

**TEAM CODE: 141 R**



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**IN THE  
INTERNATIONAL COURT OF JUSTICE  
AT THE  
PEACE PALACE, THE HAGUE  
THE NETHERLANDS**

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**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**

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**MEMORIAL FOR THE RESPONDENT**

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**THE 2009 GNLU INTERNATIONAL LAW MOOT COURT COMPETITION**

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**LIST OF ABBREVIATIONS**

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- 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.
- 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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- United Nations Guidelines Concerning Computerized Personal Data Files, *available at* <http://www.unhchr.ch/html/menu3/b/71.htm>.....7
- Universal Declaration of Human Rights G.A. Res. 217A (III), U.N. GAOR, 3d Sess. U.N. Doc. A/810 (1948) .....23

**STATEMENT OF JURISDICTION**

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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**

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The State of Rubena respectfully asks this Court to decide:

1. Whether the International Court of Justice has jurisdiction over all claims ?
2. Whether Rubena provided for adequate security measures for data protection and breached the privacy rights of the citizens of Andrena?
3. Whether the passing of ASISA, RPHSA and suspension of the trade resulted in a breach of the ARFTA?
4. Whether the breach of the principle of prohibition of use of force was violative of International law?
5. Whether Rubena is entitled to receive damages for all the claims?

**STATEMENT OF FACTS**

<b>TIMELINE</b>	<b>FACTS</b>	<b>REFERENCE OF THE FACTS</b>
	Rubena passed the Rubena Outsourcing Activity Act (ROAA) to ensure that it emerged as a safe harbour for transmission of information to an organisation engaged in outsourcing activities. An Outsourcing Activity Protection Agency (OAPA) was set up under the Act.	Paragraph 4 of the <i>Compromis</i>
1 <sup>st</sup> January 1999	The Andrena- Rubena Free Trade Agreement came into force.	Paragraph 5 of the <i>Compromis</i>
26 <sup>th</sup> 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 <i>Compromis</i>
March 2007	Reports were 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 <i>Compromis</i>
	Class action suits were 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 <i>Compromis</i>
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 Andrenan 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 <i>Compromis</i>
13 September 2007	SBI terminated its contract with IPL due to failure of obtaining the license to export the software.	Paragraph 11 of the <i>Compromis</i>
14 September 2007	Andrena invited all former contracting companies to apply for a license for the transfer of technology.	Paragraph 12 of the <i>Compromis</i>
January 2008	Consultations under ARFTA were held between the two countries without a satisfactory solution.	Paragraph 13 of the <i>Compromis</i>

**1ST GNLU INTERNATIONAL MOOT COURT COMPETITION, 2009**

- STATEMENT OF FACTS-

March 2008	Rubena passed the Rubena Public Health & Safety Act (RPHSA), imposing 150% custom duties on wine and spirits and 75% custom duties on heavy water manufacturing equipment. 97% of the above goods were imported from Andrena.	Paragraph 14 of the <i>Compromis</i>
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 <i>Compromis</i>
20 <sup>th</sup> 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, who was believed to have sought political asylum in Rubena. Rubena did not act and denied involvement of government officials.	Paragraph 17 and 18 of the <i>Compromis</i>
	Stolen data was released in the international market. Suits by Andrenian citizens against SBI and IPL are still pending. The suit by SBI against IPL was dismissed on grounds of remoteness of damage.	Paragraph 18 of the <i>Compromis</i>
	Andrena Times reported about internet credit card theft.	Paragraph 18 of the <i>Compromis</i>
	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 <i>Compromis</i>
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 <i>Compromis</i>
20 <sup>th</sup> August 2008	The Security Council called for a ceasefire and withdrawal of respective troops to <i>status quo ante</i> .	Paragraph 19 of the <i>Compromis</i>

**SUMMARY OF ARGUMENTS**

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**1. INTERNATIONAL COURT OF JUSTICE HAS NO JURISDICTION AND ADMISSIBILITY TO HEAR THE PRESENT MATTER**

The International Court of Justice has no jurisdiction over the present issue since Rubena did not consent to it. Consultation was not adopted prior to approaching this Court. Also, the WTO dispute settlement board should have been approached. In *Arguendo*, the dispute is not admissible because the local remedies have not been exhausted.

**2. RUBENA IS NOT LIABLE FOR DATA PROTECTION AND BREACH OF PRIVACY**

The passing of ASISA is violative of International Law. Rubena had in fact adopted adequate security measures. Further, the acts of Rafid cannot be attributed to the State. Also, the present case involves no violation of intellectual property rights.

**3. ANDRENA HAS ACTED IN VIOLATION OF THE ARFTA**

The present contention seeks to establish the validity of RPHSA and invalidity of ASISA as per the ARFTA which was passed to facilitate commerce between the States.

**4. CLAIMS RELATING TO USE OF FORCE**

The present contention seeks to establish that Andrena violated Article 2(4) of the UN Charter. This could not be justified by the protection of nationals doctrine since it was disproportionate. Rubena cannot be made responsible for the activities of Rafid as per the Tadic case. Shooting of drones has been justified on the basis of Article 51 of the UN Charter. Andrena's responsibility for the denial of justice has also been established.

**5. OBLIGATION OF ANDRENA TO PAY DAMAGES**

This contention seeks to claim remedies for activities of Andrena which resulted in a breach of its international obligations. 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 reparation.

**ARGUMENTS ADVANCED**

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**1. INTERNATIONAL COURT OF JUSTICE HAS NO JURISDICTION AND  
ADMISSIBILITY OVER THE PRESENT ISSUES**

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The contention raises two fundamental issues: *firstly*, whether the International Court of Justice<sup>1</sup> has jurisdiction over the present issue; *secondly*, assuming but not conceding that the ICJ does have jurisdiction, whether the dispute is admissible in the Hon'ble Court.

**1.1 RUBENA DID NOT GIVE CONSENT TO BE BOUND BY THE COURT UNDER ARTICLE 31(1) OF  
THE VIENNA CONVENTION ON THE LAW OF TREATIES**

The jurisdiction of the ICJ depends on the consent of the States.<sup>2</sup> A *Compromis* is a special agreement<sup>3</sup> and hence must be read in light of Article 31(1) of the Vienna Convention on the Law of Treaties<sup>4</sup> which provides that it must be interpreted in good faith. Although a joint *Compromis* was addressed by both Andrena and Rubena to the ICJ, Rubena consented to adjudication upon the matter of preliminary objections and not upon the jurisdiction of the ICJ in itself. In light of the principle of good faith the *Compromis* must be interpreted according to the

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<sup>1</sup> Herein after referred to as the ICJ.

