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GNLU INTERNATIONAL MOOT COURT COMPETITION

2009

IN THE INTERNATIONAL COURT OF JUSTICE

PEACE PALACE, THE HAGUE

THE NETHERLANDS

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

THE REPUBLIC OF ANDRENA

APPLICANT

v.

THE STATE OF RUBENA

RESPONDENT

**ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE JOINTLY
NOTIFIED TO THE COURT ON THE 17TH SEPTEMBER 2008**

MEMORIAL FOR THE APPLICANT

REPUBLIC OF ANDRENA

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ABBREVIATIONS

¶/¶¶	PARAGRAPH/ PARAGRAPHS
AEAR	EXPORT ADMINISTRATION REGULATIONS OF ANDRENA
ARFTA	ANDRENA RUBENA FREE TRADE AGREEMENT
Art./Arts	ARTICLE/ARTICLES
Ed.	EDITOR
Edn.	EDITION
EU	EUROPEAN UNION
GATS	GENERAL AGREEMENT ON TRADE IN SERVICES, 1994
GATT	GENERAL AGREEMENT ON TARIFFS AND TRADE, 1994
ICJ	INTERNATIONAL COURT OF JUSTICE
ILC	INTERNATIONAL LAW COMMISSION
ILO	INTERNATIONAL LABOUR ORGANIZATION
IPL	INFOTEX PUBLIC LIMITED
Madrid Agreement	MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS, 1989
MFN	MOST FAVOURED NATION

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NDP	NATIONALIST DEMOCRATIC PARTY
NTS	NATIONAL TREATMENT STANDARDS
OAPA	OUTSOURCING ACTIVITY PROTECTION AGENCY
Paris Convention	PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY, 1967
ROAA	RUBENA OUTSOURCING ACTIVITY ACT
RPHSA	RUBENA PUBLIC HEALTH AND SAFETY ACT
SBI	STANLEY BROS. INC.
SIS	SECURE INFORMATION SYSTEM
TRIPS	AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, 1994
UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948
UNESCO	UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION
WCT	WTO COPYRIGHT TREATY, 1996
WIPO	WORLD INTELLECTUAL PROPERTY ORGANIZATION
WTO	WORLD TRADE ORGANIZATION

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STATEMENT OF JURISDICTION

The Republic of Andrena and the Republic of Rubena have submitted the present dispute to the International Court of Justice pursuant to a Special Agreement (*Compromis*), dated September 17, 2008. The Court's jurisdiction is invoked under 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 Republic of Andrena and the State of Rubena are representative democracies with independent judiciaries, being roughly equal in area. Andrena has a lower population (10 million) and a higher literacy rate (98%) than Rubena (300 million population and 63%) literacy rate. Rubena has emerged as a favourite destination for outsourcing.

The Andrena-Rubena Free Trade Agreement (hereafter called ARFTA) came into force on 1st January 1999, pursuant to which Stanley Brothers Inc. (hereafter called SBI), a company involved in credit card operations entered into a contract with Infotex Public Ltd. (hereafter called IPL), based in Rubena, which entailed the exchange of confidential information from SBI to IPL.

THE LEAK OF SENSITIVE INFORMATION

Due to economic slowdown, there were significant job losses in Andrena. The blame was put on outsourcing of jobs to Rubena, and in the subsequent election, Nationalist Democratic Party (NDP) a hardliner against outsourcing came to power. In March 2007, Andrena Times reported that between March 2006 to September 2006 sensitive client information was stolen from Protech BPO, a back office support company based in Rubena receiving outsourced work from Andrena, pursuant to which class action law suits were filed in High Court of South East Andrena. The High Court imposed a fine on IPL, which was challenged in the Supreme Court, and is pending.

MEASURES BY ANDRENA

In September 2007, the Andrenian Senate adopted the Andrena Secure Information Systems Act (hereafter called ASISA). The legislation mandated that any Andrenian company engaged in outsourcing must do so if the third party to which confidential information is outsourced uses proprietary software called Secure Information System (hereafter called SIS) or any system based on similar technology. The export of SIS required special permit from the Department of Export Administration. No Andrenian company has ever got the permission to export such a license, because of which there was a huge loss of jobs in Rubena. The government of Rubena demanded the repeal of ASISA and intervention in the appeal filed before the Supreme Court.

MEASURES BY RUBENA

Rubena requested for consultation with Andrena under the ARFTA in January 2008, where no mutually satisfactory solution could be reached. In March 2008, Rubenan Parliament retaliated by enacting the Rubena Public Health & Safety Act (hereafter called RPHSA), imposing 150% custom duty on wine and spirits and 75% custom duty on heavy water manufacturing equipment etc. 97% of the imports of the above goods were from Andrena. The government of Andrena protested, and pursuant to no response from Rubena, declared the Rubenan Ambassador resident in Andrena *persona non grata*.

