforementioned pertinent facts in establishing that there was no alternative measure reasonably available to Enroda in the circumstances. Azania's failure to cooperate with Enroda in finding a suitable solution leaves Enroda with no choice but to protect the environment through the trade restriction. Alternatively, even if other measures exist for Enroda to take, the effect of Azania's actions combined with the consequences of inaction have the requisite seriousness to justify the necessity of the trade restriction. Therefore, Enroda has acted in accordance with its international obligations and the adverse impact of continued use of carbon based fuels in industrial activities of Azania on such a large scale on the environment of Enroda, sufficiently qualifies for this exception.

[A].2. ***It is justified by Art 20 (g) of the RFTA on Trade in Goods***

Enroda submits that its trade restrictions are justified under Art. 20(g) of the RFTA, as the measure relate to the conservation of exhaustible natural resources. Enroda submits that the term exhaustible natural resources must be interpreted in the context of contemporary considerations[84] and has been construed broadly to encompass both living and non-living resources,[85] susceptible to depletion.[86] Therefore, harmless air quality and environment and carbon based fuel are exhaustible natural resources, being conserved by Enroda's CTRA.

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[81] *See U.S.-Shrimp-Turtle* case, *Supra Note 74.*
[82] *See Korea- Various Measures on Beef, Supra Note 65,at* ¶ 163.
[83] *See EC - Asbestos*, *Supra Note 65*, at ¶ 169.
[84] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia Advisory Opinion*, 1971 I.C.J. 31 (June 21); *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1978 I.C.J. 3 (Dec. 19).
[85] *See* United Nations Convention on Law Of Seas, 10 December, 1982, 21 ILM 126 [hereinafter as UNCLOS], Arts. 56, 61 and 62; Agenda 21, June 14, 1992, A/CONF.151/26/Rev.1 (Vol I), Annex II, at 17.70; Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, at 15, June 23, 1979, 19 I.L.M.11; *US- Shrimp, Supra Note 74*, at ¶128-131.
[86] *See US- Shrimp*, *Supra Note 74*, at ¶133. .

Under RFTA Art. 20(g), an import regulation must include efforts by the regulating country to further the import ban's objectives in the name of conservation;[87] it must show "a close relationship between means and ends." As long as domestic production or consumption is also subject to equivalent restrictions, the trade measure qualifies as a valid exception.[88]

Enroda has coupled the import regulation with its policy of reducing domestic production by pledging to reduce greenhouse gas emissions as a Party to the UNFCCC[89] and the Kyoto Protocol and imposing carbon tax at the same level on its domestic products.[90] Enroda has subjected its domestic production to the same treaties and obligations as Azania. Limiting greenhouse gas emissions implies reduction of domestic production and use of exhaustible natural resources.[91] The production and transportation of Azania and other Annex A countries goods increases GHG emissions by increasing demands for energy, materials, and transportation, which are the primary source of GHGs. Secondly, the law imposes tax equal to the level of tax charged on the domestic industry of the like goods on the imports[92] only at the nominal rate of 10% and this would ultimately result in limiting their production and transportation, thereby limiting their contribution to global warming. This policy is thus linked to Art. 20(g).

[A].3. ***It is justified by the <u>chapeau</u> of Art 20 of the RFTA on Trade in Goods.***

An exception satisfies the *chapeau* when it neither unjustifiably discriminates nor presents a disguised restriction on international trade.[93] This requires: (1) a serious effort to negotiate; (2) flexible measures; and (3) transparency in enacting the measures.[94] It's evident from the record of the compromise that the Trade Minister of Enroda had undertaken consultation with Azania just before imposing the present CTRA.[95]

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[87] *See* Appellate Body Reports, *US – Shrimp*, *Supra Note 74*, at ¶ 143; Appellate Body Reports, *US – Gasoline*, *Supra Note 71*, at ¶ 21.

[88] *See* Appellate Body Reports, *US – Gasoline*, *Supra Note 71*, at ¶¶ 20-21.

[89] *See* Preamble to the *compromise,* submitted to the ICJ, Facts on Record.

[90] *See Supra Note* 89.