<sup>2</sup> Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras) (Jurisdiction and Admissibility), 1988 I.C.J. 69 at 109 [hereinafter *Armed Action case*]; The case of the Monetary Gold Removed from Rome (Italy v. France, UK and USA) (Preliminary Question) 1954 I.C.J. 19; The case concerning the land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria) (Application for Intervention) 1999 I.C.J. ; Case concerning Certain Phosphate Lands In Nauru (Nauru v. Australia), 1992 ICJ 240; Case Concerning East Timor (Portugal v. Australia) 1995 ICJ 89; Ambatielos case (Greece v. UK), 1952 I.C.J. 28 at 39; Anglo-Iranian Oil Company Case (Iran v. UK), 1952 ICJ 93 at 114. See also, Norman Kogan, *United Nations—Agent Of Collective Security?*, 61 Yale L.J. 1; Davis S. Robinson, *Should The United States Reconsider Its Acceptance of World Court Jurisdiction?*, 79 Am. Soc'y Int'l L. Proc. 95.

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

<sup>4</sup> Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331. [Hereinafter VCLT].

object and intention of the parties<sup>5</sup> which included contesting upon the jurisdiction of this esteemed Court. Rubena was only carrying out the directions of the Security Council as per the Charter of the United Nations<sup>6</sup> so that the ICJ itself could pronounce lack of jurisdiction in accordance with article 36(6) of the Statute of the ICJ.<sup>7</sup> Sending of a letter to the ICJ does not imply that Rubena accepted the jurisdiction of the ICJ.<sup>8</sup>

### **1.2 EXECUTION OF RECOMMENDATION OF THE SECURITY COUNCIL UNDER ARTICLE 36 OF THE UN CHARTER DOES NOT AMOUNT TO ACCEPTANCE OF JURISDICTION**

Article 25 of the Charter of the UN<sup>9</sup> makes it mandatory for all members of the United Nations to carry out the Security Council decisions but this does not translate to acceptance of the jurisdiction of the ICJ.<sup>10</sup> Articles 36(3) and 36(1) of the UN Charter<sup>11</sup> allow the Security Council to recommend dispute settlement by the ICJ in case of a legal dispute between States. But this does not itself establish the jurisdiction of the ICJ<sup>12</sup>. Thus, it is pleaded that Rubena was executing the recommendation of the Security Council, not accepting the jurisdiction of the ICJ.

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<sup>5</sup> Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), PCIJ, Ser. A., No. 22 at 13; Question concerning the Acquisition of Polish Nationality, PCIJ (1923), Series B, No. 7 at 16-17, Exchange of Greek and Turkish Population (Greece v. Turkey), PCIJ (1925), Series B, No. 10, p. 25. Norman Kogan, *United Nations—Agent Of Collective Security?*, 61 Yale L.J. 1.

<sup>6</sup> Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No 7 [hereinafter “The Charter”], Article 25.

<sup>7</sup> Statute of the International Court of Justice, Oct. 24, 1945, 832 U.S.T.S. 993 [hereinafter “the Statute”]; See the Fisheries Jurisdiction case (Spain v. Canada), 1998 ICJ at 432,450; *Armed Action case* at 76. See also, 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.

<sup>8</sup> Maritime Delimitation and Territorial Questions Case (Qatar v. Bahrain) 1994 ICJ 112.

<sup>9</sup> The Charter, *supra* note 6.

<sup>10</sup> Corfu Channel case (U.K. v. Albania) (Preliminary Objections), 1948 ICJ at 15 [hereinafter *Corfu Channel case*]. See also, Alfred P. Rubin, *Ethics and Responsibility in International Law*, 22 Suffolk Transnat'l L. Rev. 335.

<sup>11</sup> The Charter, *supra* note 6.

<sup>12</sup> BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS- A COMMENTARY 626, (2<sup>nd</sup> ed., 2002) [hereinafter BRUNO SIMMA].

### **1.3 ARTICLE 33 OF THE UN CHARTER DOES NOT ESTABLISH JURISDICTION**

Article 33<sup>13</sup> allows for various means for settlement of disputes of which judicial settlement by the ICJ is only one. Even Article 92<sup>14</sup>, which grants the ICJ the status of the principal judicial organ, does not make it obligatory for member States to submit their dispute to its jurisdiction<sup>15</sup>. Thus, in light of the same it is pleaded that the ICJ had no jurisdiction in the present case.

### **1.5 SETTLEMENT OF DISPUTE SHOULD HAVE BEEN UNDER A DISPUTE SETTLEMENT BODY OF THE WORLD TRADE ORGANISATION AS PER ARFTA, GATT, GATS**

According to the Understanding on Rules and Procedures Governing the Settlement of Disputes<sup>16</sup>, disputes of members of the World Trade Organization<sup>17</sup> concerning their rights and obligations under the WTO Agreement must be referred to the Dispute Settlement Body<sup>18</sup> of the WTO.<sup>19</sup> The General Agreement on Trade and Tariffs<sup>20</sup> and the General Agreement on Trade-in-Services<sup>21</sup> also require trade related disputes to be heard by the Dispute settlement system under WTO.<sup>22</sup> Article 95 of the UN Charter<sup>23</sup> gives States the leeway to approach any other tribunal if

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<sup>13</sup> The Charter, *supra* note 6.

<sup>14</sup> The Charter, *supra* note 6.

<sup>15</sup> BRUNO SIMMA at 1149.

<sup>16</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing The World Trade Organisation, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

<sup>17</sup> Herein after referred to as WTO.

<sup>18</sup> See Gibbs, *Continuing the International Debate on Services*, 19 J. WORLD TRADE L. 199, 214-18 (1985); Schott, *Protectionist Threat to Trade and Investment in Services*, 6 WORLD ECON. 195, 212-13 (1982); Davey, William J, *Dispute Settlement in GATT*, 11 Fordham Int'l L.J. 51 (1987-1988).

<sup>19</sup> Braga, Carlos Alberto Primo, *Economics of Intellectual Property Rights and the GATT: A View from the South* 22 Vand. J. Transnat'l L. 243 (1989), p. 249.

<sup>20</sup> Herein after referred to as GATT.

<sup>21</sup> Herein after referred to as GATS.

<sup>22</sup> DSU, *supra* note 16, Article 3 and 4.

<sup>23</sup> The Charter, *supra* note 6.

**- ARGUMENTS ADVANCED-**

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the agreement provides for the same.<sup>24</sup> In the present case Article 16 of the ARFTA<sup>25</sup> clearly provides for resort to the WTO Dispute Settlement Mechanism.

