

TEAM CODE – 120 R

**2ND GNLU INTERNATIONAL MOOT COURT COMPETITION,
2010**

IN THE INTERNATIONAL COURT OF JUSTICE

PEACE PALACE, THE HAGUE

THE NETHERLANDS

**THE CASE CONCERNING THE DIFFERENCES BETWEEN
THE STATES ARISING OUT OF THE INTERPRETATION OF
THE RAZVANA FREE TRADE AGREEMENT.**

**THE INDEPENDENT REPUBLIC OF AZANIA
APPLICANT**

V.

**THE REPUBLIC OF ENRODA
RESPONDENT**

MEMORIAL FOR THE RESPONDENT

THE REPUBLIC OF ENRODA

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List of Abbreviations

¶	Paragraph
ADA	Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994. Also known as Anti Dumping Agreement
ARO	Advance Release Orders
BTAs	Border Tax Adjustments
CCRA	Commissioner of Customs and Revenue
CO2	Carbon Dioxide
CVD	Countervailing Duty
DEPB	Duty Entitlement Pass Book
FTZ	Free Trade Zone
GATT	General Agreement on Tariffs and Trade, 1994
GOI	Government of India
OECD	Organization for Economic Cooperation and Development
PPM	Process and Production Methods
RATG	Razvana Agreement on Trade in Goods
RFTA	Razvana Free Trade Agreement
RSCM	Razvana Agreement on Subsidies and Countervailing Measures
SCM	Agreement on Subsidies and Countervailing Measures
SION	Standard Input- Output Norms
TVA	Total Value Added
UNFCCC	United Nations Framework Convention on Climate Change
C	
WTO	World Trade Organization

Index of Authorities

ARTICLES, PAPERS AND REPORTS

1. Hoda, Anwarul, Agreement on Subsidies and Countervailing Measures: Need for clarification and improvement, Working Paper No. 101, May, 2003, Indian Council for Research on International Economic Relations.
2. GATT, Basic Instruments and Selected Documents, June 17, 1987, 34th Supplement (1988).
3. Trade and Climate Change, report by the United Nations Environment Programme And the World Trade Organization, 2009

APPELLATE BODY REPORTS

1. *Brazil — Aircraft, WT/DS46/AB/R*
2. *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS 135/AB/R.*
3. *Thailand — H- Beams, WT/DS122/AB/R*
4. *United States – Import Prohibition of Certain Shrimp and Shrimp Products, , WT/DS58/AB/R*
5. *United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R*
6. *United States - Standards for Reformulated and Conventional Gasoline, WT/DS 2/AB/R*

PANEL REPORTS

1. *Brazil — Aircraft (Article 21.5 — Canada II), WT/DS46/RW/2*
2. *Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS 332/R*
3. *Canada — Aircraft Credits and Guarantees, WT/DS222/R.*
4. *EC — Bed Linen, WT/DS141/RW*

5. *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS 135/R*
6. *Guatemala — Cement, WT/DS156/R*
7. *Mexico — Corn Syrup, WT/DS132/R*
8. *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Panel Report, WT/DS 58/R*
9. *United States - Restrictions on Imports of Tuna, WT/DS29/R*
10. *US — Exports Restraints, WT/DS194/R*
11. *US — Softwood Lumber IV, WT/DS277/R*

TREATIES AND AGREEMENTS

1. Anti- Dumping Agreement
2. Agreement on Subsidies and Countervailing Measures

WEBSITES

1. http://www.wto.org/english/res_e/booksp_e/analytic_index_e/subsidies_01_e.htm#article2
2. (as visited on 18.12.2009 at 1500 hrs)
3. http://www.wto.org/english/tratop_e/envir_backgrnd_e/c3s3_e.htm,
(as visited on 12.12.2009 at 1500 hrs.)

Statement of Jurisdiction

The Independent Republic of Azania and the Republic of Enroda have submitted the present dispute to the International Court of Justice pursuant to the Joint Notification, dated August 1, 2009 along with the Compromis dated July 15, 2009.

The Court has jurisdiction to decide the present case under Article 36 of the Statute of the International Court of Justice, 1950 read along with Article 27 of the Agreement on Settlement of Disputes arising out of the Razvana Free Trade Agreement.

The Court's jurisdiction has been invoked under the provisions of Article 40(1) of the Statute of the International Court of Justice, 1950.

The Parties have agreed to act in accordance with the findings and conclusions of the Court.

Statement of Facts

BACKGROUND:

The continent of Razvana comprises the independent nation states of Elduars, Randaz, Senteranna, Azania and Enroda, all located in close geographical proximity to each other facilitating regional trade and interdependence amongst states in the region. These nation states concluded the Razvana Free Trade Agreement (RFTA) in 1997 to regulate their regional trade.

The Republic of Azania (“Azania”) is a developing nation rich in natural resources, however their commercial exploitation started late in the 1950’s. It was not industrialized and there existed large scale violence and corruption till the 1970’s. The Republic of Enroda (‘Enroda’) is a developed nation neighbouring Azania. It is much larger in size, however has extremely limited natural resources. For centuries, it has imported Diamonds and Iron ore from Azania and converted it into finished product at very low prices leading to particularly high profit margins of Enrodean enterprises.

INDUSTRIALIZATION OF AZANIA:

The Azanian Government through the Industrial Policy 1976 put forth a framework of industrialization in order to increase the number of industries especially in iron and steel to ten times its present number. As a result, the Iron ore exported to Enroda at cheap prices began to be consumed in the domestic industry of Azania. This led to the enormous growth and economic prosperity in Azania. The per capita income which had been abysmally low increased three times over a short period of ten years. However, this led to degradation of the environment as the energy resources for the industry was met through the burning of coal and natural gas in the country making one of the largest emitters of green house gas.

ENVIRONMENTAL OBLIGATIONS:

Azania signed and ratified the United Nations Framework Convention on Climate Change, 1995 as a non Annex I member country. The Government in 2003 introduced the Climate Change Executive Order, 9288 which introduced certain regulations with an objective of limiting emission of green house gases.

As a result of Azania's industrialization, the supernormal profits made by manufacturers in Enroda have eroded and by 1992 exports of steel from Azania had started to compete with exports from Enroda in third country markets. Furthermore as a result of the environmental regulations and Carbon tax imposed, the production costs of the Enrodean industries increased.

FREE TRADE ZONES:

In order to revive the Enrodean supremacy in the international steel market, the government set up Free Trade Zones ("FTZ") regulated by the Free Trade Zones Act 2000, passed by the Parliament of Enroda. Manufacturing units located in the FTZ would be allowed to import inputs used in the manufacturing process without payment of customs duty or any duty applicable on imports as long as the final product was destined for exports. As a result, the cost of production decreased significantly while exports increased by almost five times. The cheap exports from Enroda started to displace steel manufactured in Azania not only from third country markets but also the domestic market in Azania.