[91] *See* GARY C. BRYNER, "*New tools for improving government regulation: an assessment of emissions trading and other market-based regulatory tools"* 11-13 (1999); WORKING GROUP II, at 12; E. Smeloff, *Global Warming: The Kyoto Protocol and Beyond*, 1998 ENVTLPOL'Y & L. 63, (1998) at 66; *See*, e.g., Partha Dasgupta, The Environment as a Commodity, 6 OXFORD REV. ECON. POL'Y 51, (1990) at 52.

[92] *See* ¶ 24, Facts on Record.

[93] *See*, Art. 20 GATT, *Supra Note* 40.

[94] US- *Shrimp Turtle*, *Supra Note 74*, at ¶ 177.

[95] *See* ¶¶ 23-24, Facts on Record.

[A].3.1. *It is not a disguised restriction on International Trade*

A number of factors show that the Enrodean measure was a *bona fide* conservation measure, not a disguised trade restriction. These factors include the facts that: (1) the international community, as reflected in CITES, agrees that pollution is a serious threat to environment; (2) carbon tax on imported products have been adopted by dozens of countries worldwide as an important pollution control measure; (3) Enroda has made extensive efforts to reduce emission of GHG; and (4) the border tax has been narrowly crafted to affect only products of such national origin who have the capacity to fulfill such obligations both administratively and financially. It has been held that if a measure in principle is "even-handed", as between domestic and foreign manufacturers, it's not a restriction on international trade.[96]

Art. 4.1 of RFTA on Trade in Goods prohibits internal taxes and other charges, laws, regulations and requirements applied to imported or domestic products so as to afford protection to domestic production. Art. 4.2 of RFTA on Trade in Goods prohibits imposition of any tax or charge on imported products in excess of those applied to like domestic products. Further, internal quantitative regulations have also been invalidated by art. 4.5. It can be seen from the present facts that Enroda has not imposed border tax on imported products at a rate higher than that imposed on like domestic products.[97] Thus, when the imported and domestic goods are being subjected to same rate of taxes, it cannot be said that Enroda is affording protection to its domestic manufacturers.

Further, Azania had not recognized it's responsibility towards the environment. It joined the UNFCCC also not voluntarily but because of international pressure.[98] Further, Azania being the 3rd largest emitter of GHG[99] should have joined as a Annex I member of UNFCCC, taking up the heaviest burden to reduce it's GHG emission but it did not do so.[100] Minister of Environment of Azania had said in his declaration that they will cooperate with other states on measures of climate change that are sustainable and equitable,[101] but Azania's non action towards reducing it's GHG even after 8 years of being called up to take up proactive steps to reduce its GHG forced Enroda to take up this regulative measure against Azania.

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[96] *See US- Shrimp-Turtle*, *Supra Note 74*, at ¶¶ 3.277-3.281, pp. 144-145.
[97] *See* §17 of Enroda Carbon Tax Regulation Act, 2008[hereinafter referred as CTRA] *See* ¶ 24, Facts on Record.
[98] *See* ¶ 14, Facts on Record.
[99] *See* ¶ 12, Facts on Record.
[100] *See Supra Note* 99.
[101] *See* ¶ 15, Facts on Record.

[A].3.2. *It is not a counter measure against the imposition of CVD*

The Border Tax is not a counter measure against the imposition of CVD on the goods exported from Enroda to Azania. Industrialization started in 1976, bringing prosperity in Azania but at a price to the environment,[102] as significant rise in pollution level was *See*n; main sources being Thermal energy and vehicular emissions.[103] The World Environment Conservation Agency in 2000 noted Azania as 3rd largest emitter of GHG in the world and called it to take proactive steps to address climate change[104]. But in response, the Government of Azania only brought a CCE Order, 9288 of 2003[105] in which no limit or regulation was imposed on the regulated and restricted use of vehicles but only a direction given to shift towards CNG, which though an effective mechanism but still leaves a lot of loopholes in it. Environmentalists while welcoming the Order as the first step in Azanian efforts were critical of the fact that industrial pollution was kept out of purview.[106]

After 12 years since imposition of Carbon Tax and 8 years since the call of World Environment Conservation Agency, seeing that no proactive steps were taken on part of Azania to regulate its GHG emissions; Border Tax can by no means be declared to be a counter measure undertaken by Enroda. Further, production cost of Enroda had increased only *marginally* after imposition of carbon tax;[107] hence Enroda does not need to take up this counter measure. Until and unless the act of Azania is not checked, GHG will not be curtailed and so, it is required that border tax must be imposed.