The claims brought up by Andrena that relate with increase in custom duties in Rubena fall under the ambit of Article 3(3) of the Rules<sup>26</sup> and it is thus submitted that the appropriate forum to hear them, in accordance with these Rules, is a Dispute Settlement Body of the WTO, not the ICJ.<sup>27</sup>

**1.6 CONSULTATIONS UNDER ARFTA HAVE NOT BEEN CARRIED OUT**

Article 16 of the ARFTA provides for dispute settlement procedures which explicitly state that only when consultations between the parties fail, can other means as specified in Article 33 of the UN Charter<sup>28</sup> can be adopted. In the present case, no consultation was held between the two parties with regard to the issues pertaining to the passing of the RPHSA, leak of data and the use of force. It is thus humbly submitted that Article 33 of the UN Charter could not be invoked.

**1.7 ARGUENDO- ADMISSIBILITY SHOULD BE DENIED BECAUSE OF LACK OF EXHAUSTION OF LOCAL REMEDIES AND THE DOCTRINE OF CLEAN HANDS**

**A. The case is not Admissible because of Lack of Exhaustion Of Local remedies**

It is a recognised rule that a claim will be inadmissible on the international plane unless the individual or corporation concerned has exhausted the remedies available to him in the State which is alleged to be the author of the injury<sup>29</sup>.

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<sup>24</sup> BRUNO SIMMA at 1179,

<sup>25</sup> *Compromis*, p. 27.

<sup>26</sup> DSU, *supra* note 16.

<sup>27</sup> Davey, William J., *Dispute Settlement in GATT*, 11 Fordham Int'l L.J. 51 (1987-1988).

<sup>28</sup> The Charter, *supra* note 6.

<sup>29</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 492 (6th ed., 2003) [hereinafter BROWNLIE]. See also, 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; Jianming Shen, *The Non-Intervention Principle and Humanitarian Intervention Under International Law*, 7 Int'l Legal Theory 1 2001.

### **A.1 The Dispute Involves Protection Of Individual Interests**

The rule of exhaustion of local remedies can be invoked in case the legal interest of a State is based on diplomatic protection in which the interest of an individual or other legal entity of private law is affected<sup>30</sup>. In the present factual matrix, the theft of data involved violation of the rights of the citizens and the financial corporation of Andrena based on which the State was making a claim. Thus it is humbly submitted that local remedies should have been exhausted before approaching this Hon'ble Court.

### **A.2 Presumption In Favour Of Exhaustion Of Local Remedies until Express Waiver**

Article 15(e) of the ILC Draft Articles states that local remedies need not be exhausted in case the State alleged to be responsible has waived the requirement<sup>31</sup>. However, the case of *Ellettronica Sicula SPA (ELSI)*<sup>32</sup> held that this waiver must be explicit.<sup>33</sup> In the present case, Article 16 of the ARFTA provided for a dispute settlement mechanism that did not expressly mention exhaustion of local remedies<sup>34</sup>. Even Article 17 provided that domestic laws cannot be invoked in case of inconsistency with the Agreement. Since the Agreement did not deal with the issue of protection of privacy rights of the citizens, it is duly submitted that there was no waiver of the rule of exhaustion of local remedies.

### **B. There Is Inadmissibility Because Andrena Has Not Come With Clean Hands**

This doctrine states that one who seeks equity must do equity.<sup>35</sup> Violation of this doctrine has often been used by this esteemed Court as a ground for denying admissibility.<sup>36</sup> In the present

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<sup>30</sup> BROWNLIE at 493. *Ellettronica Sicula SpA (USA v. Italy)*, 1989 I.C.J 15 [hereinafter *ELSI case*].

<sup>31</sup> Draft Articles on Diplomatic Protection with Commentaries, in report of the International Law Commission, Fifty- Eighth Session, U.N. GAOR, 58<sup>th</sup> Sess., UN Doc. A/61/10 (2006) [hereinafter "The Draft Articles"].

<sup>32</sup> *ELSI case*. See also, 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.

<sup>33</sup> H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 *Brit. Y.B. Int'l L.* 221 1951.

<sup>34</sup> *Compromis*, p. 27.

<sup>35</sup> 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*

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factual matrix, Andrena has itself flagrantly violated the fundamental rights of the Rubenan citizens. It is thus the submission of Rubena that they cannot now approach the Court contending that their fundamental rights have been violated.

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**2. RUBENA IS NOT LIABLE FOR BREACH OF PRIVACY AND DATA PROTECTION**

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The contention raises seven fundamental issues: *firstly*, whether ASISA is a valid act; *secondly*, whether the security measures adopted by Rubena were adequate; *thirdly*, whether there is state responsibility on the part of Rubena for the activities of Rafid and *fourthly*, whether there is a breach of intellectual property rights in the present case.

**2.1 ASISA IS CONTRARY TO PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW**

Customary international law<sup>37</sup> requires a free flow of information between States. The protection of data should not inhibit the same.<sup>38</sup> The Andrena Secure Information Systems Act<sup>39</sup>, in the

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*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.

<sup>36</sup> Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence In International Courts*, 83 N.Y.U. L. Rev. 693; Neil Boister, *The ICJ In The Belgian Arrest Warrant Case: Arresting The Development Of International Criminal Law*, 7 J. Conflict & Security L. 293; Aaron Schwabach, *Yugoslavia v. NATO, Security Council Resolution 1244, and the Law of Humanitarian Intervention*, 27 Syracuse J. Int'l L. & Com. 77; Bruce Ackerman and Neal Katyal, *Our Unconventional Finding*, 62 U. Chi. L. Rev. 475; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J.

<sup>37</sup> 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](http://www.oecd.org/document/25/0,3343,en_2649_34255_37571993_1_1_1_1,00.html) (last visited on 8<sup>th</sup> 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.

<sup>38</sup> 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 7<sup>th</sup> March, 2009) [hereinafter "Directive"], Article 1; 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 7<sup>th</sup> March, 2009), Article 12(2); the OECD Guidelines, *Ibid.*, Article 18.

**- ARGUMENTS ADVANCED-**

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name of protection of privacy, obstructed the flow of information between Andrena and Rubena. Hence it is pleaded that it must be invalidated.

**2.2 SECURITY MEASURES REQUIRED BY CUSTOMARY INTERNATIONAL LAW WERE MET BY RUBENA**

The Organisation for Economic Cooperation and Development<sup>40</sup> in its Security Safeguard principle clearly mentions that “*data should be protected by reasonable security safeguards*” against “*loss or unauthorised access, destruction, use, modification or disclosure.*”<sup>41</sup> In the present case, IPL fully met the security and privacy norms of SBI, prior to entering into the agreement<sup>42</sup>. Thus, it is humbly stated that the security provisions in IPL were reasonable enough when compared to the risks of losses.