COUNTERVAILING DUTY:

Due to the surge in steel imports from Enroda, the Azanian Commission, on the domestic manufacturers of Azania initiated a countervailing duty investigation against steel import from Enroda. Probing allegations of prohibited export subsidies under the Razvana Agreement on Subsidies and Countervailing Measures as well as allegations that the FTZ ACT did precious little to ensure that the duty exempt raw materials imported into the FTZ was used for the manufacture of destined exports thereby avoiding the possibility of excess remission.

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The Commission determined that the exemption of duty on raw materials for steel manufactured in an FTZ did indeed comprise a prohibited export subsidy. It was further established that the subsidized import of steel from Enroda had caused material injury to the domestic industry of Azania. A countervailing duty of sixty percent – eighty percent was imposed on three exporters of steel products from Enroda.

The Trade Minister of Enroda in a sharp response to the same affirmed that duty exemption in goods destined for exports were accepted norms of international trade accepted by international trade organizations. Consultations were initiated between Enrodean and Azanian authorities; however they did not make much headway with both countries remaining adamant about their positions.

IMPOSITION OF CARBON TAX:

On 25th November 2008 the Carbon Tax Regulation Act was passed by the Enrodean Parliament, providing for the imposition of a carbon tax on imports of goods equivalent to the level of tax charged to the domestic industry of the like goods. This tax was to be charged to all nations included in Annex I of the UNFCCC, developed nations not part of the UNFCCC as well as developing nations in an advance stage of development including Azania.

The Minister for Trade of Azania in response described the Carbon Tax Regulation Act as nothing more than a disguised barrier to trade, a violation of the scheduled commitments undertaken by Enroda and a reaction to the justified steps taken by Azania to impose countervailing duties on subsidized steel from Enroda.

SETTLEMENT OF DISPUTE:

Hoping to arrive at an amicable settlement to the trade dispute, consultations, negotiations and mediations were held between the two states, however they made little headway. Following their failure to resolve the dispute both parties agreed to submit their dispute to the International Court of Justice on March 2009 and be bound by the Judgment of the court.

Issues Raised

1. The duty exemptions on import of raw materials for the steel industry is not a subsidy prohibited under the Razvana Agreement on Subsidies and the imposition of countervailing duties is inconsistent with the provisions of the Agreement.

- 1.1. The import duty exemption is not a subsidy
- 1.2. The import duty exemption is not a specific subsidy.
- 1.3. The import duty exemption is not a prohibited subsidy.
- 1.4. Countervailing duties cannot be imposed on the import duty exemptions in question.

2. The imposition of a border tax on imports is consistent with the market access commitments undertaken by Enroda.

- 2.1. That the imposition of a border tax on imports is consistent with Article IV.2 of the Razvana Agreement on Trade in Goods.
- 2.2. That the imposition of a border tax on imports is consistent with Article III.2(a) of the Razvana Agreement on Trade in Goods.
- 2.3 Arguendo, the imposition of a border tax on imports is inconsistent with Enroda's commitments under the Razvana Agreement on Trade in Goods, it is still justified under the General Exceptions contained therein.

Summary of Arguments

1. The duty exemptions on import of raw materials for the steel industry is not a subsidy prohibited under the Razvana Agreement on Subsidies and the imposition of countervailing duties is inconsistent with the provisions of the Agreement.

1.1 The import duty exemption is not a prohibited subsidy.

The import duty exemption is not a subsidy under Article 1 of the Agreement as it confers upon the recipient only a discretionary benefit. Also it is not a prohibited export subsidy under Article 2.3 of the Agreement as it is covered under the exceptions to item (i) of Annex I. This is because the import duty exemption is in compliance with the guidelines of Annex II relating to consumption of inputs in the manufacturing of exported products. And hence prevents excess remission.

1.2 Countervailing duties cannot be imposed on the import duty exemptions.

The imposition of countervailing duties is inconsistent with the provisions of the Agreement as there exists no subsidy, also there exists no material injury that has been caused by the Enrodean imports to the Azanian domestic market and thus, there is also the consequent absence of a causal link between the material injury and the imports in question. In addition to this, the proper procedure for conducting the countervailing duty investigation has not been followed.

2. The imposition of a border tax on imports is consistent with the market access commitments undertaken by Enroda.

2.1. That the imposition of a border tax on imports is consistent with Article IV.2 of the Razvana Agreement on Trade in Goods.

The word “indirectly” contained in Article IV.2 can be interpreted as allowing the use of border tax adjustments on taxes that are charged on inputs used during the production process of a particular product, i.e. applied indirectly to products. Thus, a tax on the energy or fuels used in the production process or the CO₂ emitted during production (neither of which are

physically incorporated in the final product) could therefore be considered to be applied indirectly to products. Further the border tax on imports of products has been applied in conjunction with the carbon tax imposed on the domestic producers of Enroda. Hence the border tax on imports is consistent with Article IV.2 of the RATG.

2.2. That the imposition of a border tax on imports is consistent with Article III.2(a) of the Razvana Agreement on Trade in Goods.

From a plain reading of Article III., it is clear that a fossil fuel such as coal or natural gas used up in the process of production of a product can be made subject of a charge as it nothing but *an article from which the imported product has been manufactured or produced in whole or in part*. Further, it has been held that the GATT Article II.2(a) [which is in pari materia with Article III.2(a) of the RATG] allows WTO members, at any time, to impose on the importation of any product a charge equivalent to an internal tax (e.g. a border tax adjustment). Thus the border tax on imports is consistent with Article III.2(a) of the RATG.

2.3. Arguendo, the imposition of a border tax on imports is inconsistent with Enroda's commitments under the Razvana Agreement on Trade in Goods, it is still justified under the General Exceptions contained therein.

Assuming but at no point admitting, that the imposition of a border tax on imports is inconsistent with Enroda's commitments under the Razvana Agreement on Trade in Goods, it is still justified under the General Exceptions contained in Article XX therein.

2.3.1. That the measure of imposing border tax on imports falls under the exceptions under Article XX of the Razvana Agreement on Trade in Goods.

Policies aimed at achieving the environmental objective of fighting global warming and climate change through reducing carbon emissions and encouraging shift to cleaner fuels (such as Natural Gas and Bio fuels) in Enroda and elsewhere in the world, would fall under Article XX(b), as they intend to protect human beings from the negative consequences of climate change (such as flooding or sea-level rise), or under Article XX(g), as they intend to conserve not only the planet's climate but also certain plant and animal species that may disappear because of global warming. Lastly, the second requirement of Article XX(g) too has been met as the measure affects both the imported and domestic products alike.

2.3.2. That the measure of imposing border tax on imports is consistent with the introductory paragraph of Article XX of the Razvana Agreement on Trade in Goods.

It is therefore humbly submitted before this Hon'ble Court that the measure of imposing a border tax on imports has fulfilled the requirements of the chapeau of Article XX as it has not been applied in a manner which would constitute (1) a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or (2) a disguised restriction on international trade. Thus the imposition of border tax on imports is consistent with Article XX of the RATG.

Arguments Advanced

1. The duty exemptions on import of raw materials for the steel industry is not a subsidy prohibited under the Razvana Agreement on Subsidies and the imposition of countervailing duties is inconsistent with the provisions of the Agreement.