[A].3.3. *Arguendo, counter measure is a justified principle of international law.*

Enroda submits that it is a well-established principle of customary international law that an injured State may take countermeasures against a State which has violated international law in order to induce that State to comply with its international obligations. Enroda draws the Court's attention to extensive State practice and *opinio juris,* including case law,[108] domestic

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[102] *See* ¶ 10, Facts on Record.
[103] *See* ¶ 12, Facts on Record.
[104] *See Supra Note* 103.
[105] *See* Annexure III of Facts on Record, Order 13 of CCE Order, 9288 of 2003.
[106] *See* ¶ 14, Facts on Record.
[107] *See* ¶ 17, Facts on Record.
[108] *See North Atlantic Coast Fisheries Arbitration (Gr.Brit. v. U.S.)*, 1910 H.C.R. 141, at 167 (June 1); *National Navigation Company of Egypt v. Tavoularidis, Mixed Court of Alexandria,* Annual Digest of Public International Law Cases, Case No. 110, vol. 4, at 173 (1927); SS *'Lotus' (Fr. v Turk.)*, 1927 P.C.I.J. (ser. A) No. 9 at 18 (Sept. 7); *Naulilaa (Port. v. F.R.G.)*, 1928 U.N.R.I.A.A. vol. II 1013, at 1025-6 (July 31); *The Cysne (Port. v. F.R.G.)*, 1930U.N.R.I.A.A. vol. II 1035, at 1057 (June 30); *The Railway Traffic Between Lithuania and Poland (Pol. v. Lith.)* 1931 P.C.I.J. (ser. A/B) No. 108, at 114 (Oct. 15); *Gabčikovo-Nagymaros Project (Hung. v. Slovk.)*, 1997 I.C.J. 7, at 55 (Sept. 25).

law,[109] and commentary[110]dating back to the 17th century, as well as the International Law Commission's (ILC) work on countermeasures.[111] The United Nation Charter's prohibition on the use of force[112] does not include economic coercion, which is considered a legitimate countermeasure as a method of self-protection.[113] Every State has the right to conduct their own economic affairs and the sovereign right to have international rules complied with.[114]

Enroda submits that pursuant to customary international law, three requirements must be met for countermeasures to be lawful: there must be a prior demand for redress by the injured State;[115] the countermeasures must not affect the obligation to refrain from the threat or use of force and humanitarian and human rights obligations;[116] and they must be considered proportionate to the internationally wrongful acts.[117] For countermeasures to be proportionate, the gravity of the internationally wrongful acts and the importance of the rights in question must be considered.[118]

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[109] Aussenwirtschaftsgesetz [External trade law], Apr. 28, 1961, BGBl. I at 481, § 6 (F.R.G.); Law No. 66-1008 of Dec. 28, 1966, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 16, 2000, p. 1151, art. 1 (Fr.); Protection of Trading Interests Act (1980) (U.K.); European Community: 1983 O.J. (L 230) 6; Foreign Assistance Act 22 U.S.C. §§ 1611, 1611b(b) 2370(e)(1), 2304 (1970 & Supp. III 1979).

[110] Hugo Grotius, "*DE JURE BELLI AC PACIS LIBRI TRES"* 626-627 (1646); Emmerich De Vattel, "*THE LAW OF NATIONS*" 284 (1797); Harrold Wildman, "*INSTITUTES OF INTERNATIONAL LAW*" 186-198 (vol. ii, 1849); Henry Wheaton, "*ELEMENTS OF INTERNATIONAL LAW*" 368 (8th ed. 1866); James R. Woolsley, "*INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW*", 196-189 (5th ed. 1879); William E. Hall, "*A TREATISE ON INTERNATIONAL LAW*", 338 (2nd ed. 1884); Lassa Oppenheim, "*INTERNATIONAL LAW, A TREATISE"*, 34 (vol. ii, 1906); Simon Maccoby, "*Reprisals as a Measure of Redress short of War*", 2 CAMBRIDGE L. J. 60, 67-68 (1924); Karl Strupp, "*ÉLÉMENTS DU DROIT INTERNATIONAL PUBLIC*" 345 (1930); Ellery C. Stowell, "*INTERNATIONAL LAW: A RESTATEMENT OF PRINCIPLES IN CONFORMITY WITH ACTUAL PRACTICE*" 447, 480-482 (1931); Julis Hatsheck, "*AN OUTLINE OF INTERNATIONAL LAW*" 290-292 (1930); Charles Rousseau, "*PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC*" 371 (1944); Omer Y. Elagab, "*THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW*" 4 (1988); Elisabeth Zoller, "*PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES*" 4 (1984); BIRNIE & BOYLE, *Supra Note* 44, at 713; **MALCOLM N. SHAW**, , INTERNATIONAL LAW, (5TH ED. 2005), Cambridge Publications at 708-710, 853.