**2.3 RUBENA CANNOT BE MADE TO CLAIM STATE RESPONSIBILITY FOR RAFID AND IPL SINCE DUE DILIGENCE WAS EXERCISED**

If a State has not exercised due diligence to prevent internationally injurious acts by private persons, they are to be held responsible.<sup>43</sup> However, due diligence was in fact exercised in this case as is reflected in the passing of the Rubena Outsourcing Activity Act ROAA and the setting up of an Outsourcing Activity Protection Agency (OAPA).<sup>44</sup> After this it was IPL’s responsibility not to be duped by forged identity procedures.<sup>45</sup> There was no government involvement in the incident. Moreover, there is no conclusive proof of Rafid’s presence in Rubena. Responsibility can thus not be pinned on Rubena.

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<sup>39</sup> Herein after referred to as ASISA.

<sup>40</sup> Herein after referred to as OECD.

<sup>41</sup> Directive, *supra* note 38; OECD Guidelines, *supra* note 37, Articles 15,16; 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 7 [hereinafter UN Guidelines].

<sup>42</sup> *Compromis*, ¶ 3.

<sup>43</sup> 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.

<sup>44</sup> *Compromis*, ¶ 4.

<sup>45</sup> *Compromis*, ¶ 17.

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In *Arguendo*, private individuals come to be regarded as agents of the State where they are acting on the instructions of or are being directed or controlled by the State.<sup>46</sup> This was later expanded in the *Nicaragua case*<sup>47</sup> with the “effective control test” which requires “total dependency”.<sup>48</sup> This was modified by the *Tadic case*<sup>49</sup> which established the “overall control test”<sup>50</sup> but this was on account of the fact there is a difference between “state responsibility for individual actors and responsibility for the operations of "organised and hierarchically structured group[s] such as a military unit" where effective control may not be necessary.” In general terms, the *Tadic case*<sup>51</sup> has never been by the ICJ.<sup>52</sup> In the *Bosnia Genocide case*<sup>53</sup>, even though the two tests were distinguished, the ICJ pointed out that it was not within the rights of the ICTY to lay down a general rule of state responsibility.

Even if Rubena did communicate with Rafid and he was present in the country, he is an individual actor. Rafid was only apprehended and not proved to be a Rubenan spy. The *Tadic* test cannot be applied on him and Rubena can thus not be made to claim responsibility for him.

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<sup>46</sup> 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), Article 8, [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; Case Concerning the United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ at 3 [hereinafter *Iranian Hostages case*]; 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*]

<sup>47</sup> Military and Paramilitary Activities case (US v. Nicaragua), 1984 I.C.J. at 392,429-4 [hereinafter *Nicaragua case*]

<sup>48</sup> Rachael Lorna Johnstone, *State Responsibility: A Concerto For Court, Council And Committee*, 37 Denv. J. Int'l L. & Pol'y 63.

<sup>49</sup> 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 7<sup>th</sup> March, 2009). [hereinafter *Tadic case*].

<sup>50</sup> Ruti Teitel, *Humanity Law: A New Interpretive Lens On The International Sphere*, 77 Fordham L. Rev. 667; 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.

<sup>51</sup> *The Tadic case*.

<sup>52</sup> Suzannah Linton and Firew Kebede Tiba, *The International Judge In An Age Of Multiple International Courts And Tribunals*, 9 Chi. J. Int'l L. 407.

<sup>53</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro), 46 I.L.M. 188.

## **2.4 STATE RESPONSIBILITY LIES WITH ANDRENA FOR DENIAL OF JUSTICE**

Judicial personnel are organs of the State and their acts are, accordingly, attributable to the State.<sup>54</sup> If the proceedings in the courts of the State are subject to undue delay,<sup>55</sup> or result in a manifestly unjust judgement<sup>56</sup>, it will result in a denial of justice.<sup>57</sup>

The appeal by IPL in the Supreme Court of Andrena has been pending since the middle of 2007<sup>58</sup>, resulting in an undue delay in the administration of justice to IPL. It is pleaded that Andrena must therefore accept State responsibility for denial of justice.

It is also submitted that when SBI sued IPL in the Rubenan courts, the verdict was passed on grounds of 'remoteness of damage'<sup>59</sup> and the provision of this reason prevents the judgement from being manifestly unjust.

## **2.5 THERE WAS NO BREACH OF INTELLECTUAL PROPERTY RIGHTS IN THE PRESENT CASE**

### **A. Information Leaked Does Not Amount To Intellectual Property Under TRIPS**

Article 10(2)<sup>60</sup> of the TRIPS, which deals with compilation of data, specifically states that the data in itself is not counted as intellectual property unless by reason of its selection or

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<sup>54</sup> ILC Draft Articles, *supra* note 46, Article 4.

<sup>55</sup> 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.

<sup>56</sup> 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.

<sup>57</sup> Puente, *The Concept of "Denial of Justice" in Latin America*, 43 Mich. L. Rev. 383, 390-91 (1944).

<sup>58</sup> *Compromis*, ¶ 9.

<sup>59</sup> *Compromis*, ¶ 9.

<sup>60</sup> 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?](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?) (last visited on 7<sup>th</sup> March, 2009), Article 3. 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)

**- ARGUMENTS ADVANCED-**

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arrangement<sup>61</sup>, it results in an intellectual creation.<sup>62</sup> In the current case, the grievance of Andrena relates to the leak of sensitive information and no question of either its selection or its arrangement have been raised. It is thus the respondent's submission that TRIPS and WIPO cannot be applied in the current data leak.<sup>63</sup>

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**3. ANDRENA HAS ACTED IN VIOLATION OF THE ARFTA**

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The present contention deals with two fundamental questions: *firstly*, whether the implementation of ASISA violates the ARFTA and the norms established by the WTO and *secondly*, whether the formulation of the RPHSA is in line with the provisions of ARFTA and international trade law

**3.1 ADOPTION OF ASISA IS VIOLATIVE OF THE PROVISIONS OF ARFTA**

**A. ASISA Hinders The Market Access Of Rubenan Service Providers Under GATS**

In pursuance with the free trade agreement.<sup>64</sup> Article 3 of the ARFTA, provides for the provisions and commitments of the State of Andrena to Rubena.<sup>65</sup> Now it is to be duly noted that Andrena came with a new legislation which contravened with the above mentioned provisions.

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<sup>61</sup> Feist Publications Inc. v. Rural Telephone Service Co., 499 US 340 (1991); Section 8 of Copyright Act, 1987 of Malaysia; 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.

<sup>62</sup> 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.

<sup>63</sup> The same approach was applied in *Kregos v. Associated Press*, 3 F 3d 656.

<sup>64</sup> Rafael Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas.*, 32 Fordham Int'l L.J. 345

<sup>65</sup> Article 3 of the ARFTA along with Article 7.