THEFT OF INFORMATION

On April 20, 2008, Rafid, a retired intelligence agency officer of Andrena, who was later, apprehended to be a counter intelligence spy of Rubena, entered the premise of Protech and IPL. On forged identity, he illegally downloaded data, which was later released in the international market. Andrena asked Rubena to take action, as Rafid was believed to have sought political asylum in Rubena. Rubena refused to act, denying any knowledge of the same.

POLITICAL TENSION

Pursuant to these incidents, Andrena and Rubena suspended trade relations, and dispatched several troops to vicinity of their shared borders. Andrena sent a few drones in search of Rafid, which hit two villages, killing 152 people. A World Heritage temple was also destroyed.

On August 20, 2008, the Security Council decided that both nations should amicably settle the issue before the International Court of Justice. In compliance with the decision, the parties submitted the Compromis to the Court on September 17th 2008, with Andrena as the Applicant and Rubena as the respondent, agreeing to act in accordance with the finding and conclusion of the Court.

On 18th September 2008, a crack code for SIS, and a detailed analysis done by Department of Homeland Security of Andrena regarding deficiency of SIS was posted on one of the websites.

ISSUES RAISED

1. WHETHER THE ICJ HAS THE JURISDICTION TO ADJUDICATE UPON THE CLAIMS OF THE PARTIES?
2. WHETHER ENACTMENT OF RPHSA WAS VIOLATIVE OF TRADE AGREEMENTS?
3. WHETHER ENACTMENT OF ASISA VIOLATED NTS OR CREATES A BARRIER TO TRADE?
4. WHETHER BREACH OF PRIVACY HAS BEEN COMMITTED BY THE RUBENAN B.P.O. COMPANIES?
5. WHETHER THERE WAS A BREACH OF INTERNATIONAL OBLIGATION BY THE RESPONDENT WHEN DATA THEFT TOOK PLACE?
6. WHETHER USE OF FORCE EMPLOYED BY APPLICANT WAS A LEGITIMATE EXERCISE OF SELF DEFENCE?

SUMMARY OF ARGUMENTS

1. ICJ HAS THE JURISDICTION TO ADJUDICATE UPON THE CLAIMS OF THE PARTIES

- Submission of the dispute to the ICJ is in accordance with Article 16 of the ARFTA and Article 33 of the UN Charter which provides for judicial settlement as a method of settling the dispute.
- The Applicant and Respondent have chosen to resort to a judicial settlement by signing a special agreement and submitting a *Compromis* to the Court, hence have given an express submission to the jurisdiction of the Court.
- The WTO dispute settlement mechanism does not exclude the jurisdiction of the ICJ.
- The rule of exhaustion of local remedies is not applicable to a direct injury.

2. THE ENACTMENT OF THE RPHSA WAS VIOLATIVE OF TRADE AGREEMENTS

- There was breach of the ARFTA with regard to NTS and imposition of high custom duty.
- The Procedure for Retaliatory Treatment was not followed as there was no appeal to the W.T.O. Dispute Settlement Body, which should have authorized the imposition of retaliatory measures, if the Applicant had violated the trade agreements.
- Retaliation as a measure was unreasonable as it undermines the entire WTO system, which is based upon mutually agreed trade liberalization.
- Retaliatory measures go against the interest of Rubena.

3. ENACTMENT OF ASISA DID NOT VIOLATE ANY TRADE AGREEMENT

- Enactment of ASISA did not violate NTS/MFN standards.
- Enactment of ASISA did not create a barrier to trade
 - The introduction of the licences was to protect national economic security.
 - The introduction of the licences was to promote efficiency.
 - Equivalent Technical Regulations are permitted.
- *Arguendo*, the ASISA was enacted to protect local jobs, the same was in compliance with the ARFTA.

4. BREACH OF PRIVACY AND CONFIDENTIALITY HAS BEEN COMMITTED BY THE RUBENAN BPO COMPANIES

- Sensitive information was leaked by Rubenan BPO companies.
- No action was taken by Rubena pursuant to leak of information.

5. THERE WAS A BREACH OF AN INTERNATIONAL OBLIGATION BY RUBENA

- A wrongful act had been committed when data theft took place.
- The wrongful act is attributed to the State of Rubena
- There was lack of due diligence with respect to internet websites

6. USE OF FORCE EMPLOYED BY THE APPLICANT WAS A LEGITIMATE EXERCISE OF ITS RIGHT OF SELF-DEFENSE

- There was an armed attack in response to which the right of self defense was exercised against the respondent.
- *Arguendo*, Rafid is a non-state actor, the Applicant still had a right to exercise self defense against him.
- The principle of necessity and proportionality in customary international law with respect to the use of self defense has been adhered to by Andrena.

