

TEAM CODE: 141 A



IN THE INTERNATIONAL COURT OF JUSTICE

AT THE

PEACE PALACE, THE HAGUE

THE NETHERLANDS

**THE CASE CONCERNING DIFFERENCES BETWEEN THE STATES
ARISING OUT OF THE ANDRENA-RUBENA FREE TRADE AGREEMENT**

THE REPUBLIC OF ANDRENA

V.

THE STATE OF RUBENA

MEMORIAL FOR THE APPLICANT

THE 2009 GNLU INTERNATIONAL LAW MOOT COURT COMPETITION

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LIST OF ABBREVIATIONS

- AJIL - American Journal of International law
- ASISA - Andrena Secure Information System and Safety Act
- Brit. Y.B. Int'l L - British year book of International Law.
- Cal. L. Rev. - California Law Review.
- EHRR - European Human Rights Reports
- EJIL - European Journal of International Law
- Eur. Ct. HR - European Court of Human Rights.
- Fordham L. Rev - Fordham Law Review.
- Geo. Wash. Int'l L. Rev - George Washington International Law Review.
- Harv. L. Rev - Harvard Law review
- Hastings Int'l & Comp. L. Rev. - Hastings International and Comparative Law Review
- ICLQ - The International And Comparative Law Quarterly
- ILC - International Law Commission
- ILR - International Law Report
- Mich. L. Rev - Michigan Law Review
- OECD - Organisation for economic co- operation and Development
- PCIJ - Permanent Court of International Justice.
- ROAA - Rubena Outsourcing Activity Act.
- RPHSA - Rubena Public Health
- TRIPS - Trade related Intellectual Property Rights
- U.N.R.I.A.A - United Nations Reports of International Arbitral Awards
- U.N.T.S - United Nations Treaty Series
- WCT - WIPO Copyright Treaty.

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- STATEMENT OF JURISDICTION -

STATEMENT OF JURISDICTION

The Republic of Andrena and the State of Rubena have agreed to submit the present dispute to the International Court of Justice in compliance with Article 40(1) of the Statute of this Court. The jurisdiction of the Court is being contested by the State of Rubena. This court is competent to determine its own jurisdiction in accordance with Article 36(6) of its Statute.

ISSUES RAISED

The Republic of Andrena respectfully asks this Court to decide:

1. Whether the International Court of Justice has jurisdiction over all claims?
2. Whether Rubena did not provide for adequate security measures for data protection and breached the privacy rights of the citizens of Andrena?
3. Whether the passing of the ASISA, RPHSA and the suspension of the trade agreement resulted in a breach of the ARFTA?
4. Whether the use of force by Andrena was justified in international law?
5. Whether Andrena is entitled to receive damages for all the claims?

STATEMENT OF FACTS

TIMELINE	FACTS	REFERENCE OF THE FACTS
	Rubena passed the Rubena Outsourcing Activity Act (ROAA) to ensure that it emerged as a safe harbour for transmission of information to an organization engaged in outsourcing activities. An Outsourcing Activity Protection Agency (OAPA) was set up under the Act.	Paragraph 4 of the Compromis
1st January 1999	The Andrena- Rubena Free Trade Agreement came into force.	Paragraph 5 of the Compromis
26th February 2000	Stanley Brothers Inc. (SBI), a financial sector company in Andrena, engaged in credit card operations entered into an agreement with Infotex Public Ltd. (IPL) based in Rubena. The agreement involved exchange of confidential information for which the security and privacy norms of IPL were adequate.	Paragraph 5 of the Compromis
March 2007	Reports published in Andrena Times regarding the theft of sensitive client information from Protech, a BPO in Rubena, between March and September 2006.	Paragraph 7 of the Compromis
	Class action suits filed in the High Court of South East Andrena for breach of privacy. All companies exchanged in such activities were respondents. A fine of US\$ 1,000,000 was imposed on IPL against which an appeal was filed before the Supreme Court of Andrena, the decision of which is still pending.	Paragraph 9 of the Compromis
September 2007	The Andrena Secure Information Systems Act (ASISA) was adopted and the Export Administration Regulations of Andrena (AEAR) was amended. According to ASISA, an Andrenian company could only outsource confidential information to those foreign third parties who used the software Secure Information System (SIS) or any other system based on similar technology.	Paragraph 10 of the Compromis
13 September 2007	SBI terminated its contract with IPL due to failure of obtaining the license to export the software`	Paragraph 11 of the Compromis
14 September 2007	Andrena invited all former contracting companies to apply for a license for the transfer of technology.	Paragraph 12 of the Compromis
January 2008	Consultations under ARFTA held between the two countries without a satisfactory solution.	Paragraph 13 of the Compromis
March 2008	Rubena passed the Rubena Public Health & Safety Act (RPHSA), imposing 150% custom duties on wine and spirits	Paragraph 14 of the Compromis

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	and 75% custom duties on heavy water manufacturing equipment. 97% of the above goods were imported from Andrena.	
15 April 2008	The government of Andrena sent Rubena a diplomatic note protesting the enactment of RPHSA and demanding an immediate repeal of the same. Rubena declined to respond.	Paragraph 15 of the Compromis
20th April 2008	Mr. Rafid apprehended to be a counter intelligence spy of Rubena with a personal hatred for Andrena, entered IPL and Protech pretending to be a member of OAPA and illegally downloaded sensitive data. Andrena sent Rubena a note to apprehend and stop the breach of privacy and arrest Rafid believed to have sought political asylum in Rubena. Rubena did not act and denied involvement of government officials.	Paragraph 17 and 18 of the Compromis
	Stolen data was released in the international market. Suits by Andrenian citizens against SBI and IPL are still pending. Suit by SBI against IPL was dismissed on grounds of remoteness of damage.	Paragraph 18 of the Compromis
	Andrena Times reported about internet credit card theft.	Paragraph 18 of the Compromis
	A confidential inquiry by Rubena found evidence of exchange of e-mails and documents between Mr. Rafid and the intelligence agency of Rubena, the contents of which have not been made public.	Paragraph 18 of the Compromis
August 2008	Andrena and Rubena suspended trade relations and border activities were observed. Andrena sent drones into Rubena to look for Mr. Rafid which sent down missiles, destroying two villages, killing 152 people and injuring 300. A 700 year old temple was also destroyed in the process. Rubena shot down the drones and appealed to the Security Council.	Paragraph 19 of the Compromis
20th August 2008	The Security Council called for a ceasefire and withdrawal of respective troops to <i>status quo ante</i> .	Paragraph 19 of the Compromis

SUMMARY OF ARGUMENTS

1. INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION AND ADMISSIBILITY TO HEAR THE PRESENT MATTER

The International Court of Justice has jurisdiction based on the submission of the *Compromis*, Article 33 of the UN Charter and failure of consultation. Admissibility is established for the legal dispute since there is no requirement to exhaust local remedies.

2. RUBENA IS LIABLE FOR BREACH OF PRIVACY AND DATA PROTECTION

Inadequate security measures in Rubena resulted in the breach of right to privacy of the Andrenans. Also, the activities of Rafid could be attributed to Rubena as per the Tadic case. Finally, it also violated the law of intellectual property rights.

3. RUBENA HAS ACTED IN VIOLATION OF THE ARFTA

The present contention seeks to establish the validity of ASISA (for data protection) and invalidity of RPHSA (passed in public interest) as per the provisions of the ARFTA.

4. SENDING OF DRONES AND LAUNCHING OF MISSILE BY ANDRENA HAS NOT VIOLATED RUBENA'S SOVEREIGNTY AND INTERNATIONAL LAW.

This contention seeks to justify the use of force by Rubena by establishing that Rafid is a terrorist and that the use of force was made to protect Andrenan nationals.