**- ARGUMENTS ADVANCED-**

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Certain specific commitments are mentioned under General Agreement on Trade and Services<sup>66</sup> for the members to follow other than in the case of the general exceptions<sup>67</sup> provided. Even Andrena has included a schedule under trade in services<sup>68</sup> which includes the financial services to Rubena. When such a standard is kept for supply of service, it is necessary for the developed country, under provisions of GATS, to provide for the increased participation of developing country<sup>69</sup>, with preferential aids from the developed countries.<sup>70</sup> Also, under Article VI.4 of GATS, when a country imposes domestic regulation on the technical standard of the services received they have to prove the necessity for such an act.<sup>71</sup> The impugned legislation act as a barrier for the trade of services for the State of Rubena, since it makes it mandatory for the outsourcing companies to procure a Secure Information System<sup>72</sup> is a sophisticated information processing application commanding a license fee of US \$ 64,000 per user<sup>73</sup>. The requests of the State of Rubena to procure the software were unheard and this further shows that intention of the Government of Andrena was arbitrary and discriminatory.

The State of Rubena contends that Andrena's adoption of ASISA and subsequent changes to Export Administration Regulation of Andrena<sup>74</sup> go against the concept of market access since it

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<sup>66</sup> 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, Article XVI, Article XVII and Article XVIII of GATS.

<sup>67</sup> GATS, *Ibid.*, Article XIV.

<sup>68</sup> Article 3 of ARFTA.

<sup>69</sup> GATS, *supra* note 66, Article IV; Fiona MacMillan, *The World Trade Organization and the Regulation of trade in Environmental Services*, Int. T.L.R. 2001, 7(5)

<sup>70</sup> GATS, *supra* note 66, Article VI ¶4; Markus Krajewski *Public Services and Trade Liberalisation: Mapping the Legal Framework*, 6 J. Int'l Econ. L. 341

<sup>71</sup> The Agreement On Technical Barriers To Trade, *available at* [http://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_e.htm](http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm) (last visited on 8th March, 2009), Article 2.2 [hereinafter "TBT"].

<sup>72</sup> Herein after referred to as SIS.

<sup>73</sup> *Compromis*, ¶ 10.

<sup>74</sup> Herein after referred to as AEAR. *Compromis*, ¶ 10.

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hinders the movement of service between the states.<sup>75</sup> under Article XVI of GATS. Since Rubena happens to be a developing country<sup>76</sup> it acts as a barrier to market access. The equal treatment of the outsourcing companies in Rubena and Andrena also violates the special commitments of a developed country towards a developing country.<sup>77</sup>

**B. ASISA Is A Technical Barrier Under Article 12(9) of TBT**

When a State takes a national measures wherein it has taken specific commitments, the measures should not satisfy the following, the licensing or qualification requirements or technical standards must nullify or impair specific commitments in a manner that could not reasonably have been expected at the time the specific commitments were made, the measure must be (a) not based on objective and transparent criteria; or (b) more burdensome than necessary to ensure the quality of the service; or (c) in the case of licensing procedures, in itself a restriction on the supply of the service.<sup>78</sup> The act of State of Andrena goes contrary to all of the above. It is obligatory for a developed country to facilitate the increasing participation of the developing countries by providing access to technology on a commercial basis<sup>79</sup> and to keep this in mind during consultations.<sup>80</sup> However, Andrena did not perform these obligations since they did not respond Rubena's requests for the procurement of the software.<sup>81</sup> Even though several attempts were made by the outsourcing companies, especially IPL for acquiring the technology, till now, no export of technology has happened between the two countries<sup>82</sup>, which is a direct violation of GATS<sup>83</sup> and ARFTA.<sup>84</sup>

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<sup>75</sup> Panel report on electronic commerce, S/L/74, ¶ 9 .

<sup>76</sup> *Compromis*, ¶ 2.

<sup>77</sup> *Supra* note 75, ¶ 10.

<sup>78</sup> Colin J. Bennett, *Information Policy and Information Privacy: International Arenas of Governance*, 2002 U. Ill. J.L. Tech. & Pol'y 385.

<sup>79</sup> GATS, *supra* note 66, Article IV(1).

<sup>80</sup> TBT, *supra* note 71, Article 12 (9).

<sup>81</sup> TBT, *supra* note 71, Article 12 (3).

<sup>82</sup> *Compromis*, ¶ 11.

<sup>83</sup> GATS, *supra* note 66, Article VI (3).

**3.2. EVIDENCE SUPPLIED BY RUBENA IS PERMISSIBLE ACCORDING TO THE RULES OF THE ICJ**

It is upto the parties to bring to the cognizance of the judge all the facts that may be relevant for the application of the legal norms at stake. The burden of proof<sup>85</sup> to prove that ASISA was intended to harm the outsourcing companies in Rubena and its citizens, lies with Rubena, on principle of repartition. Article 56<sup>86</sup>, though, discourages new evidences, gives an opportunity to submit evidences which are crucial to the argument<sup>87</sup>. Moreover, Article 56 of the Rules of the court<sup>88</sup> clarifies that after the closure of written proceedings, any party can introduce documents that are ‘part of a publication readily available.’ Parties can thus always refer to published material that is in the public domain, even if they have not introduced it during the written proceedings.<sup>89</sup> The publication of the detailed analysis of the efficiency of SIS is a document which is already available in the Rubenan websites. Even if the other party lodges an objection, the court need not reject new evidence, if it finds it to be of crucial relevance for deciding the case at hand.<sup>90</sup> Therefore the State humbly submits that in the *Compromis*, one of the parties asks for a claim of a specific fact with the principle of the ordinary burden of proof.<sup>91</sup> Since in this case it lies with Rubena it requests the court to weigh up the evidences put forward and figure out the relatively better title. Once the incompetence of the legislation is established, presumptions of its ill effects can be reached since “presumptions are conclusions of facts drawn from known facts.’

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<sup>84</sup> Art 3, 7 and 13 of ARFTA.

<sup>85</sup> Case concerning rights of nationals of the United States of America in Morocco (France v. U.S.A.), 1952 ICJ 176.

<sup>86</sup> The Statute, *supra* note 7.

<sup>87</sup> ZIMMERMANN at 1136.

<sup>88</sup> Rules of Court, *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0> (last visited on 7<sup>th</sup> March, 2009), Article 56 ¶ 4.

<sup>89</sup> Rules of the Court, *Ibid.*, Article 50; Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (U.K. v. Libya), 1999 ICJ; Case concerning the East Timor ( Portugal v. Australia), 1996 ICJ at 90, 93 ¶ 9.

<sup>90</sup> ZIMMERMAN at 1134; Rules of the Court, *Id.*, Article 56 ¶ 2; free zones case (PCIJ

<sup>91</sup> *Minquiers and Erehos case*, (U.K. v. France), 1953 ICJ 47.