[111] Commentaries to the Draft Art.s on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 81, U.N. Doc. A/56/10 (2001), Arts. 49-54.

[112] *See* U.N. Charter Art. 2, ¶ 4.

[113] *See* United Nations Conference on International Organization, Apr. 25- June 26, 1945, Report to the Committee I, U.N. Doc. 944/I/I/34(I) (13 June 1945) ¶ 3 at 458.

[114]*See* G.A. Res. 1803(XVII), at 15-16, U.N. Doc. A/5217 (Dec. 14, 1962); G.A. Res. 2200(XXI), Annex, at 49, U.N.Doc. A/6316 (Dec. 16, 1966); G.A. Res. 3201 (S-VII), at 4, U.N. Doc. A/9559 (May 1, 1974); G.A. Res. 3281(XXIX), at 50-55, U.N. Doc. A/9631 (Dec. 12, 1974).

[115] *See* Air Services Agreement of 27 March 1946 *(U.S. v. Fr.)*, 1978 U.N.R.I.A.A. vol. XVIII 417 (Mar. 27) , at 444; *Gabčikovo-Nagymaros Project (Hun. v. Slovk.)*,*Supra Note 108* at 56; State Responsibility Art.s, *Supra Note 111*, art. 52.

[116] *See* State Responsibility Art.s, *Supra Note 111*, art. 50(1).

[117] *See Naulilaa (Port. v. F.R.G.)*, *Supra Note 108*; Air Services Agreement of 27 March 1946 (U.S. v. Fr.), *Supra Note* 108; *Gabčikovo-Nagymaros Project (Hun. v.Slovk.)*, *Supra Note 108*; State Responsibility Art.s, *Supra Note 111*, art. 51.

[118] *See Gabčikovo-Nagymaros Project (Hun. v. Slovk)., See Supra Note 108*; James Crawford, The International Law Commission's Art.s On State Responsinbility: Introduction, Text And Commentaries 344 (2001).

Azania has committed several serious breaches of international law, affecting the environment of Enroda. As Azania was noted as 3rd largest emitter of GHG in the world and called upon to take up proactive steps to address climate change,[119] it shows that there was a prior demand for redress in this case. Further, the countermeasures do not violate the restrictions on the use of force or any humanitarian or human rights obligations. Finally, Enroda submits that its countermeasures are proportionate due to the gravity of Azania's breaches of international law. Accordingly, it is submitted that Enroda's countermeasures are consistent with international law.

[B]. AZANIA HAS VIOLATED IT'S INTERNATIONAL OBLIGATIONS AND CTRA IS JUSTIFIED AS PER CUSTOMARY PRINCIPLES OF INTERNATIONAL LAW**.**

[B].1. ***Azania has Violated UNFCCC and hence the CTRA is justified.***

Azania has committed to the "stabilization of [GHG] concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[120] As a Party to the UNFCCC, Azania is required to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of [GHG]".[121] Azania has failed to take any pertinent action that can satisfy its obligation to take corresponding measures to mitigate climate change. In fact, Azania "relies on industry" for its economic development and takes no action at all.[122] Azania has therefore violated its obligations under the UNFCCC by failing to take measures to mitigate climate change. UNFCCC provides for precautionary measure which means that lack of full scientific certainty should not be used as an excuse to postpone action when there is threat of serious or irreversible damage.[123] The CTRA enacted by Enroda will decrease the profits of users of carbon-based fuels and increase them for users of alternatives.