5. RUBENA SHOULD PAY DAMAGES UNDER INTERNATIONAL LAW

The remedies claimed are in accordance with those provided in the International Law Commission's Draft Articles on State Responsibility which provide for restitution, compensation and satisfaction as reparations to an injured State.

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**1. INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION AND
ADMISSIBILITY OVER THE PRESENT ISSUE**

The contention raises two fundamental issues: *firstly*, whether the International Court of Justice¹ has jurisdiction over the present issue; *secondly*, assuming but not conceding that the ICJ does not have jurisdiction, whether the dispute is admissible in the Hon'ble Court.

1.1 JURISDICTION IS ESTABLISHED UNDER ARTICLE 36(1) OF THE STATUTE OF THE ICJ

Under article 36(1)², the jurisdiction of the ICJ comprises all disputes which the parties refer to it.³ Since both countries referred the matter to the ICJ themselves in a joint letter to the honorable court, the jurisdiction is established⁴.

1.2 COMPROMIS INDICATES CONSENT OF THE PARTY TO THE JURISDICTION

A *Compromis* is a special agreement⁵ regarded as an acceptance of the jurisdiction of the ICJ.⁶ It is and must be read in accordance with Article 26 and Article 31(1) of the Vienna Convention on

¹ Herein after referred to as the ICJ.

² Statute of the International Court of Justice, Oct. 24, 1945, 832 U.S.T.S. 993 [hereinafter "the Statute"].

³ BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS- A COMMENTARY 1155, (2nd ed., 2002) [hereinafter BRUNO SIMMA].

⁴ Page 1 of the *Compromis*

⁵ ANDREAS ZIMMERMANN, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE- A COMMENTARY 613, (1st ed., 2006) [hereinafter ZIMMERMANN]; Mohammad Bedjaoui, *The Manufacture Of Judgments at The International Court of Justice*, 3 Pace Y.B. Int'l L. 29.

⁶ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 683, (6th ed., 2003) [hereinafter BROWNLIE]; *Minquiers and Ecrehos Case (U.K. v. France)*, 1953 ICJ 47: See also, Stanimir A. Alexandrov, *The*

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the Law of Treaties⁷ which provide for the rule of *pacta sunt servanda* and interpretation based on good faith respectively. This involves the intention of the parties and the object and purpose of the treaty⁸.

Since both Rubena and Andrena have sent a *Compromis* to be read according to the VCLT to the ICJ, Rubena must follow the principle of good faith in the interpretation of the *Compromis*. Moreover, the object of the *Compromis* and the intention of both the parties was adjudication by the ICJ. Thus, it is pleaded that submission of the *Compromis* amounted to consent and Rubena must accept the jurisdiction of this Hon'ble Court in accordance with the object of the *Compromis*.

1.3 JURISDICTION IS ESTABLISHED IN ACCORDANCE WITH ARTICLE 33 OF THE UN CHARTER

Article 33 of the UN Charter⁹ provides for judicial settlement in case a dispute between the parties is capable of disrupting international peace and security. Moreover, Article 92¹⁰ states that the ICJ is the principal judicial organ of the United Nations. The present case involved the questions of use of force and breach of a bilateral agreement between the two States which have international repercussions. Thus, in light of the same it is pleaded that ICJ has jurisdiction over the present issues.

1.4 FAILURE OF CONSULTATION GRANTS ICJ THE JURISDICTION OVER THE PRESENT CASE

Article 16 of the ARFTA provides for dispute settlement, which explicitly states that only if consultation fails as a mode of dispute settlement, can the parties adopt other means as enshrined

Compulsory Jurisdiction of the International Court Of Justice: How Compulsory Is it?, 5 Chinese J. Int'l L. 29; Susan W. Tiefenbrun, *The Role Of The International Court In Settling International Disputes: A Recent Assessment*, 20 Loy. L.A. Int'l & Comp. L.J. 1.

⁷ Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331. [Hereinafter VCLT].

⁸ Norman Kogan, *United Nations—Agent Of Collective Security?*, 61 Yale L.J. 1.

⁹ Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No 7 [hereinafter "The Charter"].

¹⁰ The Charter, Id.

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in Article 33 of the UN Charter¹¹. In the present case, consultations were held between the two parties which failed to result in a mutually satisfactory result¹². In light of this fact, it is humbly submitted that recourse to this Hon'ble Court was justified.

1.5 WTO DISPUTES SETTLEMENT BODY IS NOT AN APPROPRIATE FORUM DESPITE PROVISIONS IN ARFTA AND THE UN CHARTER

Article 16 of the ARFTA provides for taking recourse to the WTO Dispute Settlement Mechanism. This has been authorized by Article 95 of the UN Charter¹³. However, the fact that Article 16 states that this mechanism “may” be approached highlights that the jurisdiction of the ICJ cannot be questioned. Also, the breach of the provisions of the agreement is closely linked to the use of force and breach of privacy to resolve which the WTO would not be an appropriate forum. In the light of the same, it is submitted that the jurisdiction over the present issue lies with this Hon'ble Court.

1.6 ARGUENDO- ADMISSIBILITY CANNOT BE DENIED ON THE GROUNDS OF POLITICAL OR MILITARY OVERTONES, THE RULE OF EXHAUSTION OF LOCAL REMEDIES OR THE CLEAN HANDS DOCTRINE

A. The Case Has Admissibility On Account Of Being A Legal Dispute

Any dispute capable of being settled by the application of the general principles of international law is characterized as a legal dispute.¹⁴ The legality of the possible conduct of States with

¹¹ The Charter, Id.

¹² *Compomis*, ¶ 13 and ¶ 17..

¹³ The Charter, Id.

¹⁴ Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), 1988 I.C.J at 16, 91 [hereinafter *The Armed Actions Case*]; Certain Expenses of the United Nations case, 1962 I.C.J at 151, 155 [hereinafter *Certain expenses*]. See also R. Higgins, *Policy Considerations and the International Judicial Process*. 17 ICLQ, 1968, pp. 58, 74.

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regard to international legal obligations as an 'essentially judicial task.'¹⁵ A conflict of view regarding law¹⁶ or fact or even a conflict of interests¹⁷ qualifies as a legal dispute.¹⁸ Moreover, The ICJ cannot reject a case merely because it has political or military overtones.¹⁹ In the present case, the dispute arises because of the disagreement regarding treaty obligations, other questions of international law and the nature and extent of reparation to be made for the breaches between Andrena and Rubena. It is submitted that the case is thus a legal dispute.

¹⁵ Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict [hereinafter *Legality of Nuclear Weapon opinion*], 1996 I.C.J at 66, 73; *Certain Expenses Case* at 151, 155.

¹⁶ It is to be kept in mind that treaties are a source of law as per article 38(1)(a) of the statute of the ICJ. See, Dinah Shelton, *Form, Function And Power Of International Courts*, 9 Chi. J. Int'l L. 537.

¹⁷ Advisory Opinion on the Interpretation of Peace Treaties, 1950 I.C.J. at 65, 74; Military and Paramilitary Activities case (US v. Nicaragua), 1984 I.C.J. at 392,429-4 [hereinafter *Nicaragua case*]; Larsen v. Hawaiian Kingdom 119 ILR, pp. 566,587; R. W TUCKER, PRINCIPLES OF INTERNATIONAL LAW 526 (2nd ed., 1966). See also V. Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AJIL, 1994, p. 643.

¹⁸ The Statute, *supra* note 2, Article 36(2). The Mavrommatis Palestine Concessions (Jurisdiction) case (Greece v. Britain), PCIJ, Series A, No. 2, 1924 at 11. See also the South West Africa cases (Ethiopia v. South Africa), 1962 I.C.J at 319, 328 and the Nuclear Tests case (Australia v. France), 1974 I.C.J at 253; Case concerning East Timor (Portugal v. Australia), 1995 I.C.J at 90, 99-100; Case concerning the Application of the Convention on the Prevention and Punishment of the crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) 1996 I.C.J. at ¶ 29; Case concerning the land, island and maritime frontier dispute (El Salvador/Honduras: Nicaragua intervening), 1992 I.C.J at 351, 555.