### **3.3 THE LEGISLATION OF RUBENA PUBLIC HEALTH AND SAFETY ACTS IS IN ACCORDANCE WITH GATT AND ARFTA**

#### **A. RPHSA is Compatible with the Provisions of GATT**

The free trade areas between the States are established under Article XXIV of GATT which creates further concessions in the trade between both the parties<sup>92</sup> and the State recognises that the contracting parties should aid for trade rather than creating barriers.<sup>93</sup> In cases of general exceptions under GATT<sup>94</sup>, State has a discretion to impose measures of safeguards against imports of the other free trade area members.<sup>95</sup> When the State imposes a safeguard measures, it also has to comply to the exceptions under GATT and the safeguard measures under the Agreement of Safeguards.<sup>96</sup>

General exceptions under the ARFTA also allow the States to take measures in view of protecting human health and environment.<sup>97</sup>

Thus the legislative intent behind the enactment of the RPHSA was a non arbitrary, non discriminatory one which was solely aimed for improving the health as well as the environment of Rubena.

#### **B. RPHSA is enacted for public interest and is thus allowed under Article XX of GATT**

There is a specific acknowledgement which, gives WTO Members a large measure of autonomy to determine their own policies on the environment as far as that autonomy is circumscribed only

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<sup>92</sup> Rafael Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas.*, 32 Fordham Int'l L.J. 345

<sup>93</sup> 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 [hereinafter GATT].

<sup>94</sup> GATT, *Ibid.*, Article XX.

<sup>95</sup> US- Line Pipe case (WT/DS/202ABR).

<sup>96</sup> Chios Carmody, *A Theory of WTO Law*, 11 J. Int'l Econ. L. 527

<sup>97</sup> Article 11 of ARFTA

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by the need to respect the requirements of the *General Agreement* and the other covered agreements.<sup>98</sup>

The extra duties on wine and spirit were imposed since it is found by various studies<sup>99</sup> to affect the physical and mental health of humans. The duties on heavy water manufacturing equipment was imposed to discourage the use of it, since it is found to be a threat to living organisms, plant cells and marine species.<sup>100</sup>

State of Rubena justifies the enactment of RPHSA under Article XX on the basis of the three tier test<sup>101</sup>, that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;<sup>102</sup> that the inconsistent measures for which the exception was being invoked were *necessary* since it posed serious injury to fulfil the policy objective; and that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX since the enactment was made without any arbitrary or unjustifiable discrimination.

### **C. RPHSA Was Not In Violation Of Market Access Commitment Under GATT**

Article XIX of GATT gives the provision for a member State to impose emergency action on Imports of Particular products<sup>103</sup> in instances of unforeseen situations.<sup>104</sup> In case of imposition of the above Article, it is necessary that the measures are in consonance with Article 11 of the Agreement on Safeguards. The safeguards should be further in accordance with Article 2 and 4 of the Safeguard measures.<sup>105</sup> It was under this situation that the enactment of RPHSA was done

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<sup>98</sup> Decision on trade and environment, Adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994

<sup>99</sup> Eduardo De Stefani, *et. Al*, *Tobacco smoking and alcohol drinking as risk factors for stomach cancer: a case control studying Uruguay*, Cancer, Causes and Control, Vol. 9. No.3 ( May, 1998), pp. 321- 329.

<sup>100</sup> Stephen Zamenhof and M. Demerec, *Studies on Induction Of Mutations by Chemicals. I. Experiments with Heavy Water ( Deuterium oxide)*, The American Naturalist, Vol. 77, No. 771 (Jul.- Aug., 1943), pp. 380- 384.

<sup>101</sup> *US — Gasoline (WT/DS/2ABR)* at 30–31

<sup>102</sup> *Compromis*, ¶ 14.

<sup>103</sup> Junji Nakagawa, *No More Negotiated Deals? : Settlements Of Trade and Investment Disputes in East Asia*, 10J. Int'l Econ. L. 837.

<sup>104</sup> Korea- Dairy case (WT/ DS/ 98R.)

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under the provisions of Article 6 of the Agreement on Safeguards. Here Rubena justifies that RPHSA was an emergency action taken by the Government so as to reduce the imports of the impugned products from Andrena since it posed a serious injury<sup>106</sup> to the health of its citizens and the environment. The injury due to these products were impended by the State of Rubena and hence the enactment.

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**4. SENDING OF DRONES AND LAUNCHING OF MISSILE BY ANDRENA IS A VIOLATION OF RUBENA'S SOVEREIGNTY AND VIOLATES INTERNATIONAL LAW.**

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The present contention deals with two fundamental questions: *firstly*, whether the use of force by the Republic of Andrena was Violative of the provisions of the Charter of the UN and *secondly*, whether the shooting down of drones by the State of Rubena could be justified according to the rules provided in the UN Charter.

**4.1 USE OF FORCE BY ANDRENA WAS IN VIOLATION OF ARTICLE 2(4) OF THE CHARTER OF THE UN**

Article 2(4)<sup>107</sup> of the Charter of the UN clearly prohibits any use of force which might jeopardize the territorial integrity<sup>108</sup> or political sovereignty of a nation.<sup>109</sup> By sending drones into the

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<sup>105</sup> US- lamb Case (WT/ DS/ 178ABR).

<sup>106</sup> Argentina — Footwear (EC) (WT/DS/ 121ABR).

<sup>107</sup> The Charter, *supra* note 6; 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; Robert J. Delahunty and Antonio F. Perez, *The Kosovo Crisis: A Dostoievskian Dialogue On International Law, Statecraft, And Soulcraft*, 42 Vand. J. Transnat'l L. 15; Kevin H. Govern and Eric C. Bales, *Taking Shots At Private Military Firms: International Law Misses Its Mark (Again)*, 32 Fordham Int'l L.J. 55.

<sup>108</sup> *Nicaragua case* at 14, 109-10; Douglas Kash, *Abducting Terrorists under PDD – 39: Much ado about nothing new*, 13 AM. U. INT'L L. REV. 139 (1997); Virginia Morris & M. Christiane Bourloyasnis-Vrailas, *The Work of the Sixth Committee at the Forty-Eighth Session of the UN General Assembly*, 88 AM. J. INT'L L. 343, 357-58 (1994). The Case of the S. S. Lotus (France v. Turkey), 1927 PCIJ (Ser. A) No. 10, 18. See also, Bowett, Derek, *Reprisals involving Recourse to Armed Forces*, 66 Am. J. Int'l L. 1 (1972); McDougal, Myres S.; *Identification and Appraisal of Diverse Systems of Public Order*, 53 Am. J. Int'l L. 1 (1959).

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Rubenan territory<sup>110</sup>, Andrena violated the territorial integrity as well as political sovereignty of Rubena. They took none of the precautions as were required to be taken by them.<sup>111</sup> It is hence submitted that they violated Article 2(4) of the Charter of the UN.