It is contended that the duty exemptions on raw materials is not a subsidy under the Razvana Agreement on Subsidies (hence forth referred to as the Agreement) as the Enroda Free Trade Zone Act (henceforth referred to as the FTZ Act) does not “as such” makes a mandatory conferral of benefit. Moreover, the duty exemptions in this case is not a prohibited export subsidy as it is an exception to Item (i) of Annex I to the Agreement (Illustrative List of Export Subsidies) as the legislation follows the guidelines on Consumption of Inputs used in the manufacture of Exported products under Annex II, thereby, prevents excess remission of import charges and thus is not being covered by item (i). The countervailing duty imposed against the exemption of import charges on the inputs used for the manufacture of exported goods is inconsistent with the provisions of the Agreement as the measure in question is not a specific subsidy and also there is no material injury caused due to the exemption.

1.1. The import duty exemption is not a subsidy

Article 1.1 of the Agreement defines a Subsidy¹. In *Brazil — Aircraft case*,² the Appellate Body indicated that “a ‘financial contribution’ and a ‘benefit’ as two separate legal elements in Article 1.1 of the *SCM Agreement*, which *together* determine whether a subsidy *exists*”.³

¹ A subsidy as defined by Article 1.1, in the relevant part, is:

“1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), i.e. where:...

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

...and

(b) a benefit is thereby conferred.”

² Appellate Body Report on *Brazil — Aircraft*, WT/DS46/AB/R

³ Appellate Body Report on *Brazil — Aircraft*, WT/DS46/AB/R ¶ 157; also affirmed in Panel Report on *Brazil — Aircraft (Article 21.5 — Canada II)*, WT/DS46/RW/2 ¶ 5.18; Panel Report on *US — Exports Restraints*, WT/DS194/R ¶ 8.20; Panel Report on *Canada — Aircraft Credits and Guarantees*, WT/DS222/R.

As regards the “benefit conferred” element, the mandatory/ discretionary distinction should be applied. Under this distinction— “employed in both GATT and WTO cases over the years— only legislation that requires a violation of GATT/WTO rules could be found to be inconsistent with those rules.”⁴

In this regard the panel in *United States — Export Restraints case*⁵ stated:

“There is a considerable body of dispute settlement practice under both GATT and WTO standing for the principle that only legislation that mandates a violation of GATT/WTO obligations can be found as such to be inconsistent with those obligations”

In the light of the distinction between mandatory and discretionary legislation it is contended that the import duty exemption for inputs imported for manufacture of export products under the Enroda Free Trade Zones Act, 2001 does not mandate a conferral of benefit, rather conferral of benefit in adherence to the Act is discretionary and not obligatory.

The Panel on *Canada — Aircraft Credits and Guarantees*⁶ clarified that:

“to satisfy the ‘benefit’ element of Article 1.1 of the SCM Agreement for purposes of a challenge to [the programme at issue] as such, [the complainant] must show that the programme requires conferral of a benefit, not that it could be used to do so, or even that it is used to do so.”

In the present case it is alleged by the Applicants that the FTZ Act is conferring benefit upon the manufacturers of export products in the FTZs as they get an import duty exemption on consumed inputs. However, it maybe stated over here that the benefit is not mandatory. The act specifically provides that all the exporters who wish to avail the import duty exemption must execute a Bond-cum-Legal undertaking accepting their duties and liabilities for availing the exemption. Thus, if any manufacturer does not wish to avail the duty exemption scheme then he may not do so and no advantage shall be conferred on him by way of this legislation. Thus, this duty exemption legislation does not require (mandate) conferral of a benefit but it only provides for it and the benefit maybe used or may not be used, i.e. it is discretionary.

⁴ Panel Report on *Canada — Aircraft Credits and Guarantees*, WT/DS222/R

⁵ Panel Report on *US — Exports Restraints*, WT/DS194/R

⁶ Panel Report on *Canada — Aircraft Credits and Guarantees*, WT/DS222/R

Owing to the fact that the FTZ Act does not make the conferral of benefit mandatory the import duty exemption scheme cannot be considered to be a subsidy as benefit is not mandatory but merely optional.

The same reason could be used to reason out whether a particular legislation mandates export subsidies or not. If the prohibited export subsidies are discretionary then the legislation cannot be said to be violative of Article 2.3 of the Agreement, only when the usage of the prohibited export subsidy is mandatory will it become violative of Article 2.3 of the Agreement.⁷

1.2. The import duty exemption is not a specific subsidy

Article 1.2 of the Agreement states:

“1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.”

Therefore, even if for arguments sake it is assumed that the exemption is a subsidy under Article 1.1 of the Agreement for it to be subject to the provisions of Part II (Prohibited Subsidies) and Part V (Countervailing Measures) it is necessary to establish the specificity of the subsidy.

Article 2 in the relevant provision, Article 2.3, states that “any subsidy falling under the provisions of Article 3 shall be deemed to be specific.” Article 3 defines Prohibited Subsidies. Therefore, if the import duty exemption is established not to be a prohibited subsidy it shall also establish that the exemption is not a specific subsidy, thus the provisions of Part V relating to Countervailing Measures would be inapplicable.

1.3. The import duty exemption is not a prohibited subsidy

It is contended that the impugned duty exemption does not fulfil the definition of prohibited subsidy under Article 3 of the Agreement. Article 3 states in the relevant part:

“3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

⁷ The Panel on *Canada — Aircraft Credits and Guarantees*

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(a) *subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I*⁸;

(b) *...*”

Thus, the Article provides that all subsidies conditional upon export performance should be considered prohibited subsidies. However, footnote 5 of the Agreement in this regard mentions that “measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement”. This provision clearly states that exceptions provided for in the Annex I (Illustrative List of Export Subsidies) shall not be taken to be prohibited subsidies.

It is contended that the import duty exemption in the present instance falls under the exception mentioned in Item (i) of Annex I of the Agreement. Item (i) states:

“(i) The remission or drawback⁹ of import charges¹⁰ in excess of those levied on imported inputs that are consumed¹¹ in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.”

It is amply clear that Item (i) intends to only classify those import charge/duty remissions/drawbacks as export subsidies that are “in excess of” or more than the actual

⁸ Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

⁹ Footnote 58 of the Agreement states: "Remission or drawback" includes the full or partial exemption or deferral of import charges.

¹⁰ Footnote 58 of the Agreement states: The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports.

¹¹ Footnote 58 of the Agreement states: Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

import charges levied on the import of inputs consumed in the manufacture of exported goods. The Item implies an exception, the exception being that imports duty exemptions that are “not in excess” of the actual import charges on the inputs shall not be taken to be as export subsidies and thus owing to footnote 5 of the Agreement this exception shall not come be a Prohibited subsidy within the meaning of this Agreement. The item also provides for substitution drawback schemes to be an exception to the item (i) under certain conditions, however, in this instance they are not a matter of contention.