¹⁹ *The Armed Actions Case; The South West Africa case* at 319; *Nicaragua Case* at 392; Case Concerning Armed Activities on the Territory of Congo (Congo v. Uganda) (Provisional Measures), I.C.J. 2001 at 660; Case Concerning the United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ at 7, 19-20 [hereinafter *Iranian Hostages case*] and *Legality of Nuclear Weapon opinion* at 226, 234. See, R. Y. Jennings, *Gerald Gray Fitzmaurice*, 55 BYIL, 1984, pp. 1, 18. Vera Gowlland Debbas, *The Relationship Between The International Court of Justice And The Security Council In The Light Of The Lockerbie Case*, 88 Am. J. Int'l L. 643.

B. The Case Falls Under Exceptions To The Rule Of Exhaustion Of Local Remedies

B.1 The Case Involves Direct Violation Of The Rights Of The State And International Agreements

The recognised rule of exhaustion of local remedies²⁰ is subject to the condition that there must not be a direct injury to a State²¹ and a State must not be guilty of a direct breach of an International agreement or customary law.²² Article 15(a) of the ILC Draft Articles on Diplomatic Protection provides an exception in the form of absence of local remedies to provide effective redress²³. Inapplicability extends to cases of inadequate local remedies as well.²⁴ In the present case, violation of the privacy rights of the Andrenan citizens was a violation of the political sovereignty of Andrena which directly affected the State and contravened customary international law. Hence, it is humbly submitted that the rule of exhaustion of local remedies is inapplicable in the present claim.

B.2 Waiver of the Requirement of Exhaustion of Local Remedies is Provided under ARFTA

Article 15(e) of the ILC Draft Articles states that local remedies don't need to be exhausted in case the State alleged to be responsible has waived the requirement that local remedies need to be exhausted²⁵. The present case involved a free trade agreement between the two countries,

²⁰ Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions under International Law*, 7 Int'l Legal Theory 1 2001.

²¹ Corfu Channel Case (Merits) (UK v. Albania), 1949 I.C.J. 4 [hereinafter *Corfu Channel Case*], Case Concerning The Air Services Agreement of 27 March 1946 (US v. France), ILR 54, 304 at 323-5.

²² H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 221 1951.

²³ Draft Articles on Diplomatic Protection with Commentaries, in report of the International Law Commission, Fifty- Eighth Session, U.N. GAOR, 58th Sess., UN Doc. A/61/10 (2006) [hereinafter "The Draft Articles"]; *Altesor v. Uruguay*, (1982), ILR, 70. See also Advisory Opinion OC-11/90 of the Inter- American Court of Human Rights on *Exceptions to the Exhaustion of Local Remedies* (1990).

²⁴ Kevin C. Kennedy, *Parallel Proceedings At The WTO And Under NAFTA Chapter 19: Whither The Doctrine Exhaustion Of Local Remedies In DSU Reform*, 39 Geo. Wash. Int'l L. Rev. 47.

²⁵ The Draft Articles, *Ibid.* See also, *American International Group Inc. v. Islamic Republic of Iran*, 4 Iran- U.S. Cl. Trib. Rep. 96 (1983); William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven Of NAFTA*, 23 Hastings Int'l & Comp. L. Rev. 357.

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Article 16 of which provided for consultation and any other mode specified under Article 33 of the UN Charter. Article 17 clearly stated that domestic laws could not be invoked in cases of inconsistency with the Agreement. Hence, it is pleaded that there was an express waiver of the requirement of exhaustion of local remedies.

C. The Doctrine of Clean Hands is not an Internationally Acceptable Doctrine

The clean hands doctrine states that one who seeks equity must do equity.²⁶ This doctrine is, however, restricted to domestic courts²⁷ and it is submitted that the preliminary objections must exclude any discussion on the said principle.

2. RUBENA IS LIABLE FOR BREACH OF PRIVACY AND DATA PROTECTION

The contention raises seven fundamental issues: *firstly*, whether the security measures adopted by Rubena were adequate; *secondly*, whether there was a breach of the fundamental right to privacy; *thirdly* whether IPL should have been in possession of the data; *fourthly* whether ASISA is a valid act; *fifthly*, whether Rafid is allowed to have access to the information; *sixthly* whether there is state responsibility on the part of Rubena for the activities of Rafid and *seventhly*, whether there is a breach of intellectual property rights in the present case.

²⁶ Thomas W. Merrill, *Golden Rules For Transboundary Pollution*, 46 Duke L.J. 931; S. Shawn Stephens, *The Hermitage And Pushkin Exhibits: An Analysis Of The Ownership Rights To Cultural Properties Removed From Occupied Germany*, 18 Hous. J. Int'l L. 59; Daniel R. Williams, *After The Gold Rush--Part I: Hamdi, 9/11, And The Dark Side Of The Enlightenment*, 112 Penn St. L. Rev. 341; Dieter Fleck, *Individual And State Responsibility For Intelligence Gathering*, 28 Mich. J. Int'l L. 687.

²⁷ Geoffrey R. Watson, *The "Wall" Decisions In Legal And Political Context*, 99 Am. J. Int'l L. 6; Leo Gross, *Voting In The Security Council: Abstention From Voting And Absence From Meetings*, 60 Yale L.J. 209.

2.1 RUBENA DID NOT ADOPT ADEQUATE SECURITY MEASURES AS REQUIRED UNDER CUSTOMARY INTERNATIONAL LAW

Customary international law has addressed the issue of cross border data protection in the form of guidelines issued by numerous international organizations²⁸. The Organization for Economic Cooperation and Development²⁹ in its Security Safeguard principle clearly mentions that “reasonable security safeguards” must be provided to data against “loss or unauthorized access, destruction, use, modification or disclosure.”³⁰ In the present case, Andrena had specified the use of the 128 bit encryption system, Secure Information System (SIS), or any other system based on similar technology, for the protection of personal information of the clients. The Rubenan companies failed to acquire the system³¹. Hence, with regard to the customary laws, it is submitted that Rubena failed to adopt security measures in proportion to the risks involved.

2.2 THE FUNDAMENTAL RIGHT TO PRIVACY OF SBI CLIENTS HAS BEEN INFRINGED BY LEAKAGE OF INFORMATION OF IPL

Of the fundamental rights provided under international law,³² the right to privacy has been recognized as an important one.³³ This has been acknowledged in various conventions and

²⁸ The status of the OECD guidelines as customary international law has been established by the report of the OECD available at

http://www.oecd.org/document/25/0,3343,en_2649_34255_37571993_1_1_1_1,00.html (last visited on 8th March, 2009). Soft law being regarded as customary international law has been recognised by: Joel R. Reidenberg, *The Privacy Obstacle Course Hurdling Barriers To Transnational Financial Services*, 60 Fordham L. Rev. S137; Smita Narula, *The Right To Food: Holding Global Actors Accountable Under International Law*, 44 Colum. J. Transnat'l L. 691; Jan Arno Hessbruegge, *Human Rights Violations Arising From Conduct Of Non-State Actors*, 11 Buff. Hum. Rts. L. Rev. 21; Ilias Bantekas, *Corporate Social Responsibility In International Law*, 22 B.U. Int'l L.J. 309; Oscar Schachter, *United Nations Law*, 88 Am. J. Int'l L. 1 1994.

²⁹ Herein after referred as OECD.

³⁰ The Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with regard to the processing of personal data and on the free movement of such data, available at <http://www.dataprotection.ie/viewdoc.asp?DocID=89> (last visited on 7th March, 2009), Article 17 [hereinafter “Directive”].

³¹ *Compromis*, ¶10.