ARGUMENTS ADVANCED

1. ICJ HAS THE JURISDICTION TO ADJUDICATE UPON THE CLAIMS OF THE PARTIES

1.1 Submission of the dispute to the ICJ is in accordance with Article 16 of the ARFTA and Article 33 of the UN Charter

Article 16 of the ARFTA lays down the dispute settlement method with respect to all disputes arising from the interpretation and application of the Agreement. It provides that the parties are to resort to consultations *failing which* any method of settlement enumerated under Article 33 of the UN Charter may be resorted to.¹ The dispute settlement mechanism under the WTO is also stipulated as a method.² The Applicant and the Respondent have already engaged in consultations without reaching a satisfactory conclusion before submitting the dispute to this Court.³

Article 33 of the UN Charter is the next stipulated method of dispute resolution; under which “judicial settlement” is stipulated as a valid method of dispute settlement.⁴ The presence of other available options does not nullify the jurisdiction of the ICJ. Also, the jurisdiction of the court can be ousted only in exceptional cases where the dispute falls within the exclusive jurisdiction reserved to some other authority.⁵ There is no exclusivity as to jurisdiction mentioned in the ARFTA and therefore a presumption against the jurisdiction of the court cannot be made. The present forum is a form of judicial settlement and therefore submission of the dispute for settlement before it is in accordance with both Article 16 of the ARFTA and Article 33 of the UN Charter.

¹Article 16, ARFTA.

² *Id.*

³ *Compromis*, ¶ 13.

⁴ Article 33 of the UN Charter provides that, “*The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*”

⁵ Sohn, *Settlement of Disputes relating to Interpretation and Application of Treaties*, 150 RECUEIL DES COURS 248 (1976 II).

1.2 A *Compromis* or a special agreement submitting the dispute to the ICJ has been signed by the Applicant and Respondent

The UN Charter under Article 33 of the UN Charter provides for pacific methods of dispute settlement stipulating mediation, conciliation, arbitration, judicial settlement, among other peaceful means.⁶ Such dispute settlement clauses which embody a general obligation to settle disputes peacefully without specifying the method of dispute settlement, require the party to conclude a special agreement on a specific method after a dispute arises.⁷

Furthermore, Article 40 of the Statute of the ICJ provides that cases may be brought before the Court either by notification of the special agreement or by a written application addressed to the Registrar.⁸

In the present case, though Article 16 of the ARFTA refers to Article 33 of the Charter and not a particular method under it; the Applicant and Respondent have chosen to resort to a judicial settlement by signing a special agreement and submitting a *Compromis* to the Court.⁹ Therefore, there has been an express submission to the jurisdiction of the Court.

1.3 The WTO dispute settlement mechanism does not exclude the jurisdiction of the ICJ

The ARFTA provides that the parties for dispute settlement method *may* resort to the WTO dispute settlement mechanism.¹⁰

Article 23.1 of the DSU requires WTO members to “*seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements . . . [by] recourse to . . . the rules and procedures of this Understanding.*”¹¹ WTO law does not prevent the submission of disputes over related obligations under other international treaties to the ICJ; if the dispute before the WTO dispute settlement bodies is limited to WTO law

⁶ Article 33 UN Charter.

⁷ *Supra* note 5 at 261.

⁸ Article 40 of the Statute of the ICJ.

⁹ *Compromis*, ¶ 20.

¹⁰ Article 16, ARFTA.

¹¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2; *Legal Instruments--Results of the Uruguay Round*, 33 I.L.M. 1125 (1994). [“Dispute Settlement Understanding” hereinafter].

and the dispute before the ICJ is related to other international treaty rights and obligations, the simultaneous examination of all treaty obligations in order to reach a comprehensive settlement of the dispute may be in the interest of both parties.¹² There is nothing in the DSU that excludes the jurisdiction of the ICJ in examining disputes arising out of WTO agreements.

It is submitted that disputes referred to the ICJ involving rights and obligations under the WTO law may be adjudicated upon by the former since it is not prohibited. This is also in consonance with Article 16 of the FTA and therefore the present forum has the authority to hear the claims of the parties.

1.4 The rule of exhaustion of local remedies is not applicable to a direct injury

The rule of exhaustion of local remedies in international law is that a claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies available to him in the state which is alleged to be the author of the injury.¹³

However, injuries caused by one state to another, are direct injuries and are not subject to the rule of local remedies¹⁴; since States represent principally their own interest rather than the interests of their nationals and are the real claimants. It follows that a request by the respondent state that the claimant state should exhaust the legal remedies available in the former state would run counter to the principle *par in parem non habet imperium, non habet jurisdictionem*; which mandates that no State can claim jurisdiction over another.¹⁵ The rule of local remedies is thus applicable to indirect injury to a State, that is, injury caused to its nationals or their property, in which case they would have to institute proceedings in the court

¹² Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273 (2002); Akehurst, MODERN INTRODUCTION TO INTERNATIONAL LAW, 177 (1990).