In order to ascertain whether the import duty exemptions in a particular case are in excess of the import charges on inputs the Item states that it ought to be interpreted in accordance with Annex II (guidelines on consumption of inputs in the production process).

Annex II, Part I in paragraph 1 states that “drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste)”. It further establishes that those exemptions that maybe up to the partial or full value (and are “not in excess”) of the import charges on inputs are not considered to be prohibited export subsidies and are exceptions under Annex I.

In Part II of Annex II detailed guidelines have been laid down for the investigating authorities to determine in countervailing duty investigations that the prior stage indirect tax rebate schemes or remission or drawback of import charges do not provide for excess rebate. It must be first determined if the Member country concerned has in place and applies an effective system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a procedure is applied, the investigating authorities have to examine them to see if reasonable, effective.¹²

In the Council Regulation (EC) No 573/2002 of 3 April 2002 on imports of Sulphanilic acid from India the EEC did not impose countervailing duty (CVD) on the basis of exemption of import duties on raw materials as it was found during investigation that the exemption was granted in accordance with Annexes I to III of the basic Regulation. Thus, it reiterated the

¹² Hoda, Anwarul, Agreement on Subsidies and Countervailing Measures: Need for clarification and improvement, Working Paper No. 101, May, 2003, Indian Council for Research on International Economic Relations

fact that if import duty exemptions are in accordance with the guidelines in Annex II it cannot be countervailable.¹³

Emphasising on the sufficiency of proper records to comprise a proper and reasonable system to prevent excess remission in the final determination during a countervailing duty investigation in *Certain Stainless Steel Round Bar in September 2000* the CCRA in Canada did not hold the Duty Entitlement Pass Book (DEPB) Scheme of India to be countervailable *in toto*. It held that the exporters of stainless steel round bar not only imported the inputs but also maintained sufficient records to enable the investigating authority to relate the DEPB credits on the goods exported with the duty paid on the inputs imported and used to produce exported goods. Based on these records the CCRA imposed CVD only to the amount of excess refund.¹⁴

As far as imports of raw materials on a duty free basis is concerned the Indian EOU/EPZ/EHTP/STP scheme has all the elements of the framework envisaged in item (i) of the Illustrative List and Annex II of the ASCM for non-excessive remission of import charges. These raw materials are imported for being used in the production for exports, as the units undertake to export their entire production. Even if they are permitted to supply to the domestic tariff area it is only after payment of full duties. Supplies to the domestic tariff area are no different from exports and they should be treated as exports. In light of this the EEC has not countervailed against the scheme for exemption of duty on raw materials where the case has been presented properly and verifiable information furnished.¹⁵

In the present instance, Enroda has followed the guidelines mentioned in Annex II to ensure that no excess remission takes place. It has put into place a proper system under the FTZ Act in this regard. The Act requires every FTZ Act manufacturer to undertake a legal obligation to maintain proper accounting of all kinds of goods including those imported duty free and to achieve net foreign exchange. The condition of achieving net foreign exchange imposes on all manufacturers the liability to export the manufactures goods thus ensuring that all manufacturers use the duty free imports only for manufacturing exports.

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

Secondly, the Act imposes an obligation on manufacturers for proper accounting of all duty free imports, their utilization, by-products, waste/scrap left in the process, the amount of goods exported, and those supplied to domestic tariff area. All this accounting is required to be done financial year-wise and it also ought to be quantitative thus ensuring at all steps of manufacturing and export existence of proper transparency, of verifiable character, as to the usage of duty free imports.

Thirdly, in case of non-usage of duty-free goods or their theft the manufacturer at all times is required to pay back the amount of exemption that he had received.

These methods employed by Enroda are methods effective and reasonable enough to ensure that there takes place no excess remission with regard to import duty exemptions. They provide for transparency, proper accounting of a verifiable character and also impose on the manufacturers the duty to pay back any excess remissions taking place. Thus, the FTZ Act follows the guidelines mentioned in Annex II of the Agreement and hence is not a prohibited export subsidy.

Hence, it is submitted that the impugned import duty exemptions are not prohibited export subsidies. Owing to the fact that they are not prohibited subsidies they do not satisfy the definition of Specific Subsidy as under Article 2.3 of the Agreement. Thus, the impugned duty exemption is a non-specific subsidy. In the light of this conclusion the impugned duty exemption cannot be subjected to provisions of Part V (Countervailing Measures) of the Agreement as mentioned under Article 1.2 of the Agreement.

1.4. Countervailing duties cannot be imposed on the impugned import duty exemptions

For the application of a countervailing duty the following three points are essential to be established:

- 1.) The existence of a subsidy
- 2.) An injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement
- 3.) A causal link between the subsidized imports and the alleged injury.

1.4.1. The Existence of a subsidy

It has already been established that no subsidy exists within the meaning of “specific subsidy” and hence the provisions relating to Countervailing duties cannot be applied in the instant case and its application by the Applicants is unjustified. Moreover, in the absence of a subsidy no material injury can be alleged.

1.4.2. An injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement

Arguendo, even if a subsidy is assumed to exist no injury has been caused by the subsidy. As per Article 15.1 the determination of material injury shall depend on the following two factors:

- i) a) The volume of subsidized imports and
 - b) Their effect on the like products in the domestic market
- ii) The impact of these imports on the domestic producers

It may be noted that Article 15.1 has been worded in a way which depicts that to determine the material injury caused to a domestic industry it is necessary to establish the existence of both the above mentioned conditions in the manner prescribed by the subsequent paragraphs in the Article. Thus, to disprove the existence of any of the two conditions would in effect disprove the existence of a material injury by the duty exempted imports to the domestic industry of Azania.

It is imperative over here to mention that it in decisions like that by the Panel on US — Softwood Lumber VI case¹⁶ the clauses in the Agreement on Subsidies and Countervailing Measures (which is *pari materia* to the Agreement) and the Anti Dumping Agreement (ADA) dealing with the determination of material injury and have been interpreted in the same fashion leading to the conclusion that decisions regarding interpretation of determination of injury concerning either of the Agreements maybe used as a valid interpretation under the other agreement also.

¹⁶ Panel Report on *US — Softwood Lumber IV*, WT/DS277/R

1.4.2.1.1.(a). The volume of the subsidised imports

According to Article 15.2 regarding the volume of subsidised imports “the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member”.

It maybe stated over here that there are no explicit facts state that would clearly imply that there had been a “significant increase” in the imports from the Enroda. Thus, it would be incorrect to deduce “significant increase” in volume of allegedly subsidised imports when there are no facts to state the same.

1.4.2.1.1.(b). Their effect on the like products in the domestic market

Article 15.2 mentions that the effect of the subsidised imports on the like products in the domestic market shall be determined by considering “whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member.”

As regards whether there was any price undercutting by the subsidised imports as compared to the price of Azanian products the facts do not ascertain whether there had been any price undercutting or not. The mention of the word “cheap” in relation to imports from Enroda does not go on to signify that Enrodean imports had undercut their prices. “Cheap” in this regard has been used only to signify that the Enrodean products were “low in price”. By no means does it go on to prove that they were lesser in price than the Azanian domestic products.