[119] *See Gabčikovo-Nagymaros Project (Hun. v. Slovk),.Supra Note* 108,at ¶ 13.
[120] *See* United Nations Framework Convention on Climate Change, May 29, 1992, 1771 U.N.T.S. 165[hereinafter referred as UNFCCC], Art. 2.
[121] *See* UNFCCC, *Supra Note 120*, Art. 4(2)(a).
[122] *See* ¶ 14, Facts on Record.
[123] *See* UNFCCC, *Supra Note 120*, art 3.3.

[B].2. ***Azania has Violated Kyoto Protocol and hence CTRA is justified.***

Azania has ratified the Kyoto Protocol and has an obligation not to "act to defeat the object and purpose of the treaty."[124] An "action that defeats the purpose" has been defined as when "the treaty was rendered meaningless by such acts and lost its object."[125] Azania is the 3rd greatest net emitter of GHG in the world, contributing to worldwide anthropogenic emissions.[126] By failing to take effective steps to regulate GHG, and allowing its emissions to increase, Azania has rendered Kyoto meaningless because it is impossible to stabilize GHG concentrations without reductions from the world's largest GHG emitter.

The carbon tax imposed by Enroda will decrease the profits of users of carbon-based fuels and increase them for users of alternatives. This will subsequently enhance use of non-polluting fuels in the industrial activity and lower the level of pollution in due course of time.

[B].3. It is against the precautionary principle and it is a binding obligation.

The precautionary principle, as recognized in the CBD[127] and Rio Declaration,[128] mandates taking measures to prevent serious or irreversible damage irrespective of scientific uncertainty regarding the same.[129]This principle also reflects customary international law.[130] The principle has been implemented in state practice[131] as well as in case law[132] and international instruments[133] satisfying both requirements of qualification for customary international law. Therefore, the precautionary principle is a rule of customary international law. The principle recognizes that the states must protect its environment and shifts the burden of proof in potentially environmentally risk activities to the state that engages in that

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[124] *See* Vienna Convention on the Law of Treaties [hereinafter as VCLT], opened for signature May 23, 1969, 1155 U.N.T.S. 331, art. 18.

[125] *See* Masahiko Asada, "CTBT: Legal Questions Arising from its Non-Entry-into-Force," 7 J. CONFLICT & SECURITY L. 85, FN 30 (quoting Professor Waldock UN Conference on the Law of Treaties, First Session, Vienna 1968, Official Records (UN, 1969) 104,¶ 26).

[126] *See* ¶ 13, Facts on Record.

[127] *See* Convention on Biological Diversity,[hereinafter as CBD] 5 June 1992, 31 ILM 8182, Prmbl [CBD].

[128] *See* Rio Declaration on Environment and Development**,** 31 ILM 874, UNCED Doc A/Conf.151/5/Rev.1 (1992), Principle 15.

[129] *See* Daniel Bodansky, "Scientific Uncertainty and the Precautionary Principle", 33 ENVT. 4 (1991).

[130] *See* World Charter for Nature, G.A.Res.37/7, U.N.GAOR, 48th plen. mtg., U.N.Doc.A/RES/37/7 (1982) at 17; Southern Bluefin Tuna *(Austl. & N.Z. v. Japan)*, Jurisdiction and Admissibility Award, (UN Law of the Sea Arb. Trib., Aug.4, 2000) [Bluefin Tuna]; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, [1996] I.C.J. Rep. 226 at 502-03; *See* also Francois Ewald, The Return of the Crafty Genius: An Outline of a Philosophy of Precaution, 6 CONN.INS.J.L. 47, 60-61 (1999).

[131] *See* Gabcikovo *Supra Note 108.*

[132] *See* Bluefin Tuna *Supra Note 130.*

[133] *See* preamble to UNCLOS, *Supra Note* 85.

activity[134]. The burden of proof is on the actor to show that his action is environmentally benign.[135] Therefore, it is Azania's burden to prove that its industrial activities do not negatively impact the environment. Hence, Azania violated the precautionary principle by not taking a proper measure to control its GHG emission, which has been very widely, accepted as a part of precautionary approach.