³² Gregory H. Fox, *The Right to Political Participation in International Law*, 17 Yale J. Int'l L. 540 1992; Eric Lane, *Mass Killings by Governments: Lawful in the World Legal Order?*, 12 N.Y.U. J. Int'l L. & Pol. 239 1979-1980; Paul W. Kahn, *American Hegemony and International Law, Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order*, 1 Chi. J. Int'l. L. 1 2000; Henry T. King and Theodore C.

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treaties of great import.³⁴ Sensitive data of the SBI clients was released from IPL. It is hence submitted that the course of events in Rubena led to the fundamental right to privacy of these clients being blatantly breached.

2.3 IPL SHOULD NOT HAVE BEEN IN POSSESSION OF INFORMATION REGARDING CLIENTS OF SBI ACCORDING TO CUSTOMARY INTERNATIONAL LAW

The OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data provide for the Data Quality Principle³⁵ and the Collection Limitation Principle³⁶ according to which only *relevant* data must be collected for *lawful* purposes.³⁷ Once SBI had terminated the contract with IPL³⁸, there was no legitimate reason for the leaked information to have been retained with IPL. It is hence submitted that IPL acted in violation of international custom by way of unlawful possession of data.

Theofrastous, *From Nuremburg to Rome: A Step Backward for US Foreign Policy*, 31 Case W. Res. J. Int'l L. 47 (1999).

³³ Convention for the Protection of Human Rights and Fundamental Freedoms, available at <http://www.conventions.coe.int/treaty/EN/Treaties/html/005.htm> (last visited on 7th March, 2009), Article 8; African Charter on Human and Peoples' Rights international Peace and Security, available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (last visited on 7th March, 2009), Article 23. See also, Steven R. Salbu, *The EU Data Privacy Directive and International Relations*, 35 VAND. J. TRANSNAT'L L. 655, 684 (2002).

³⁴ Universal Declaration of Human Rights G.A. Res. 217A (III), U.N. GAOR, 3d Sess. U.N. Doc. A/810 (1948), Article 12, [hereinafter "UDHR"]. See also, International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, Article 17 [hereinafter "ICCPR"]; Warren, Samuel D, *Right to Privacy*, 4 Harv. L. Rev. 193 (1890-91); William L Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960). See also William J. Brennan, *State Constitutions and Protection of Individual Rights*, 4 Harv. L. Rev. 193, p. 501.

³⁵ Part II, ¶ 8 of the Guidelines, *Supra* note 28.

³⁶ Part II, ¶ 7 of the Guidelines, *supra* note 28.

³⁷ The Directive, *supra* note 30, Article 6(1)(a); Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Treaty 108), available at <http://www.conventions.coe.int/Treaty/en/Treaties/Word/108.doc> (last visited on 7th March, 2009), Article 5(e) [hereinafter "Personal Data Convention"].

³⁸ *Compromis*, ¶ 11.

2.4 ASISA IS A VALID ACT UNDER ARFTA AND CUSTOMARY INTERNATIONAL LAW

International law has recognized that transfer of data can be limited to the countries that share the same standard of security measures.³⁹ It is further pointed out that Article 7⁴⁰ of ARFTA only provides that “unnecessary” barriers must not be provided to electronic transmission. However, it is submitted that Andrena was entitled to expect destination countries to have Security Information System or equivalent technology. There measure was undertaken to ensure security and was under no circumstance unnecessary.

2.5 ACCESS TO INFORMATION BY RAFID IS INVALID UNDER CUSTOMARY INTERNATIONAL LAW

International law prohibits making personal data accessible to anyone without the consent, or at least the knowledge of the data subject.⁴¹ Even as a representative of the Outsourcing Activity Protection Agency⁴², Rafid should not have been granted access to the personal information of clients since their consent, which is a prerequisite, and has not been attained.

2.6 RUBENA MUST CLAIM RESPONSIBILITY FOR RAFID AS WELL AS IPL

A. Rubena Is Responsible For The Activities Of IPL For Failure To Exercise Due Diligence

If a State has not exercised due diligence to prevent internationally injurious acts on the parts of private persons, they are to procure reparation for the wronged State.⁴³ Rafid represented himself as a member of the OAPA.⁴⁴ OAPA was a government agency and it was thus the responsibility

³⁹ Directive, *supra* note 28, article 25.1; Personal Data Convention, *supra* note 34, Article 12(1) and 12(3); OECD guidelines, *supra* note 26, Article 17; Directive, *supra*, note 28, Article 25; United Nations Guidelines Concerning Computerized Personal Data Files, available at <http://www.unhchr.ch/html/menu3/b/71.htm> (last visited on 7th March, 2009), Article 9 [hereinafter UN Guidelines].

⁴⁰ Page 21 of the *Compromis*.

⁴¹ OECD Guidelines, *supra* note 28; Directive, *supra* note 30, Articles 10(c) and 11(1); UN Guidelines, *supra* note 39, Article 3.

⁴² Herein after referred as OAPA.

⁴³ British Property in Spanish Morocco Case (1925), RIAA, 2, pp. 636, 709-10; Jane’s Case (1925), RIAA, 4, p 86ff; Kennedy Case (1927), RIAA, 4, p. 194.

⁴⁴ *Compromis*, ¶ 17.

of the government to ensure that private citizens are unable to forge identity cards to pass off as members of the same. Clearly, there was lack of due diligence in not having a more secure identification procedure.

B. Rubena Must Claim Responsibility For The Acts Of Rafid As Per The “Overall Control” test of the Tadic Case

Private individuals may come to be regarded as having acted as agents of the State if they are acting on the instructions of or are being directed or controlled by the State, as has been laid down in article 8 of the Draft Articles on State Responsibility.⁴⁵ The scope of this article has been expanded in the *Nicaragua case*⁴⁶ with the “effective control test” and still more, in the *Tadic case*⁴⁷ which laid down the “overall control test.”⁴⁸ In the latter, the requirements of “dependancy and control” as laid down in the Nicaragua case were done away with. The authority of this test has often been upheld.⁴⁹ An exchange of documents and emails between Rafid and the intelligence agency of Rubena⁵⁰ is strong evidence of the fact that Rafid was under the overall control of Rubena. The fact that Rafid was apprehended to be a Rubenan spy on an earlier occasion further substantiates this claim.⁵¹ It is thus pleaded that even if there is no proof

⁴⁵ Draft Articles 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, U.N. Doc. A/56/10 (2001), [hereinafter “ILC Draft Articles”], Article 8; See also the *Zaffro Case* (1925), RIAA, 6, p. 160; *Stephens Case* (1927), RIAA, 4, p. 267; *Lehigh Valley Railroad Co. Case* (1930), RIAA, 8, p. 84; *Iranian Hostages case* at 3; *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Preliminary Objections)*, 1970 I.C.J. 3 at 22-31 [hereinafter *Barcelona Traction*].

⁴⁶ *Nicaragua case* at 392.

⁴⁷ Prosecutor v Tadic, Case No IT-94-1-A (ICTY 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf> (last visited 7th March, 2009).

⁴⁸ Ruti Teitel, *Humanity Law: A New Interpretive Lens On The International Sphere*, 77 Fordham L. Rev. 667.

⁴⁹ Suzannah Linton and Dr. Firew Kebede Tiba, *The International Judge In An Age Of Multiple International Courts And Tribunals*, 9 Chi. J. Int'l L. 407; Rachael Lorna Johnstone, *State Responsibility: A Concerto For Court, Council And Committee*, 37 Denv. J. Int'l L. & Pol'y 63; Nigel D. White and Sorcha McLeod, *EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility*, 19 Eur. J. Int'l L. 965.

⁵⁰ *Compromis*, ¶ 18.

⁵¹ *Compromis*, ¶ 17.

of explicit, specific instructions on Rubena's part authorizing Rafid's course of action, the State of Rubena must still claim responsibility for his acts under the "overall control" test.