This can also be ascertained by the fact that the word “cheap” is not an adjective of comparative degree and thus it does not compare the prices of the Enrodean product with that of Azania but merely states the innate quality of Enrodean imports, that of being low in price. Had the facts wanted to state that the Enrodean products were lower in price than the Azanian products then the phrase used to describe the price of Enrodean imports would have been “cheaper than”. Had this been the case there might have been a question of price undercutting by the Enrodean imports but in the present circumstance no such question arises.

Thus, the Enrodean imports have not had any effect of price undercutting as compared to the Azanian domestic imports. Hence, as the condition of “effect” has not been fulfilled in the

instant case there exists no material injury that has been caused by the Enrodean imports to the Azanian domestic industry.

1.4.2.2. The impact of these imports on the domestic producers

Though it has been already established that the first condition required to prove existence of a domestic injury does not hold water, arguendo, even if assumed that the volume of imports had increased significantly and that there was price undercutting by the Enrodean imports as compared to the Azanian domestic goods even then the condition of there being an impact on the domestic producers because of the imports cannot be satisfied.

Article 15.4 of the Agreement, elaborating the impact of the impugned imports on the domestic products states:

“15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.”

Interpreting Article 3.4 of the Anti Dumping Agreement (ADA), which is pari material to the abovementioned Article (except for the words “subsidised imports” that has been replaced by “dumped imports”) The Panel on *EC — Bed Linen*¹⁷, in a finding not addressed by the Appellate Body, considered whether the list of factors in Article 3.4 is illustrative or mandatory. Further to concluding that the list is mandatory, the Panel addressed the issue of whether only the four groups of “factors” represented by the subgroups separated by semicolons in Article 3.4 must be evaluated, or whether each individual factor listed must be considered:

¹⁷ Panel Report on *EC — Bed Linen*, WT/DS141/RW

“ The use of the phrase ‘shall include’ in Article 3.4 strongly suggests to us that the evaluation of the listed factors in that provision is properly interpreted as mandatory in all cases. That is, in our view, the ordinary meaning of the provision is that the examination of the impact of dumped imports must include an evaluation of all the listed factors in Article 3.4...

...We recall that, in the Tokyo Round AD Code, the same list of factors was preceded by the phrase ‘such as’, which was changed to the word ‘including’ that now appears in Article 3.4 of the AD Agreement. ... We thus read the phrase ‘shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including ...’ as introducing a mandatory list of relevant factors which must be evaluated in every case...

... [I]n our view, neither the presence of semicolons separating certain groups of factors in the text of Article 3.4, nor the presence of the word ‘or’ within the first and fourth of these groups, serves to render the mandatory list in Article 3.4 a list of only four ‘factors’....

Based on the foregoing, we conclude that each of the fifteen factors listed in Article 3.4 of the AD Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned.”

This decision has also been affirmed in the subsequent Appellate Body Report on Thailand — H-Beams¹⁸, and the Panel decisions in the cases of Mexico — Corn Syrup,¹⁹ Guatemala — Cement II.²⁰

These decisions emphasise the fact that all fifteen factors that are mentioned in the concerned Article relating to impacts of imported goods needs to elaborated and should be shown to exist mandatorily. However, the impact of subsidised imports on all these fifteen factors have not been shown to exist in the domestic market of Azania. Hence, in the event of failure to elaborate the impact on all the factors no material injury to the domestic industry of Azania can be established.

¹⁸ Appellate Body Report on *Thailand — H- Beams*, WT/DS122/AB/R

¹⁹ Panel Report on *Mexico — Corn Syrup*, WT/DS132/R

²⁰ Panel Report on *Guatemala — Cement*, WT/DS156/R

1.4.3. A causal link between the subsidized imports and the alleged injury should exist

As has been established above there exists no subsidy in the present case as the import duty exemption on the goods imported by Azania from Enroda does not comprise a specific subsidy under Article 2 of the Agreement hence the provisions of Part V dealing with countervailing measures cannot be applied in the instant case. Arguendo, it has also been established that even if the imports were subsidised for the purposes of application of countervailing duty the imports do not cause any kind of material injury.

Thus, there exists no material injury and hence, there is no causal link between the assumed subsidised imports and the alleged injury. The question of showing this link thus does not arise.

Moreover, over here it may also be stated that the countervailing duty by Azania had not been done in good faith as there were no consultations in this regard with Enroda to settle the issue. Articles 13.1 and 13.2 mention that as soon as the application from a domestic industry is accepted with regards to countervailing duty investigations, efforts should be made for consultations with the Members whose products are being subject to such investigation even before the initiation of the investigation so as to settle matters amicably and such consultations should continue even while the investigation is going on. However, there has been no mention of any efforts for having consultations on Azania's behalf. It was only when the Enrodean Trade Minister suggested that they enter into consultations did they take place at all, though they made little headway in solving the dispute.

Thus, it is evident the proper procedure for carrying on the investigation had not been followed and in the wake of the flawed procedure the imposition of countervailing duties cannot be held to be consistent with the Agreement.

Conclusively, it is submitted before this Hon'ble Court that the import duty exemption on the exported goods manufactured in the FTZs is not a prohibited export subsidy as it falls under the exception to item (i) of Annex I of the Agreement. There is no excess remission as far as the exemption of import duty is concerned as there is a proper and effective system, adhering to the guidelines stated in Annex II, is put into place to check that no excess remission takes place. Also the countervailing duty that has been imposed is inconsistent with the Agreement

for lack of a specific subsidy, any material injury and also because of non-compliance with the proper procedure of conducting a counter ailing duty investigation due to absence of any proper consultations being initiated by Azania.

2. The imposition of a border tax on imports is consistent with the market access commitments undertaken by Enroda.

2.1. That the imposition of a border tax on imports is consistent with Article IV.2 of the Razvana Agreement on Trade in Goods.

According to Article IV of the Razvana Free Trade Agreement (hereinafter referred to as “RATG” :

Article IV: National Treatment on Internal Taxation and Regulation.

“2. The products of the territory of any Member State imported into the territory of any other Member State shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.”

From a plain reading of the above Article, it is clear that Enroda is allowed to impose an internal tax on imports from other nations as long as Enroda has applied the same to its like domestic product directly or *indirectly*. Now, from the facts at hand it is clear that Enroda has applied a carbon tax on its domestic products which is charged on actual usage of coal, oil and other fossil fuels at a fixed rate²¹. This is a tax applied indirectly as used in the sense of Article IV.2 quoted above since the imposition of the carbon tax on actual usage of coal, oil and other fossil fuels at a fixed rate will increase the price of the resultant product (based on the amount of consumption of fuel during production) and incentivise producers and consumers to adopt low carbon technology/goods.