[B].4. *Azania has not exercised due diligence.*

Due diligence is the standard basis for environmental protection and requires that as a *bare minimum*, States must introduce legislation and control mechanisms to regulate activities that affect other States and the global environment.[136] The requirement of due diligence was expounded in the widely supported ILC's Draft Art.s on prevention of Transboundary Harm from Hazardous Activities[137] and stipulates that States have an obligation to take appropriate measures to prevent and minimize the risk of transboundary harm,[138] to cooperate in good faith, [139]to establish suitable monitoring mechanisms and implement the necessary legislative or administrative controls,[140] undertake an assessment of risk[141] and notify the affected State of the risk.[142] Despite the fact that Azania is the 3rd greatest net emitter of GHG's in the world, it has done nothing to minimize the risk and has failed to undertake any of the pertinent activities inherent in acting with due diligence. Accordingly, it has breached its obligation to act with due diligence.

[B].5. *Applicant has violated the duty to cooperate.*

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[134] *See* Daniel Bodansky, "THE PRECAUTIONARY PRINCIPLE IN U.S. ENVIRONMENTAL LAW, IN THE PRECAUTIONARY PRINCIPLE", (RIORDAN & CAMERDEON EDS., 1994) at 203-228

[135] *See* Philippe Sands, "*The Greening of International Law: Emerging Principles and Rules*", 1 IND.J.GLOBAL LEG.STUD. 293 (1994).

[136] *See* BIRNIE & BOYLE, *See Supra Note* 65; ILC Prevention Art.s and Commentary, *Supra Note 111*, at 392; UNCLOS, *Supra Note* 85, art. 194(1); Convention on Long-Range Transboundary Pollution, art.2, Nov. 16, 1979, 18 I.L.M. 1442; Vienna Convention for the Protection of the Ozone Layer, art. 2, Mar. 22, 1985, 26 I.L.M. 1529 [hereinafter Vienna Convention for the Protection of the Ozone Layer]; Convention on Environmental Impact Assessment in a Transboundary Context, art. 2(1), Feb. 25, 1991, 30 I.L.M. 800; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 2(1), Mar. 17, 1992, 31 I.L.M. 1312 [hereinafter Convention on Protection of Watercourses]; G.A. Res. 37/7, U.N. Doc. A/RES/37/7 (Oct. 28, 1982).

[137] ILC Prevention Art.s and Commentary, *Supra Note 111*, at 381.

[138] *Supra Note 111*, Art 3.

[139] ILC Prevention Art.s and Commentary, *Supra Note 111*, art. 4 and at 396; United Nations Conference on the Human Environment, Stockholm Declaration, June 16, 1972, U.N. Doc. A/CONF.48/14 & Corr. 1., Principle 24; Rio Declaration, *Supra Note 128*, Principle 7; VCLT, *Supra Note 124*; Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 17 I.L.M. 1488.

[140] ILC Prevention Art.s and Commentary, *Supra Note 111*, art. 5.

[141] *See Supra Note 111*, Art 7.

[142] *See Supra Note 111*, Art 8.

The obligation to cooperate in matters concerning the protection of the environment is affirmed in virtually all international environmental agreements of bilateral and regional application,[143] and global instruments.[144] The applicant state is party to various international conventions[145] hence by application of the principle of *pacta sunt servanda*[146] it must comply with the obligations entailed under these conventions which mandates duty to cooperate with other states and organizations to conserve and protect the environment. Further the duty has been firmly entrenched as a customary international law. Hence in the present set of facts, applicants action of non-imposition of environmental standards with regard to its industrial activity and non-compliance with border tax requirement clearly violates duty to cooperate mandated under international law.

[C]. BORDER TAX IS NOT A VIOLATION OF MARKET ACCESS COMMITMENTS.

[C].1. *It does not violate RFTA on Trade in Goods.*

[C].1.1. *It does not violate Art 3 of RFTA*

Art. 3 mandates equal treatment for "like products". The argument has been convincingly made that there is no practical difference between PPM-based and product-based trade measures.[147] Appellate Body rulings have removed the barriers to using PPM-based trade measures, as long as it is done in a manner that conforms to other WTO law.[148] The Appellate Body made clear in the Shrimp –Turtle case that under WTO rules, countries have the right to take trade action to protect the environment. The WTO does not have to "allow" them this right.[149] The GATT's first major report on trade and the environment propounded the same view.[150] That report states that a shared resource, such as a lake or the atmosphere, which is being polluted by foreign producers, may give rise to restrictions on trade in the product of

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[143] Convention Related to the Reservation of Fauna and Flora in their Natural State (London), 8 November 1933, 173 LNTS 241, Art. 12(2); Convention on Natural Protection and Wildlife Preservation in Western Hemisphere, 12 October 1940, 56 Stat. 1354, TS 981, Art. VI; Convention on the Protection of the Alps, 7 November 1991, 31 ILM 767, Art. 2(1); Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, 16 June 1994, 34 ILM 67.