C. Rubena Must Claim State Responsibility For Denial Of Justice

It has been accepted in international law that judicial personnel are organs of the State and their acts are, accordingly, attributable to the State.⁵² If the proceedings in the courts or other appropriate tribunals of the State⁵³ are subject to undue delay,⁵⁴ or result in a manifestly unjust judgement⁵⁵, it will result in a denial of justice.⁵⁶

In the current case it is contended that the appeals in Andrena lay pending for about a year which is not an unreasonable period of time. Moreover, it is submitted that the case filed by SBI against IPL was met with an evidently biased verdict. While the case was for breach of contract, the explanation of 'remoteness of damage' dealt only with economic losses. It is thus submitted that Rubena must be held as liable for denial of justice while no such responsibility can be pinned on Andrena.

⁵² ILC Draft Article, *supra* note 45, Article 4.

⁵³ Courts operating within a state may not always be courts of that state so as to make it responsible for their acts: see for example the Restitution Courts in the Federal Republic of Germany, Re Application No. 182/56 (X v. Federal German Republic), ILR, 24 (1957), p. 401; Re Application No. 235/56 (Mr. X and Mrs. X v. Federal German Republic), ILR, 25 (1958-I), pp. 190, 205-10. Nor is the Federal Republic of Germany responsible for arrest and imprisonment by the authorities in the Soviet Zone of Germany: Z v. Federal Republic of Germany (1966), ILR, 51, p. 239, 244ff. Similarly a private law arbitral tribunal is not necessarily a tribunal 'of the State' in which it sits and under the law of which it operates: Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG [1985] ECR 1095. The Judicial Committee of the Privy Council which sits in London, does so in many cases as the final appellate tribunal of the independent Commonwealth state from which the appeal has come.

⁵⁴ Andrew Newcombe, *Jan Paulsson, Denial Of Justice In International Law (Book Review)*, 17 Eur. J. Int'l L. 692; Craig Forcese, *The Capacity To Protect: Diplomatic Protection Of Dual Nationals In The 'War On Terror'*, 17 Eur. J. Int'l L. 369.

⁵⁵ Andrea K. Bjorklund, *Reconciling State Sovereignty And Investor Protection In Denial Of Justice Claims*, 45 Va. J. Int'l L. 809; Sean D. Murphy, *U.S. Interpretation of Denial of Justice Standard*, 96 Am. J. Int'l L. 707; René Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 B.Y.U. L. Rev. 229.

⁵⁶ Puente, *The Concept of "Denial of Justice" in Latin America*, 43 Mich. L. Rev. 383, 390-91 (1944).

2.7 RUBENA HAS VIOLATED ITS OBLIGATIONS FOR PROTECTION OF INTELLECTUAL PROPERTY RIGHTS UNDER TRIPS AND WCT

A. Intellectual Property Law Relating To Databases Has Been Breached

In general, databases are a form of compilation, collection, collective work or composite work.⁵⁷ Those databases qualify as intellectual creations which involve a requisite degree of creativity in selection or arrangement of the data⁵⁸ as per article 10(2)⁵⁹ of TRIPS. In the current case, the data of various SBI clients was outsourced to IPL collectively. It thus falls within the definition of 'database.' Only such data as was required by the companies for the issuance of credit cards was compiled. It was sensitive, personal data which was required for the specific purpose for which it was collected. It is hence submitted that the data was collected through a process of careful selection and Article 12 of the WCT⁶⁰, which provides for safeguards for intellectual property, stands violated.

B. In *Arguendo*, The 'Sweat Of The Brow' Approach Can Be Applied In The Current Case

As per this approach, as long as a significant effort has been put into a work, it must fall under copyright protection laws⁶¹. The author must only prove that sufficient labour, skill and

⁵⁸ Michael D. Birnhack, *Global Copyright, Local Speech*, 24 CARDOZO Arts & Ent. L. J. 491; Robert Burrell and Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. Ill. J.L. Tech. & Pol'y 259; Oren Bracha, *The Ideology Of Authorship Revisited: Authors, Markets, And Liberal Values In Early American Copyright*, 118 Yale L.J. 186; Simon Thomas McBride Newman, *Human Rights And Copyrights: A Look At Practical Jurisprudence With Reference To Authors' Rights*, E.I.P.R. 2009, 31(2), 88-92.

⁵⁹ Berne Convention for the Protection of Literary and Artistic Works, 1 B.D.I.E.L. 715, Article 2(5) and Directive 96/9/Ec Of The European Parliament And Of The Council of 11 March 1996 on the legal protection of databases, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc? (last visited on 7th March, 2009), Article 3. Article 1(e) provides for protection of databases. *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 US 340 (1991); Section 8 of Copyright Act, 1987 of Malaysia; *Kregos v. Associated Press*, 3 F 3d 656. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreements].

⁶⁰ WIPO Copyright Treaty, available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html (last visited on 8th March, 2009).

⁶¹ MARK J. DAVISON, *THE LEGAL PROTECTION OF DATABASES* 10 (1st ed., 2003). Also see *Telstra v. Desktop Marketing Pty Ltd* [2001] FCA 612;

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judgement.⁶² In the current case these requirements were satisfied in compiling information of the clients. It is thus submitted that the absence of a high level of creativity will not exclude the information from the scope of intellectual property.

3. RUBENA HAS ACTED IN VIOLATION OF THE ARFTA

The contention deals with two fundamental questions: *firstly*, whether the ARFTA is violative of international trade law and *secondly*, whether evidence is admissible in the ICJ after the *Compromis* has been submitted and *thirdly*, whether the RPHSA is violative of the ARFTA.

3.1 THE PASSING OF ASISA IS NOT VIOLATIVE OF ARFTA

A. The Impugned Act is in Accordance with the General Exceptions under GATS

Article II⁶³ of General Agreement on Trade in Services⁶⁴ provides for the Most Favoured Nation commitments. However, this provision is subject to the General Exceptions provided under article XIV.⁶⁵ According to Article XIV (a) and XIV (c) of GATS⁶⁶, the Member States can take measures or precautions in order to protect the confidential matters of the clients with banks, notwithstanding the Agreement of GATS.⁶⁷ Moreover, Article VI of GATS gives the discretion

⁶² *Macmillan & Co. v. Cooper*, (1924) 93 LJPC 113; *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd* [1964] 1 All ER 465.

⁶³ General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing The World Trade Organisation, Annex 1B, THE LEGAL TEXTS: THE RESULT OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

⁶⁴ Herein after GATS.

⁶⁵ GATS, *supra* note 63.

⁶⁶ GATS, *supra* note 63

⁶⁷ GATS, *supra* note 63.

to a member state to introduce domestic regulations in case of necessity. In the present case, ASISA was passed with an intention of protecting the information of the citizens of Andrena and hence fell within the General Exceptions clause. Here the necessity arose from the situation of the leakage of sensitive data regarding the citizens. It is thus submitted that on account of the aforementioned clauses, ASISA is a valid act.

B. ASISA Does Not Act As A Barrier For Market Access According To Article XIV Of GATS

The commitment under Article XVI of GATS⁶⁸ requires a member not to resort to measures which hinder another Members' access to the market or obstruct the services provided by another member. However, the Annex on Financial Services⁶⁹, which has been included as a provision under Article 3 of the ARFTA, provides the authority to the Member State to take measures⁷⁰ for the safety of its financial services⁷¹. Commitments to liberalize⁷² do not affect governments' right to set levels of quality, safety, or price, or to introduce regulations to pursue any other policy objective they see fit. Governments naturally retain their right to set qualification requirements for the various services received to the country. This has been reiterated in Article 2.2 of the Technical Barrier Trade Agreement.⁷³ Again, Article VI of GATS provides for domestic regulation of services, even if they affect market access as long as it is considered necessary.

⁶⁸ GATS, *supra* note 63.