²¹ Compromis, ¶ 17

Further, it has been argued by some that the word “indirectly” contained in the above stated Article IV.2 may be interpreted as allowing the use of border tax adjustments on taxes that are charged on inputs used during the production process of a particular product, i.e. applied indirectly to products. According to this argument, a tax on the energy or fuels used in the production process or the CO₂ emitted during production (neither of which are physically incorporated in the final product) could therefore be considered to be applied indirectly to products.²²

The GATT *Superfund case*²³ has been mentioned in this context. In this case, the dispute panel found that a US tax on certain substances (used as inputs in the production process of certain chemicals) which was imposed directly on products was eligible for border tax adjustment. It has been argued that this case confirms that the GATT allows border tax adjustments on imported products in relation to an internal tax on certain inputs used in the production process.

Further, Section 17 of the Carbon Tax Regulation Act provided for the imposition of a carbon tax on imports of goods equivalent to the level of tax charged to the domestic industry of the like goods.²⁴ Thus products from Azania are subject to the same level of tax as applied to the products of Enroda.

Thus the imposition of the border tax on imports is valid under Article IV.2 of the RATG.

2.2 That the imposition of a border tax on imports is consistent with Article III.2(a) of the Razvana Agreement on Trade in Goods.

According to Article III of the RATG:

Article III: Schedules of Concessions.

²² According to a 2009 report by the United Nations Environment Programme and the World Trade Organization titled “Trade and Climate Change” published by the World Trade Organization. Can be accessed on http://www.unep.ch/etb/pdf/UNEP%20WTO%20launch%20event%2026%20june%202009/Trade_&_Climate_Publication_2289_09_E%20Final.pdf

²³ June 17, 1987, GATT, Basic Instruments and Selected Documents, 34th Supplement (1988), 136. The Superfund Act of 1986, aimed at financing domestic programmes to clean up hazardous waste sites, imposed taxes on petroleum and on chemicals.

²⁴ Compromis, ¶ 24.

“2. Nothing in this Article shall prevent any Member State from imposing at any time on the importation of any product:

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article IV of the RATG in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part.”

As proved above in Section 2.1, the imposition of border tax on imports is consistent with the provisions of paragraph 2 of Article IV of the RATG. While Article IV provides the principle on which an internal tax may be imposed, the charge to be imposed (the border tax adjustment sought to be done) must be in accordance with legal basis as provided under Article III.2(a) of the RATG.

Even if the carbon tax is not considered to be a tax applied *indirectly* to products (within the scope of Article IV.2 of the RATG) which justifies imposing a border tax on imports equivalent to this carbon tax, Article III.2(a) of the RATG allows a charge equivalent to an internal tax imposed in respect of *an article from which the imported product has been manufactured or produced in whole or in part*. From a plain reading of this Article, it is clear that a fossil fuel such as coal or natural gas used up in the process of production of a product can be made subject of a charge as it nothing but *an article from which the imported product has been manufactured or produced in whole or in part*.

The rationale for this stems from the decision of the General Agreement on Tariffs and Trade (hereinafter referred to as “GATT”) Panel in the *US – Taxes on Petroleum and Certain Imported Substances*²⁵ wherein the GATT Panel confirmed the application of border taxes on the derivate product when the domestic tax is imposed on upstream producers.

Lastly, according to a 2009 report²⁶ by the United Nations Environment Programme and the World Trade Organization titled “Trade and Climate Change” published by the World Trade Organization, the GATT Article II.2(a) [which is in pari materia as Article III.2(a) of the

²⁵ June 1987 (BISD 34S/136).

²⁶ On page 103 of Part IV.

This report can be accessed on

http://www.unep.ch/etb/pdf/UNEP%20WTO%20launch%20event%2026%20june%202009/Trade_&_Climate_Publication_2289_09_E%20Final.pdf

RATG] allows WTO members, at any time, to impose on the importation of any product a charge equivalent to an internal tax (e.g. a border tax adjustment).

From an analysis of the above arguments, it is clear that the imposition of a border tax on imports is consistent with Article III.2(a) of the Razvana Agreement on Trade in Goods.

2.3 Arguendo, the imposition of a border tax on imports is inconsistent with Enroda's commitments under the Razvana Agreement on Trade in Goods, it is still justified under the General Exceptions contained therein.

Assuming but at no point admitting, that the imposition of a border tax on imports is inconsistent with Enroda's commitments under the Razvana Agreement on Trade in Goods, it is still justified under the General Exceptions contained in Article XX therein.

According to Article XX of the RATG:

Article XX: General Exceptions.

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;*
- (b) necessary to protect human, animal or plant life or health;*
- (c) imposed for the protection of national treasures of artistic, historic or archaeological value;*
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”*

From a plain reading of the above enumerated Article, it is clear that Article XX listing the general exceptions requires a twofold test to be satisfied. Article XX on General Exceptions

consists of two cumulative requirements. For a GATT-inconsistent environmental measure to be justified under Article XX, a member must perform a two-tier analysis²⁷ proving:

1. First, that its measure falls under at least one of the exceptions (e.g. paragraphs (b) and/or (g), two of the exceptions under Article XX); and,
2. Second, that the measure satisfies the requirements of the introductory paragraph (the “chapeau” of Article XX), i.e. that it is not applied in a manner which would constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, and is not “a disguised restriction on international trade”.

2.3.1. That the measure of imposing border tax on imports falls under the exceptions under Article XX of the Razvana Agreement on Trade in Goods.

The trade measures applied by Enroda are directed towards the environmental objective of fighting global warming and climate change through reducing carbon emissions and encouraging shift to cleaner fuels (such as Natural Gas and Bio fuels) in Enroda and elsewhere in the world. Accordingly, this measure aims at reducing the consumption of fossil fuels containing high carbon content as that will have a direct impact on reducing carbon emissions. Thus, the amount of tax will be based on actual usage of coal, oil and other fossil fuels at a fixed rate²⁸ with higher rates of tax being charged for fuels containing higher levels of carbon. Thus, higher the content of carbon in a fuel, higher the carbon tax imposed on it. This will create an incentive for the industries to shift to low carbon fuels such as natural gas and bio fuels, etc. Thus an important objective of consumption of cleaner fuels (that emit lesser carbon emissions due to lesser carbon content than the traditional coal based fuels) will be achieved by the imposition of the border tax on imports, not just in Enroda, but in several other countries of the world as well.

Now, the biggest reason for environmental degeneration of Azania (and consequently the world as the atmosphere is a common resource and environmental pollution in one country affects the environment of the world) is the vast use of thermal (coal based) energy²⁹. Further,

²⁷ *United States - Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS 2/AB/R (29 April 1996), 25.

²⁸ *Supra* note 21.

²⁹ *Compromis*, ¶ 12.

Enroda has abundant resources of natural gas in the country³⁰. If Azanian industries were given an incentive to shift to natural gas instead of energy derived from coal based fuels then the environmental objective of reducing carbon emissions and encouraging adoption of cleaner fuels would be achieved. This will in turn help achieve the bigger environmental objective of fighting global warming and climate change. This is where the border tax on imports of products into Enroda comes in.