[144] VCLT *Supra Note 124*, Art, 2(2); CBD, *Supra Note 127*, Art. 5; Stockholm Declaration *Supra Note 139* Princ. 24.

[145] *See* Preamble to the *Compromis and ¶14.17.*

[146] VCLT *Supra Note 124*, Art. 26.

[147] US-*Shrimp- Turtle* case, *Supra Note 74.*

[148] *See* US *Shrimp-Turtle, Supra Note 74* and EC-Asbestos, *Supra Note 65.*

[149] Shrimp-Turtle case, *Supra Note 74.*

[150] Jan Tumlir , GATT, "*Industrial Pollution Control and International Trade,*" GATT Studies in International Trade 1, July 1971.

that process justifiable on grounds of the public interest in the importing country of control over a process carried out in an adjacent or nearby country.

National trade measures have been used to influence other countries as in 1906, the United States banned the landing and sale of sponges from the Gulf of Mexico gathered by certain harmful methods--namely, diving or using a diving apparatus so as to conserve sponge belts in international waters. In particular, there was a concern about so-called Greek diving methods. In 1921, Great Britain prohibited the importation of plumage of any bird so as to stem the widespread destruction of birds due to the feather trade.[151] In both cases, a nation used trade restrictions to influence environmentally sensitive actions beyond its territorial borders. Further, it is to be noted that there is very little in the GATT concerning the *intent* of a law. It would not seem to matter who might be influenced by a border measure so long as the method of regulation meets the relevant GATT rules.

[C].1.2. *There lies no discrimination in application of border tax.*

Art. 3 of RFTA on Trade in Goods talks about equally favorable treatment and no excess amount of duties being imposed on the imported products. National treatment is defined as a treatment accorded within the territory of a Party upon terms no less favourable than treatment accorded therein in like situations to nationals, companies, products, ship and other objects as the case may be of such a party[152].

The border tax by Enroda is charged at the border and charged on goods originating in all Annex A nations of CTRA.[153] Thus there lies no discrimination as it applies equally to all the nations who are committed to reduce the GHG emission and who have the resources and capacity to comply with the measure. Further, Enroda was one of the first countries to put in place a carbon tax mechanism to regulate carbon emission by domestic industries in the year 1996[154]. It was only after 12 years of internal regulation of domestic industry that S. 17 of the Act provided for the imposition of a carbon tax on imports of goods equivalent to the level of tax charged to the domestic industry of the like goods[155]. Thus no excess amount of tax is imposed or a treatment being met to the imported goods, not in conformity with Art 3 of RFTA.

[C].1.3. *It does not violate Art. 4 of RFTA*

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[151] *See* An Act to Prohibit the Importation of Plumage, 1921, 39 & 40 Vict. ch. 36 1 (repealed).

[152] *See* Mosler, H, "The International Society as a Legal Community", 1980, p 255, Germantown, MD: Sijtihoff Nordhoff.

[153] *See* ¶ 24, Fact on Record.

[154] *See* ¶ 17, Fact on Record.

[155] *See Supra Note* 247.

Art 4(1) prohibits the imposition of any internal tax or charges, laws, regulations and requirements so as to afford protection to domestic production. Art 4(2) prohibits the imposition of excessive tax on imported products as imposed on like domestic products. Art. 4(3) provides that the imported products shall be accorded equally favourable treatment as accorded to like products of national origin in respect of all laws, regulations and requirements. The provisions of Art 4 has also well been qualified in the present set of facts as border tax imposed on Annex A countries is equal to the level of carbon tax imposed on like products of Enroda's domestic industry.[156]

[C].2. *Enroda can impose trade restrictions unilaterally.*

Faced with a choice between doing nothing and taking action with respect to climate change, nations have opted to impose unilaterally defined standards for internal and external commerce, characterized as "gunboat environmentalism," economic "righteousness," or "green vigilantism."[157] This asymmetry may *See*m unfair to the smaller countries, but it leads the larger countries to feel more responsible for the impact of their consumption patterns.