⁶⁹ GATS, *supra* note 63, Article XIV.

⁷⁰ GATS, *supra* note 63, article XIV.

⁷¹ GATS, *supra* note 63, article XIV.

⁷² GATS, *supra* note 63, Article V.

⁷³ The Agreement On Technical Barriers To Trade, *available at* http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (last visited on 8th March, 2009).

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The legislation of the ASISA was passed in order to obstruct leakage of confidential information, especially financial information. It is thus pleaded that on grounds of the above provisions, ASISA cannot be held invalid on account of market access.

C. National Treatment To Andrenan And Rubenan Centres Makes ASISA Valid as per article XVII of GATS

According to GATS, the market access commitment becomes complete with national treatment⁷⁴. It is to be further noted that the GATS mandates further work to develop disciplines to ensure that domestic licensing requirements or technical standards do not constitute unnecessary barriers in trade. In this context, Andrena pleads that the financial services as well as the other services (bound to be affected by ASISA and AEAR) from Rubena were given national treatment since the legislation applies equally to any third party to which confidential information is outsourced. Thus, ASISA is a measure applying to the safe trade in services, in a reasonable, objective and impartial manner.⁷⁵ According to the GATS mandates, it does not constitute a barrier to trade.

3.2 EVIDENCE GIVEN AFTER SUBMISSION OF COMPROMIS IS INVALID AS PER THE STATUTE OF THE ICJ

As per Article 52⁷⁶ of the ICJ statute, evidence not submitted within the period specified by the ICJ can be held to be invalid. In such instances, the ICJ may consider in accepting additional evidences but is not obliged to do so.⁷⁷ Article 52 of the ICJ Statute further excludes the submission of “further oral or written evidence”⁷⁸ on the condition of the consent of the parties,⁷⁹

⁷⁴ The concept of national treatment is given under Article XVII of the GATS.

⁷⁵ GATS, *supra* note 63, Article VI. 1.

⁷⁶ The Statute, *supra* note 2.

⁷⁷ ZIMMERMANN at 818.

failing which the court can carry out its discretion on its admissibility.⁸⁰ Here the new evidence against the competence of the ASISA was submitted once the submission of the *Compromis* was over.⁸¹ The State of Andrena objects⁸² to the fresh evidence which was not even presented for consultation. It is hence submitted that on the above grounds the evidence submitted should be rejected.

3.3 THE LEGISLATION OF RPHSA IS VIOLATIVE OF ARFTA

A. Rphsa Is In Violation Of The Provisions Of Gatt

ARFTA which has been created under the provisions of Article XXIV of GATT provides for certain tariff concessions⁸³ for the trade of products between the two States.⁸⁴ It is to be duly noted that even introduction of new customs duty is contrary to the aims under GATT⁸⁵ and ARFTA⁸⁶. Fair tariff rates are enshrined under Art I and Art II of GATT. Also, inconsistency in competitive provisions is violative of international law.⁸⁷ Article II (b) of GATT exempts the members from the imposition of 'ordinary customs duty'⁸⁸ since nothing regarding a future

⁷⁸ZIMMERMANN AT 1131.

⁷⁹ The Statute, *supra* note 2.

⁸⁰ ZIMMERMANN at 1133.

⁸¹ The Statute, *Supra* note 2, Article 56.

⁸² ZIMMERMANN at 1153.

⁸³ Kylie Bagwell and R. W. Staiger, *An Economic Theory of GATT*, *The American Economic Review*, Vol. 89, No. 1 (Mar., 1999), pp. 215-248.

⁸⁴ Article 2 of the ARFTA.

⁸⁵ General Agreement On Tariff and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing The World Trade Organisation, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), Article XXIV Article II (b) [hereinafter GATT].

⁸⁶ Art. 2 (4) of ARFTA.

⁸⁷ Korea - Alcoholic Beverages, WT/DS84/14.

⁸⁸ Chile - Price Band System., WT/DS207/1.

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increase in the custom duties is mentioned in any of the schedules.⁸⁹ It is to be further noted that article 14 of the ARFTA, seeks for consultation before the imposition of custom duties. The RPHSA imposes 150% as customs duty on wine and spirit and 75% on heavy water equipments, 97% of the articles which were imported from Andrena.⁹⁰ It also creates a barrier⁹¹ for trade between the two States. By increasing the custom duties in such a manner, it is pleaded that the RPHSA acts in contravention of the above provisions and is not protected by article II(b) of the GATT. No consultation was conducted by Rubena before the imposition of custom duties.

B. RPHSA is not Protected by the Agreement for Safeguards

The agreement for safeguards⁹², gives a scope for the exclusion of the parties of a free trade area agreement from the safeguard measures until proved that the products cause serious injury.⁹³ The resort to safeguard measures or general exceptions shall be taken only during ‘emergency actions’.⁹⁴ Since, Rubena has not validated its measures through a competent investigation⁹⁵, the validity of the legislation stands questioned. The high value of the custom duty imposed stands as unreasonable and unjustified as of now.⁹⁶ Also, the Rubenan Parliament has failed to define what they mean by ‘public interest.’ Thus, it is submitted that the legislations were disguised restrictions to international trade and is in violation of ARFTA.⁹⁷

⁸⁹ Argentina Textile and Apparel, WT/DS56/R

⁹⁰ *Compromis*, ¶ 14.

⁹¹ Turkey- Textiles WT/DS34/AB/R.

⁹² Brain Hindley, *GATT Safeguards and Voluntary Export Restraints: What are the Interests of the Developing Countries?*, The World Bank Economic Review, Vol.1, No.4, Symposium (Sep. 1987), pp 690.

⁹³ US- Line pipe case (WT/DS/202ABR); Article 9 of the ARFTA..

⁹⁴ *Korea- Dairy* (WT/DS/98ABR).

⁹⁵ Art 9.2 of the ARFTA.

⁹⁶ EC – Hormones, (WT/DS48/AB/R).

⁹⁷ *Compromis*, ¶15.

C. RPHSA Violates National Treatment Given Under Article III Of Gats

The legislation enacted only applies to the imported products of the State of Rubena. This is discriminatory per se and goes against the concept of national treatment.⁹⁸ The legislation was an emergency action on imports of particular products⁹⁹ and while such an action is taken it has to comply with the provisions of article 11 of the Agreement on Safeguards.¹⁰⁰ The application of Article XIX of GATT is an emergency extraordinary remedy.¹⁰¹ It is to be further noted that the safeguard measure on the import of the impugned products were made without any investigation.¹⁰² Moreover, Rubena has failed to consult¹⁰³ Andrena on the matter of the increase in imposition of customs duty since the respondent state failed to respond to consultation requests from Andrena after the enactment of RPHSA.¹⁰⁴ It is thus submitted that on account of all the cited provisions RPHSA violates national treatment principles.

4. CLAIMS RELATING TO USE OF FORCE

The present contention deals with three fundamental questions: *firstly*, whether Rafid can be designated a terrorist; *secondly*, whether the use of force was justified under international law and *thirdly*, whether Rubena can be held responsible for the activities of Rafid.

⁹⁸ GATT, *supra* note 85, Article III; Art II of ARFTA.

⁹⁹ GATT, *supra* note 85, Article XIX.

¹⁰⁰ The Panel on US Lamb Report WT/DS/178R.

¹⁰¹ Interpretation of Art XIX of GATT *available at* http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article19 (last visited on 8th March, 2009), ¶ 523.

¹⁰² GATT, *supra* note 85, Article X ; The Agreement on Safeguards 1994, *available at* http://www.wto.org/english/tratop_e/safeg_e/safeint.htm (last visited on 8th March, 2009), Article 3 [hereinafter “Safeguard Agreement”].

¹⁰³ Safeguard Agreement, *Ibid.*, Article 12.4 and 15.

¹⁰⁴ *Compromis*, ¶ 13.