Further, in the *US – Shrimp case*,³¹ the Appellate Body accepted as a policy covered by Article XX(g), one that applied not only to turtles within the United States' waters but also to those living beyond its national boundaries. The Appellate Body found that there was a sufficient nexus, or connection, between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g). This point is particularly important in the context of climate change mitigation policies. It is believed that this finding could be relevant to establishing a sufficient nexus between a member's domestic mitigation policy or a border measure and the intended objective of this policy, the protection of a global common asset, the atmosphere.

In *US – Shrimp case*, the United States was permitted to protect turtle in India based on the fact that (1) the turtle are an endangered species; and (2) the turtle are highly migratory animals which are known to occur in U.S. waters. If the United States was permitted to protect turtle in India that may at some point cross U.S. waters, it is hard to imagine why Enroda would not be permitted to protect against carbon emitted in Azania that certainly crosses territorial borders and is known by science to be as dangerous for climate change as carbon emitted within Azania itself. The world's atmosphere is, after all, a global commons; and carbon emissions are, because of their global impact, a collective action problem. Thus, the *US – Shrimp case*³² case allows for a country to impose measures towards achieving an environmental objective even if it has an effect on other countries as long as the intended objective of this environmental policy is the protection of a global common asset, the atmosphere.

³⁰ Compromis, ¶ 10.

³¹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report, WT/DS 58/R (15 May 1998); Appellate Body Report, WT/DS58/AB/R (12 October 1998).

³² Supra note 32.

Finally, the rationale of a carbon tax as a measure to fight climate change has been endorsed by a 2009 report³³ by the United Nations Environment Programme and the World Trade Organization titled “Trade and Climate Change” published by the World Trade Organization in the following words:

“In the case of climate change, the harmful environmental effects derive from the accumulation over time of stock pollutants such as greenhouse gases. This would make a case for the adoption of a tax.”

From an analysis of the above arguments it is established that the environmental objective of fighting global warming and climate change through reducing carbon emissions and encouraging shift to cleaner fuels (such as Natural Gas and Bio fuels) in Enroda and elsewhere in the world is achievable by the measure of imposing a carbon tax on domestic producers and a border tax on imports of products from other countries by Enroda. Thus, the necessary link between the measure and the intended environmental objective stands established.

Finally, to justify the measure under Article XX of the RATG, all that remains to be proved is that the environmental objective of fighting global warming and climate change is an environmental objective contemplated by Article XX of the RATG.

The intended environmental objective adopted by Enroda can be justified under Clause b (*necessary to protect human, animal or plant life or health*) and/or under Clause g (*relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*). In past cases, a number of policies have been found to fall within the realm of paragraphs (b) and (g) of Article XX: (i) policies aimed at reducing the consumption of cigarettes, protecting dolphins³⁴, reducing risks to human health posed by asbestos³⁵, reducing risks to human, animal and plant life and health arising from the accumulation of waste tyres³⁶ [under Article

³³ In Part IV on Pg 98 of the report. For reference see supra note 22.

³⁴ *United States - Restrictions on Imports of Tuna*, DS 29/R, 16 June 1994, (1994) 33 ILM, 839.

³⁵ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Panel Report (18 Sept. 2000), WT/DS 135/R; Appellate Body Report (12 March 2001), WT/DS 135/AB/R.

³⁶ *Brazil – Measures Affecting Imports of Retreaded Tyres*, Panel Report, WT/DS 332/R, 12 June 2007.

XX(b)]; and (ii) policies aimed at the conservation of tuna³⁷, salmon and herring, dolphins, turtles, petroleum, and clean air³⁸ [under Article XX(g)].

Although policies aimed at climate change mitigation have not been discussed in the dispute settlement system of the WTO, the example of the *US – Gasoline case*³⁹ case may be relevant. In this case, the panel had agreed that a policy to reduce air pollution resulting from the consumption of gasoline was a policy concerning the protection of human, animal and plant life or health as mentioned in Article XX(b)⁴⁰. Moreover, the panel found that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g)⁴¹. Here, the United States had adopted a measure regulating the composition and emission effects of gasoline in order to reduce air pollution in the United States. The Appellate Body found that the chosen measure was “primarily aimed at” the policy goal of conservation of clean air in the United States and thus fell within the scope of paragraph (g) of Article XX. As far as the second requirement of paragraph (g) is concerned, the Appellate Body ruled that the measure met the “even handedness” requirement, as it affected both imported and domestic products.

Against this background, it is but natural to conclude that policies aimed at achieving the environmental objective of fighting global warming and climate change through reducing carbon emissions and encouraging shift to cleaner fuels (such as Natural Gas and Bio fuels) in Enroda and elsewhere in the world, would fall under Article XX(b), as they intend to protect human beings from the negative consequences of climate change (such as flooding or sea-level rise), or under Article XX(g), as they intend to conserve not only the planet’s climate but also certain plant and animal species that may disappear because of global warming⁴². Lastly, the second requirement of Article XX(g) too has been met as the measure affects both the imported and domestic products alike.

³⁷ Supra note 11.

³⁸ *United States - Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS 2/AB/R (29 April 1996), 25.

³⁹ Supra note 15.

⁴⁰ In ¶ 6.21 of the Panel report.

⁴¹ In ¶ 6.37 of the Panel report.

⁴² In Part IV at page 108 of a 2009 report by the United Nations Environment Programme and the World Trade Organization titled “Trade and Climate Change” published by the World Trade Organization. Can be accessed on http://www.unep.ch/etb/pdf/UNEP%20WTO%20launch%20event%2026%20june%202009/Trade_&_Climate_Publication_2289_09_E%20Final.pdf

In the context of climate change, according both to Article XX(b) and to Article XX(g), a substantial link will need to be established between the trade measure and the environmental objective. This has been established above. Finally, it should be noted that in *Brazil – Retreaded Tyres case*⁴³, the Appellate Body recognized that certain complex environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. The Appellate Body pointed out that the results obtained from certain actions – for instance, measures adopted in order to address global warming and climate change – can only be evaluated with the benefit of time.

The respondent humbly submits that the time is ripe for this great temple of justice to enunciate that the environmental objective of addressing global warming and climate change is very much within the scope of Article XX of the RATG and to uphold the measure of imposing border tax on imports of products applied by Enroda.

2.3.2 That the measure of imposing border tax on imports is consistent with the introductory paragraph of Article XX of the Razvana Agreement on Trade in Goods.

From an analysis of the Article XX of the RATG, it is clear that before the policy measure (a border tax on imports in our case) is allowed under Article XX, the requirements of the introductory phrase (i.e. the chapeau) must be fulfilled. This phrase requires that measures are not applied in a manner which would constitute (1) a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or (2) a disguised restriction on international trade.

It has been held in the past that a country before imposing a trade measure must take into account the particular conditions of the different countries affected by the imposition of such trade measure. However, the Appellate Body in *US – Shrimp case*⁴⁴ pointed out, that Article XX does not require a WTO member to anticipate and provide explicitly for the specific conditions prevailing in every individual member. Although it is not necessary for Enroda to take into account explicitly the specific conditions prevailing in Azania, yet it was only after considering the same that Enroda decided to classify Azania as an Annex A country.