The U.S. ban of 1897 on fur seal imports led to the international treaty on seals and sea otters of 1911.[158] The U.S. ban of 1969 on the importation of endangered species, spurred the Washington Convention (on International Trade in Endangered Species of Wild Fauna and Flora, or CITES) of 1973.[159] The U.S. government threat (beginning in 1988) to impose trade sanctions against Korea and Taiwan for failing to cooperate in driftnet fishing negotiations and the U.S. ban on the importation of driftnet-caught fish (beginning in 1991) were instrumental in gaining support for and adherence to three U.N. resolutions calling for a moratorium on the use of large-scale driftnets.[160] The U.S. embargo on Mexican tuna has contributed to the reversal of Mexico's longtime intransigence regarding an intergovernmental agreement on dolphin protection.[161]

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[156] *See* ¶ 24, Fact on Record..
[157] *See* Gijs M. de Vries, "*How to Banish Eco-Imperialism*," The Journal of Commerce, April 30, 1992, p. 8A.
[158] *See* Convention Respecting Measures for the Preservation and Protection of Fur Seals, 214 Consolidated Treaty Series 80 (no longer in force).
[159] *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 993 UNTS 243.
[160] *See* U.S. Public Law 100-220, Title IV; U.S. Public Law 101-627, *§* 901 (g); and UN General Assembly Resolutions 44/225, 45/197, and 46/215.
[161] *See* the advertisement, *"A long-standing commitment...just got deeper,"* The New York Times, September 27, 1991, at p. A13.

Thus, Unilateralism is good for the environment because it assists sovereign nations in achieving their own ecological goals. Since nations face different environmental challenges and have different values and temporal preferences, it is natural that countries will want to formulate their own standards for production, consumption, and disposal which apply to imported as well as domestically produced goods. A world where countries marched in environmental lockstep would depress standards to the lowest common denominator.

[C].3. *Enroda can impose extra-territorial laws.*

"Extrajurisdictionality" means a law concerning activities that occur outside one's country. It is to be noted that extrajurisdictionality does not mean is extraterritoriality.[162]

Enroda submits that “Jurisdictionality” should be rejected as a GATT principle because the attempt to distinguish between a nation's own environment and the rest of the world's environment is unhelpful in dealing with natural resources not located in any country's jurisdiction (for example, the ozone layer) or with resources that migrate (for example, birds).[163] If no country is permitted to take extra jurisdictional action, then much of our biosphere would be unreachable by environmental trade measures.

Neither Art. XX of the GATT nor Art. 20 of the RFTA contain express language requiring that the imposed measure lie within the territory or jurisdiction of the party imposing the measure.[164] Nor is this dictated by customary international. Thus, applying principles of general treaty interpretation, when a provision is clear and unambiguous on its face, then it must be interpreted in such a manner, as required under Art.s 31-32 of the Vienna Convention.

Since both the RFTA and the GATT are silent in imposing extra-jurisdictional restrictions on Art. 20 exceptions, this Court must not impose such a restriction, as there is no treaty authority for doing so. Although prior panel and appellate body reports interpreting the GATT have imposed an extra-territorial restriction on Art. Twenty’s *General Exceptions,* this body should not do the same. Prior panel reports were in error and an overruling of prior precedent in this area is justified. There is nothing in the legislative history or customary international law that warrants such an interpretation.

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[162] *See "Developments in the Law-International Environmental Law"* (especially sec VI.---Extraterritorial Environmental Regulation), Harvard Law Review, May 1991, pp. 1484, 1611-12, 1622-23, and 1630-31.

[163] *See* Laura L Lones, *"The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation,"* Vanderbilt Journal of Transnational Law, 22, no 4 (1989) 997, 1017.

[164] *See*, *United States-Restrictions on Imports of Tuna, Supra Note 74.*

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 Enroda respectfully requests this Hon'ble Court to:

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

All of which is respectfully affirmed and submitted

AGENTS FOR THE RESPONDENT,

REPUBLIC OF ENRODA.