4.1 RAFID IS A TERRORIST AS PER INTERNATIONAL LAW

No uniform definition for the term 'terrorist' has been adopted by the UN.¹⁰⁵ However it has been endorsed by the UN that terrorism is not restricted to taking of lives but extends to fundamental freedoms being jeopardized in order to instill terror in the civilians.¹⁰⁶ International obligations make it incumbent upon states to combat the threat of terrorism with restrictive mechanisms.¹⁰⁷ If a State is reluctant to impede terrorist acts committed in their territory, the State which is the victim of such acts can take action. For this reason the military action of the USA and UK against Afghanistan was appreciated by the Security Council.¹⁰⁸ Rafid was a terrorist residing in the country of Rubena while Rubena took no action to arrest or restrain him. It is thus the submission of Andrena that they were justified in using military action to search for him in order to curb terrorism.

¹⁰⁵ Cyrille Begorre-Bret, *The Definition Of Terrorism And The Challenge Of Relativism*, 27 Cardozo L. Rev. 1987; Milton Hirsch, *Fourth Amendment Forum*, 30-DEC Champion 58; Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism And A New International Law*, 13 U. Miami Int'l & Comp. L. Rev. 293; M. Cherif Bassiouni, *Evolving Approaches To Jihad: From Self-Defense To Revolutionary And Regime-Change*, 8 Chi. J. Int'l L. 119; Igor Primoratz, *A Philosopher Looks at Contemporary Terrorism*, 29 Cardozo L. Rev. 33.

¹⁰⁶ G.A. Res. 49/60, UN GAOR, 49th Sess., U.N. Doc. A/RES/49/60 (1994), Articles 2 and 3; GA Resolution 3034 (XXVII), UN GAOR; GA Res. 32/147, UN GAOR, 32nd Sess., UN Doc. A/RES/32/147 (1977); GA Res. 31/102, UN GAOR, 32nd Sess., U.N. Doc. A/RES/31/102 (1977); GA Res 34/145, UN GAOR, 34th Sess., U.N. Doc. A/RES/34/145 (1979); GA Res. 38/130, UN GAOR, 38th Sess., UN Doc. A/RES/38/130 (1983); GA Res. 40/61, UN GAOR, UN Doc. A/RES/40/61 (1985); GA Res. 44/29, UN GAOR, 44th Sess., UN Doc. A/RES/44/29 (1989).

¹⁰⁷ S.C. Res. 1373, U.N. SCOR, 4385th Sess., U.N. Doc. SC/1373 (2001), S.C. Res. 1269, U.N. SCOR, U.N. Doc. SC/1269 (1999), Article 4 ; S.C. Res. 1368, U.N. SCOR, U.N. Doc. SC/1368 (2001), G.A. Res. 49/60, UN GAOR, 49th Sess., UN Doc. A/RES/49/60 (1994), Article 5; G.A. Res. 46/51, UN GAOR, 46th Sess., UN Doc. A/RES/46/51 (1991), Articles 4, 5; G.A. Res. 36/109, UN GAOR, 36th Sess., UN Doc. A/RES/36/109 (1981); Georges Abi-Saab, *The Proper Role of International Law in Combating Terrorism*, 1 Chinese J. Int'l L. 304; Joo-Cheong Tham and K D Ewing, *Limitations of a Charter of Rights in the Age of Counter-Terrorism*, 31 Melb. U. L. Rev. 462.

¹⁰⁸ S.C. Res. 7167, U.N. SCOR, U.N. Doc. SC/7167 (2008); Amos N. Guiora, *Self-Defense--From The Wild West To 9/11: Who, What, When*, 41 Cornell Int'l L.J. 631.

4.2 THE ACTS OF RAFID AMOUNTED TO THE USE OF FORCE UNDER ARTICLE 2(4) OF THE CHARTER OF THE UN

The use of force as has been given in article 2(4) of the Charter of the UN¹⁰⁹ extends beyond military force.¹¹⁰ Article 51¹¹¹ provides for defense only in cases of armed attack. So if a country applies non-military force on another country, the second party does not have the option of doing anything by way of self defense under the Charter of the UN. In the light of this oversight in the drafting of the UN Charter it is submitted that it must be accepted that the defense under Article 51 must not be restricted to just an armed attack. Thus, it is pleaded that the sending of drones was an act of self defence against the attack by Rafid against his attack on the right to privacy of the Andrenan citizens.

4.3 THE SENDING OF DRONES WAS IN PURSUANCE OF THE PROTECTION OF NATIONALS DOCTRINE AND IS THUS JUSTIFIED

Article 2(4)¹¹² does not prohibit the use of force if it is for the protection of nationals whose lives or health are endangered by another state that is unable to provide them with protection.¹¹³ The right to life includes certain fundamental rights that are essential to the existence of every person. The right to privacy has been recognised as one such right. The only conditions are that such use of force must be necessary and proportional.¹¹⁴

¹⁰⁹ The Charter, *supra* note 9; Robert D. Sloane, *The Cost Of Conflation: Preserving The Dualism Of Jus Ad Bellum And Jus In Bello In The Contemporary Law Of War*, 34 Yale J. Int'l L. 47.

¹¹⁰ George E. Little, *Forced Movement Of Peoples*, 90 Am. Soc'y Int'l L. Proc. 545; Sikander Ahmed Shah, *The U.S. Attacks on Afghanistan: An Act of Self-Defense Under Article 51?*, 6 Seattle J. for Soc. Just. 153.

¹¹¹ The Charter, *supra* note 9; Brian Barbour and Brian Gorlick, *Embracing The 'Responsibility To Protect': A Repertoire Of Measures Including Asylum For Potential Victims*, 20 Int'l J. Refugee L. 533; Robert A. Caplen, *The 'Charlie Brown Rain Cloud Effect' In International Law: An Empirical Case Study*, 36 Cap. U. L. Rev. 693.

¹¹² The Charter, *supra*, note 9.

¹¹³ BRUNO SIMMA, at 132; Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 Int'l J. Refugee L. 4 (1992).

¹¹⁴ Same Varayudej, *A Right To Democracy In International Law: Its Implications For Asia*, 12 Ann. Surv. Int'l & Comp. L. 1; Tom Ruys and Sten Verhoeven, *Attacks By Private Actors And The Right Of Self-Defence*, 10 J. Conflict & Security L. 289.

Such use of force was necessary because other peaceful means had been exhausted and the demand of Andrena for the arrest of Rafid was met with no favourable response. In the light of Rafid's status as a terrorist who had deprived the Andrenan citizens of their right to privacy, it is submitted that the use of force was also proportional.

4.4 THE PROTECTION PROVIDED TO CULTURAL PROPERTY CANNOT BE EXTENDED TO THE TEMPLE WHICH IS A MILITARY OBJECTIVE

Cultural property is protected by the Geneva Convention, 1949.¹¹⁵ The first Protocol Additional to the same provides for an exception to the protection offered by the convention in case the property is a military objective under Article 52(2).¹¹⁶ It is mandatory for such sites to make an "effective contribution" to military action or offer a "definite military advantage". Precautions must be taken to remove civilians from a military objective.¹¹⁷ Measures to safeguard the cultural property must be undertaken by parties to the Hague Convention of 1954 if it is under threat.¹¹⁸ In the current case, drones were sent to the border to locate Rafid, a terrorist. Hence the missiles were shot in order to achieve a definite military advantage. Rubena made no attempt to ensure that Rafid was far from the temple and villages along the border, where military activity had already been witnessed. No safeguards were provided to the temple. There is no mention of any symbol of identification or another measure which would bring the notice of any third party to the fact that the temple indicated must be protected. It is thus submitted that Andrena cannot be held responsible for damage to cultural property.

¹¹⁵ MARIA TERESA DUTLI, PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 34 (1st ed. 2000).

¹¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3, [hereinafter "The 1st Protocol"].