**4.2 ANDRENA IS GUILTY OF INTERVENTION IN RUBENA’S DOMESTIC AFFAIRS**

Non-intervention in essentially domestic matters is an internationally recognised principle.<sup>112</sup> In the current case, Andrena wanted Rubena to arrest Rafid.<sup>113</sup> On non-compliance, they sent drones to coerce them to do the same<sup>114</sup>. Hence, it is submitted that Andrena forcibly interfered with the decision made by the state of Rubena regarding something that essentially lies within their domestic jurisdiction.

**4.3 THE USE OF FORCE BY ANDRENA CANNOT BE JUSTIFIED ON ACCOUNT OF PROTECTION OF NATIONALS SINCE IT WAS UNNECESSARY AND DISPROPORTIONATE**

Customary international law regards the use of force, even for the protection of nationals as violative of the prohibition on the use of force<sup>115</sup> if it does not meet the requirements of

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<sup>109</sup>General Treaty for the Renunciation of War (the Kellogg-Briand pact), 1928, *available at* [http://www.iiij.org/courses/documents/Kellogg-BriandPact\\_000.pdf](http://www.iiij.org/courses/documents/Kellogg-BriandPact_000.pdf) (last visited on 7th March, 2009); The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, G.A. Res. 2131(XX), U.N. GAOR, 36<sup>th</sup> Sess., U.N. Doc., A/RES/36/103 (1981); the 1970 Declaration on Principles in International Law, G.A. Res. 2625 (XXV), U.N. GAOR, 25<sup>th</sup> Sess., U.N. Doc. A/RES/2625(XXV) (1970).

<sup>110</sup> *Compromis*, ¶ 19.

<sup>111</sup> 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, Article 57 [hereinafter “The 1<sup>st</sup> Protocol”].

<sup>112</sup> Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 3100, 165 L.N.T.S. 17. 1933 (LNTS, 165, p.19), Article 8; Charter of the Organisation of American States, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3624.html> (last visited on 7th March, 2009), Article 15; Charter of the League of Arab States, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3ab18.html> (last visited on 7th March, 2009), Article 8; the Charter of the Organisation of African Unity, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3ab18.html> (last visited on 7th March, 2009), Article 3. ; *Nicaragua case* at 106-7; Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 Int'l J. Refugee L. 4 (1992).

<sup>113</sup> *Compromis*, ¶ 17.

<sup>114</sup> *Compromis*, ¶ 19

<sup>115</sup> Article 2(4), the Charter, *supra* note 7.

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proportionality and necessity.<sup>116</sup> In the current case 152 people lost their lives while 300 others were injured. A 700 year old temple was ruined. All this was done for finding Rafid, whose presence had been explicitly denied by Rubena. It is thus submitted that the attack by the Andrenan missiles was both unnecessary and disproportionate.

#### **4.4 SHOOTING DOWN OF DRONES IS JUSTIFIED**

##### **A. For the Protection of Cultural Property**

Destruction of property<sup>117</sup> and loss of life<sup>118</sup> have been recognized as constituting an armed attack at international law<sup>119</sup>. Cultural property is now protected by the Geneva Convention, 1949.<sup>120</sup> According to Article 4(3)<sup>121</sup> of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, any country is entitled to put an end to any acts of vandalism towards any cultural property. The damage caused by the missiles fired from the Andrenan drones included a temple which had been identified as a World Heritage Site by the UNESCO.<sup>122</sup> It is hence pleaded that Rubena was justified in shooting down the drones to prevent any further damage to the temple.

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<sup>116</sup> 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.

<sup>117</sup> The Geneva Convention relative to the Protection of Civilian Persons in Time of War, (12 August 1949) 75 UNTS 287, Article 53 [hereinafter "Geneva Convention"]; Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 3268, 167 L.N.T.S. 289, 290 Article I [hereinafter "Artistic Treaty"].

<sup>118</sup> Geneva Convention, *Ibid.*, Articles 3(a), 27 and 32.

<sup>119</sup> *Iranian Hostages case* at ¶¶ 14, 57, 64.

<sup>120</sup> Hirad Abtahi, *The Protection Of Cultural property in times of Armed Conflict: The Practice Of The International Criminal Tribunal For The Former Yugoslavia*, 14 Harv. Han. Rts. J. 1.

<sup>121</sup> Wayne Sandholtz, *The Iraqi National Museum and International Law: A duty to protect*, 44 Colum. J. Transnat'l L. 185.

<sup>122</sup> *Compromis*, ¶ 19.

**B. Under Article 51 Of The Charter Of The UN**

Article 51<sup>123</sup> of the Charter of the UN grants to States, the right to self-defense in case of armed attack<sup>124</sup>. Once the Andrenan drones invaded Rubenan territory they were shot down because they had killed 152 people and injured 300, along with damaging a 700 year old temple<sup>125</sup>. This was not an act of aggression but one of self-defence. The damage caused by them was unnecessary.<sup>126</sup> It is hereby contended that they were justified in shooting down the drones.

**4.5 ANDRENA IS GUILTY OF CAUSING DAMAGE TO THE CULTURAL PROPERTY OF RUBENA UNDER ARTICLE 4(1) OF CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT**

Under Article 4(1) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954<sup>127</sup>, States are expected to respect the cultural property of one another and are obliged to prevent any damage to this property in the times of armed conflict.<sup>128</sup> The missiles fired by the Andrenan drones caused damage to a 700 years old temple that had been recognized by UNESCO as a World Heritage Site<sup>129</sup>. It is submitted that Andrena is thus found responsible for violating the above conventions.

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<sup>123</sup> The Charter, *supra* note 7.

<sup>124</sup> J. BRIERLY, THE LAW OF NATIONS 417-18 (6th ed. 1963); D. P. O'CONNELL, INTERNATIONAL LAW 317 (2nd ed. 1970).

<sup>125</sup> *Compromis*, ¶ 19.

<sup>126</sup> The 1<sup>st</sup> protocol, *supra*, note 93, Article 35(2).

<sup>127</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907) 36 Stat 2277, Articles 27 and 56; Convention concerning Bombardment by Naval Forces In time Of War (Hague IX), 205 CTS 345; 1 Bevans 681, Article 5; Artistic Treaty, *supra* note 101.

<sup>128</sup> Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, Articles 8 (2) (a) (iv), 8 (2) (b) (ii) and 8 (2) (b) (ix); The 1<sup>st</sup> Protocol, *supra* note 93, Articles 51,52.

<sup>129</sup> *Compromis*, ¶ 19.