⁴³ Supra note 13.

⁴⁴ Supra note 11.

Now, in relation to Enroda classifying Azania as an Annex A (along with other developing nations in an advance stage of development) the following facts need to be examined:

1. Azania is rich in natural resources such as iron ore and diamonds⁴⁵.
2. The Industrial Policy of 1976 introduced in Azania put forth a framework of industrialization with a stated goal of increasing the number of industries especially in the primary sector, like iron and steel to ten times its present number. The energy resources for the industry were to be met through the abundant resources of coal and natural gas in the country⁴⁶.
3. The effect of industrialization on the economic prosperity of Azania was enormous. The per capita income which had been abysmally low increased three times over a short period of ten years⁴⁷.
4. The World Environment Conservation Agency in a survey carried out in 2000 noted that Azania was one of three largest emitter of green house gas in the world⁴⁸.
5. Industrial pollution which comprised the primary source of pollution in Azania was kept out of the purview of the Climate Change Executive Order, 9288 introduced by the Azanian Government in 2003⁴⁹.

The above facts clearly establish that Azania can be classified as a developing nation in an advance stage of development which is a category to which the border tax on imports applies. Thus the policy measure was based after taking into account the specific conditions in Azania and is thus cannot be said to be unjustifiable discrimination as contemplated in the chapeau to Article XX of the RATG. Further, negotiations were held⁵⁰ with Azania as to the imposition of the border tax and other issues and it was only after these negotiations failed, that Enroda had decided to impose the border tax on imports from Azania (and other countries included in Annex A of the Carbon Tax Regulation Act introduced in Enroda.

⁴⁵ Compromis, ¶ 1.

⁴⁶ Compromis, ¶ 10.

⁴⁷ Compromis, ¶ 11.

⁴⁸ Compromis, ¶ 13.

⁴⁹ Compromis, ¶ 14.

⁵⁰ Compromis, ¶s 23, 26 and 27.

Further, it is pertinent to note the effect of “carbon leakage”. If Enroda imposes a domestic carbon tax, it is possible that industries may relocate to countries with lesser stringent or no environmental laws at all. In that case the whole objective of imposing the carbon tax fails as the industries, which are the biggest carbon emitters will be saved of the incidence of carbon tax. Thus it is equally important to impose a border tax on imports from countries (such as Azania in our case which has kept its industries out of the purview of the regulations with an objective of limiting greenhouse gases)⁵¹ which have less stringent environmental regulations or no environmental regulations or have environmental regulations which don’t apply to industries (such as Azania). This is exactly what Enroda has sought to do with the imposition of the border tax on imports from countries in Annex A in conjunction with applying a carbon tax on its own producers. The effect of “carbon leakage” has also been examined by a 2009 report⁵² by the United Nations Environment Programme and the World Trade Organization titled “Trade and Climate Change” published by the World Trade Organization in the following words:

“The concerns related to carbon leakage are usually linked to two risks: a risk of creating “carbon havens”, i.e. countries with less stringent carbon policies which attract carbon-intensive industries, thereby endangering the global effectiveness of carbon Constraining environmental policies, and a risk of job relocation resulting from the relocation of industries to countries where climate change mitigation policies are less costly.”

Lastly, it has been held in relation to environmental policies (and resultant trade measures) with regard to justification under Article XX, that each WTO member has the autonomy to determine their own environmental objectives. WTO members’ autonomy to determine their own environmental objectives have been reaffirmed by the WTO’s Dispute Settlement Body on a number of occasions (for example, in the US – Gasoline⁵³ and the Brazil - Retreaded Tyres⁵⁴ cases).

⁵¹ Compromis, ¶ 14.

⁵²On page 99 of Part IV. This report can be accessed on http://www.unep.ch/etb/pdf/UNEP%20WTO%20launch%20event%2026%20june%202009/Trade_&_Climate_Publication_2289_09_E%20Final.pdf

⁵³ *United States - Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS 2/AB/R (29 April 1996), 25.

⁵⁴ *Brazil – Measures Affecting Imports of Retreaded Tyres*, Panel Report, WT/DS 332/R, 12 June 2007.

Fifteen years ago, there was uncertainty as to whether the GATT outlawed imports linked to the content of another country's environmental policy. Since then the case law of the WTO has clarified that GATT rules do not necessarily preclude such environmental measures. In a central ruling in the *United States – Shrimp case*,⁵⁵ the Appellate Body explained that “conditioning access to a member’s domestic market on whether exporting members comply with, or adopt, a policy or policies unilaterally prescribed by the importing member may, to some degree be a common aspect of measures falling within the scope of one the exceptions of Article XX”⁵⁶. In the follow up compliance litigation, the panel stated that the WTO Agreement “does not provide for any recourse” to an exporting country in a situation where another WTO member requires “as a condition of access of certain products to its market, the exporting countries commit themselves to a regulatory program deemed comparable to its own”⁵⁷.

It is therefore humbly submitted before this Hon’ble Court that the measure of imposing a border tax on imports has fulfilled the requirements of the chapeau of Article XX as it has not been applied in a manner which would constitute (1) a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or (2) a disguised restriction on international trade. Further, for an aspect of climate policy to be challenged under the RATG a member country must show not only inconsistency with some condition of the chapeau, but also harm from the resulting trade impacts. Furthermore, to prove that the policy is not worthy of exception under Article XX, the complainant must show that a less trade-restrictive policy option is available and effective, or possibly even that the policy does not contribute toward achieving a reasonable climate goal at all.

Thus, the onus is on Azania to prove that the border tax on imports has been applied in a way so as to violate the chapeau of Article XX of RFTA, or that the measure of imposing the border tax does not contribute toward fighting against climate change and global warming. In the absence of Azania establishing this, the Court is bound to assume the propriety of the measure under Article XX of the RATG.

⁵⁵ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report, WT/DS 58/R (15 May 1998).

⁵⁶ At paragraph 121.

⁵⁷ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R (12 October 1998).

In view of the above arguments it is humbly submitted before this Hon'ble court that even if the imposition of a border tax on imports is held to be inconsistent with Enroda's commitments under the Razvana Agreement on Trade in Goods, it is still justified under the General Exceptions contained in Article XX therein. Therefore it is humbly prayed before this Hon'ble Court that the border tax on imports be upheld and declared consistent with the Razvana Agreement on Trade in Goods.

Prayer

Therefore, in light of the issues raised, arguments advanced and authorities cited, it is humbly prayed that this Hon'ble Court may be pleased to hold, adjudge and declare that:

- I. The duty exemptions on import of raw materials for the steel industry is not a subsidy prohibited under the Razvana Agreement on Subsidies
- II. The imposition of countervailing duties by Azania is inconsistent with the provisions of the Razvana Free Trade Agreement.
- III. The border tax on imports is consistent with the provisions of the Razvana Agreement on Trade in Goods.
- IV. Uphold the legality of border tax on imports of goods as imposed by Enroda.

All of which is respectfully affirmed and submitted

Agents for the Respondent