¹¹⁷ Ist Protocol, *ibid.*, Article 58.

¹¹⁸ Convention for the Protection of Cultural Property In the Event of Armed Conflict (7 August 1956), 249 UNTS 240, Article 3.

5. RUBENA MUST PAY DAMAGES FOR THE BREACH OF INTERNATIONAL LAW

The present issue deals with the fundamental question of remedies available to the State of Andrena in the form of restitution, compensation and satisfaction.

5.1 REQUEST FOR DECLARATORY JUDGMENT¹¹⁹

The State of Andrena request this Honourable Court to declare that there was a breach of international legal obligations on the part of the State of Rubena on the grounds that they acted against the provisions of ARFTA¹²⁰ which enables Andrena to claim damages.¹²¹ The State pleads for satisfaction¹²² submits to the court to determine the extent of reparation to the citizens of Andrena.¹²³

5.2 REQUEST FOR THE AWARD OF DAMAGES¹²⁴

Andrena submits that Rubena shall pay to Andrena on its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Rubena's legal obligations to Andrena, in a sum to be determined by the court.¹²⁵

¹¹⁹ CHRISTINE GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 100 (1st ed., 1987) [hereinafter GRAY].

¹²⁰ VCLT, *supra* note 7, Article 26.

¹²¹ G.G. Fitzmaurice, *The Case Concerning I Am Alone*, (1936)BYBIL 82.

¹²² The ILC Draft Articles, *supra* note 45, Article 37. Rainbow Warrior Case (New Zealand v. France), (1990) 82 ILR 499 ; I Am Alone Case, (1935), RIAA, 3.

¹²³ The Statute, *supra* note 7, Article 36; *Iranian Hostages Case*.

¹²⁴ The ILC Draft Articles, *supra* note 45, Article 34.

¹²⁵ Spanish Zone of Morocco claims, 2 RIAA, p. 615 (1923); 2 AD, p. 157; Case concerning the Factory At Chorzow (Claim for Indemnity) (Germany v. Poland), PCIJ, Series A, No. 17, 1928 at 29 [hereinafter *Chorzow Factory Case*]; *Corfu Channel case* at 4, 23.

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A. Claims for Restitution¹²⁶

The obligation under a treaty to enact a uniform law is breached by the failure to enact the law, or a law which goes contrary to the obligation¹²⁷, the affected State can request for reparation.¹²⁸ With the enactment of RPHSA, the Rubenan government caused great monetary losses to Andrena in terms of export revenue by increasing the custom duties on goods exported from Andrena, thus violating the principles laid down in the trade agreement. Andrena requests for juridical restitution in this instance¹²⁹. Only with the annulment of the incompatible legislation can the free trade agreement between the two countries could be carried forward.

B. Claims for compensation¹³⁰

The State of Rubena is obliged to compensate¹³¹ the State of Andrena on the following material grounds:¹³²

¹²⁶ The ILC Draft Articles, *supra* note 45, Article 35; See also *The Iranian Hostages Case* at 44–45; Naomi Roht-Ariazza, *Reparations Decisions And Dilemmas*, 27 *Hastings Int'l & Comp. L. Rev.* 157.

¹²⁷ *Iranian Hostages case* at 30–33, ¶¶ 62–68; *Rainbow Warrior case* at 266–267, ¶¶ 107–110.

¹²⁸ The ILC Draft Articles, *supra* note 45, p.5; MALCOLM SHAW, *INTERNATIONAL LAW* 698, (5th ed. 2003) [hereinafter SHAW]; *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, PCIJ, Ser. A., No. 22.

¹²⁹ The ILC Draft Articles, *supra* note 45, Article 4. See also *Norris v. Ireland*, Eur. Court H.R., Series A, No. 142, ¶ 31 (1988), citing *Klass and Others v. Germany*, *ibid.*, No. 28, ¶ 33 (1978); *Marckx v. Belgium*, *ibid.*, No. 31, ¶ 27 (1979); *Johnston and Others v. Ireland*, *ibid.*, No. 112, ¶ 42 (1986); *Dudgeon v. the United Kingdom*, *ibid.*, No. 45, ¶ 41 (1981); and *Modinos v. Cyprus*, *ibid.*, No. 259, ¶ 24 (1993).

¹³⁰ The ILC Draft Articles, *supra* note 45, Article 36.

¹³¹ GRAY at 107; The Draft Articles, *supra* note 45, Article 31; See also Dinah Shelton, *Righting Wrongs: Reparations In The Articles On State Responsibility*, 96 *Am. J. Int'l L.* 833.

¹³² *Case concerning Certain Phosphate Lands In Nauru (Nauru v. Australia)*, 1992 ICJ 240.

B.1 For Loss Of Profits Due To Leak of Data

Compensation for the loss of profits¹³³ as well as loss of goodwill and profitability of business entities¹³⁴ is common in international law. State responsibility for IPL and Rafid has already been contended. It is submitted in this regard that the theft of client information led serious losses for citizens of Andrena¹³⁵ which affected their earnings and also brought in huge losses in terms of profit and goodwill for SBI. Thus, in view of material losses faced by the nationals and business entities of the Andrena, the Andrena humbly pleads for compensation as a means of full reparation in the present case.

B.2 For Other Loss Of Profits Due To RPHSA¹³⁶

International tribunals have granted compensation for the loss of earning to the nationals of the State¹³⁷. In a number of cases, award for loss of profits has been made with respect to contract-based lost profits¹³⁸. Article XX of the GATT also provides for correction of breach of Agreement or compensation for losses suffered. The State of Andrena, used to export 97% of the commodities which are affected under the purview of the enactment of the RPHSA. As a result of this legislation, huge losses were incurred in the Andrenan market.¹³⁹ In the light of these losses, it is duly requested that Rubena compensate Andrena for the same.

¹³³ *Affaire des navires Cape Horn Pigeon*, James Hamilton Lewis, C. H. White et Kate and Anna, UNRIAA, vol. IX (Sales No. 59.V.5), p. 63 (1902). Similar conclusions were reached in the *Delagoa Bay Railway case*, Martens, vol. XXX, p. 329 (1900); the *William Lee case* Moore, History and Digest, vol. IV, pp. 3405–3407; and the *Yuille Shortridge and Co. case* (Great Britain v. Portugal), Lapradelle–Politis, vol. II, p. 78 (1861). Contrast the decisions in the *Canada case* (United States of America v. Brazil), Moore, History and Digest, vol. II, p. 1733 (1870) and the *Lacaze case*, vol. II, p. 290, at pp. 297–298.

¹³⁴ See decision No. 9 of the UNCC Governing Council in “Propositions and conclusions on compensation for business losses: types of damages and their valuation” (S/AC.26/1992/9), ¶ 16.

¹³⁵ *Compromis*, ¶ 18.

¹³⁶ The ILC Draft Articles, *supra* note 45, Article 36; *Chorzow factory case*.

¹³⁷ *Supra*, note 133.

¹³⁸ *Amco Asia Corporation and Others v. The Republic of Indonesia*, ILR 89, 368; *AGIP SpA v. the Government of the People’s Republic of the Congo*, ILR 67, 318.

¹³⁹ *Ibid*.

- PRAYER -

PRAYER

Wherefore, in the light of the questions presented, arguments advanced and authorities cited, **ANDRENA** requests this Hon'ble Court to find, adjudge and declare that:

1. The Court has jurisdiction over all the claims in this case;
2. Rubena lacked adequate security measures for data protection and caused a breach of privacy of the citizens of Andrena by leaking vital data in the international market;
3. The RPHSA is a violation of the terms of the ARFTA;
4. The use of force against Rubena is justified on grounds of intervention
5. Rubena must pay damages in the form of restitution, compensation and satisfaction for the claims made.

In respectful submission before the International Court of Justice.

Agents for the Republic of **ANDRENA**.