**A. The Temple Is Not A Military Objective as per Article 52 of the First Protocol Additional to the Geneva Convention**

The first Protocol Additional to the Geneva Convention<sup>130</sup> provides for an exception to the protection offered by the convention in case the property is a military objective under Article 52(2)<sup>131</sup>. It is mandatory for such sites to make an “effective contribution” to military action or offer a “definite military advantage”. Such attacks must not be indiscriminate.<sup>132</sup> In the present case, Andrena sent the drones in search of Rafid. They did not even know for sure where he was. No *specific* military advantage was sought. Moreover, the missiles shot down civilians without distinguishing between civil and military objectives and were indiscriminate. It is thus submitted that the sending of drones does not fall under the exception in article 52(2).

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**5. ANDRENA MUST PAY DAMAGES FOR THE BREACH OF INTERNATIONAL LAW**

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

**5.1 REQUEST FOR DECLARATORY JUDGMENT<sup>133</sup>**

Rubena requests this esteemed Court to declare that there was a breach of legal obligations from the part of the State of Andrena on the grounds that they acted against the provisions of ARFTA in violation of International law<sup>134</sup>, which enables the Rubena to claim damages.<sup>135</sup> The State

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<sup>130</sup> *Supra* note 101, article 52(2).

<sup>131</sup> The 1<sup>st</sup> Protocol, *supra* note 93.

<sup>132</sup> Geneva Convention, *supra* note 103, Articles 51(4), 51(5) and 85(4)(d).

<sup>133</sup> CHRISTINE GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 100 (1<sup>st</sup> ed., 1987) [hereinafter GRAY].

<sup>134</sup> VCLT, *supra* note 4, Article 26.

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requests satisfaction<sup>136</sup> from the respondent state for the unnecessary use of force which threatened the sovereignty<sup>137</sup> with the dropping of missiles in habituated areas and also harming the World Heritage temple. The state submits to the court to declare satisfaction<sup>138</sup> from the State of Andrena and determine the extent of reparation<sup>139</sup> to the citizens of Rubena.

## **5.2 REQUEST FOR THE AWARD OF DAMAGES<sup>140</sup>**

Rubena requests that the State of Andrena shall pay to the state of Rubena on its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Andrena's international legal obligations to the State of Rubena, in a sum to be determined by the court.<sup>141</sup>

### **A. Claims for Restitution<sup>142</sup>**

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 obligation<sup>143</sup>, the affected State can request for reparation.<sup>144</sup> With the enactment of

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<sup>135</sup> G.G. Fitzmaurice, *The Case Concerning I Am Alone*, (1936)BYBIL 82.

<sup>136</sup> ILC Draft Articles, *supra* note 46, Article 37.

<sup>137</sup> Rainbow Warrior Case (New Zealand v. France), (1990) 82 ILR 499 at 215 [hereinafter *Rainbow arbitration*]; I Am Alone Case, (1935), RIAA, 3 at 612-5.

<sup>138</sup> *Corfu Channel case*.

<sup>139</sup> The Statute, *supra* note 7, Article 36; *Iranian Hostages Case*; Dinah Shelton, *Righting Wrongs: Reparations In The Articles On State Responsibility*, 96 Am. J. Int'l L. 833.

<sup>140</sup>The ILC Draft Articles, *supra* note 46, Article 34.

<sup>141</sup> 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, p. 29 [hereinafter *Chorzow Factory Case*]; *Corfu Channel case* at 4, 23.

<sup>142</sup> The ILC Draft Articles, *supra*, note 46, Article 35; See also *The Iranian Hostages Case* at 44–45; Naomi Roht-Ariazza, *Reparations Decisions And Dilemmas*, 27 HSTICLR 157.

<sup>143</sup> *Iranian Hostages case* at 30–33, ¶¶ 62–68; *Rainbow Warrior case* at 266–267, ¶¶ 107–110.

<sup>144</sup> Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), PCIJ, Ser. A., No. 22; MALCOLM SHAW, INTERNATIONAL LAW 698, (5<sup>th</sup> ed. 2003) [hereinafter SHAW]; The ILC Draft Articles, *supra* note 46, p.5.

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ASISA, resulted in the job loss of 20,000 personnel and has been estimated to affect the employment of 600,000 people<sup>145</sup> Thus, Andrena violated its responsibility towards Rubena for which it is pleaded that Andrena should amend its laws and restore *status quo*. Rubena requests for juridical restitution<sup>146</sup>. Only with the annulment of ASISA can the free trade agreement between the two countries be carried forward.

**B. Claims for compensation**<sup>147</sup>

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

**B.1 For Use of Force**

States have the right to claim compensation for moral and material losses suffered by the nationals.<sup>148</sup> Numerous other covenants and treaties also provide for the same<sup>149</sup>. The missiles from the Andrenan drones hit two villages, killed 152 people and injured 300. It also destroyed a 700 year old temple. The State of Rubena requests for compensation for the loss of life<sup>150</sup> as *ex gratia*<sup>151</sup> to its citizens and for the injured.<sup>152</sup> The State also requests for the grant of compensation to the loss to the environment by destruction of its heritage site. The Republic of

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<sup>145</sup> *Compromis*, ¶ 11.

<sup>146</sup> The ILC Draft Articles, *supra* note 46, Article 4. See also *Norris v. Ireland*, Eur. Court H.R., Series A, No. 142, ¶ 31 (1988),

<sup>147</sup> The ILC Draft Articles, *supra* note 46, Article 36.

<sup>148</sup> See the *Lusitania* case, UNRIAA, vol. VII (Sales No. 1956.V.5) 32 at 39 (1923) [hereinafter *Lusitania*]. See also, *Chevreau* case, UNRIAA, vol. II (Sales No. 1949.V.1) 1113 at 1141 (1931); the *Gage* case, UNRIAA, vol. IX (Sales No. 59.V.5) 226 (1903).

<sup>149</sup> Universal Declaration of Human Rights G.A. Res. 217A (III), U.N. GAOR, 3d Sess. U.N. Doc. A/810 (1948), Article 3.

<sup>150</sup> *Corfu Channel Case*.

<sup>151</sup> S.C. Res. 687, U.N. SCOR, U.N. Doc. S/RES/687 (1991).

<sup>152</sup> *Lusitania*

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Andrena is also liable to pay for the damage caused the property of its citizens in the two villages<sup>153</sup>.

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<sup>153</sup> S.C. Res. 290, U.N. SCOR, U.N. Doc. S/RES/387 ( 1971); S.C. Res. 387, UN. SCOR, U.N. Doc. S/RES/387 (1976).

- PRAYER -

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**PRAYER**

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

- I. the Court does not have jurisdiction over all the claims in this case;
- II. the security measures of Rubena were adequate and the breach of privacy by Mr. Rafid cannot be attributed to the state of Rubena;
- III. the ASISA is a violation of the terms of the ARFTA;
- IV. the use of force by Andrena violated Article 2(4) of the UN Charter;
- V. Andrena 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 State of **Rubena**.