¹³ Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 497 (1963).

¹⁴ Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 BRIT. Y.B. INT'L L 84 (1959); Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 404 (1938); See Separate Opinion of Judge Lauterpacht in the Certain Norwegian Loans case, ICJ Reports, (1957) 39-41.

¹⁵ Aerial Incident of 27th July, 1955 (*Israel v. Bulgaria*) ICJ Reports (1959) 154.

of the State at fault.¹⁶ This rule is qualified by two considerations as to whether a particular act is a direct injury; the subject of the dispute and the nature of the claim.¹⁷

There are certain categories that could be the subject matter of a direct injury and the violation of treaties are considered to be a category of direct injury as was established in the case of *Phosphates in Morocco*¹⁸; where it was noted that where an act of the Department of Mines of France was challenged by Italy as an unlawful international act because it was in violation of certain vested rights placed under the protection of international conventions. The act was attributable to the State and was described as contrary to the treaty right of another State; international responsibility so being established.¹⁹

The second condition is the nature of the claim, which depends on the real interests and objects pursued by the Claimant State. The precise and direct statement of the claim²⁰ is to be used to construe the nature of the claim in establishing whether the state has a distinct reason of its own for the institution of the international claim.

In the present case the claims arise out of violations of certain international treaties and obligations that both the States are parties to, thereby the subject matter of the claim being one of direct injury.²¹ Secondly, the primary object of the claim is to obtain from the Court declaration of the responsibility of the respondent in international law²², thereby establishing that the interest of the State of Andrena as separate from those of its nationals is to be formulated.

1.5 Joinder of preliminary objections to merits of dispute

The claims so made by Andrena bear relation to the breach of the ARFTA and the dispute settlement process so stipulated under it may be resorted to as under Article 16 of the

¹⁶ Fawcett, *Exhaustion of Local Remedies: Substance or Procedure?*, 31 BRIT. Y.B. INT'L L 452, 458 (1954); *Supra* note 13 at 381.

¹⁷ Meron, *Supra* note 14 at 87; Brownlie, *Supra* note 13, at 500.

¹⁸ *Phosphates in Morocco (Italy v. France) (Preliminary Objections)*, (P.C.I.J., Series A/B, No.74), 25-29.

¹⁹ *Phosphate case Id.*

²⁰ *International Fisheries case (United Kingdom v. Norway)* ICJ Reports, (1951) 126.

²¹ The ARFTA, UN Charter, the ICCPR, GATT, GATS, etc.

²² This was held to be a claim of direct injury in the *Corfu Channel case (United Kingdom v. Albania)* (Merits) ICJ Reports, (1949) 10.

ARFTA. The appellant submits that the court declares a joinder of the preliminary objections with regard to other claims with merits,²³ although the plea may be in form of a preliminary objection²⁴, jurisdiction as to certain issues can be determined after consideration of fact, law and status.²⁵

2. THE ENACTMENT OF THE RPHSA WAS VIOLATIVE OF TRADE AGREEMENTS

Rubena imposed retaliatory sanctions in response to the trade practice it deemed as unreasonable (i.e. introduction of license based SIS).²⁶ The RPHSA was introduced which imposed 150% custom duty on spirits and 75% custom duty on heavy water.²⁷ It is pertinent to note that 97% of the imports were from Andrena.²⁸

2.1 There was breach of the ARFTA

It is submitted that the custom duty on wine and spirit involve like products, and the taxes on the imported products are “in excess” of taxes on local goods, and hence a violation of the NTS.²⁹ According to Article 2(3) of the ARTFA, Rubena is expected to accord national treatment to the goods of the other party in accordance with Article III of the GATT 1994.³⁰ There is also a clear breach of the Article 2(2) of the ARTFA which envisages each party to progressively eliminate its custom duty on originating goods of the other party.

²³ Right of Passage case, ICJ Reports (1957) 149.

²⁴ Electricity Company of Sofia and Bulgaria, (PCIJ, Ser.A/B, no.77), 78, 82-3.

²⁵ Thirlway, *The Law and Procedure of The International Court of Justice*, 89 BRIT. Y.B. INT’L L.,143 (1960); Oppenheim, INTERNATIONAL LAW, 204 (1996).

²⁶ *Compromis*, ¶ 12.

²⁷ *Compromis*, ¶ 14.

²⁸ *Id.*

²⁹ Japan - Alcohol Beverages case, sourced from Matsushita, Schoenbaum and Mavoroidis, THE WORLD TRADE ORGANISATION: LAW, PRACTICE AND POLICY, 170 (2006).

³⁰ Article 2.3 of the ARFTA.

2.2 The Procedure for Retaliatory Treatment was not followed

It is submitted that if no satisfactory agreement is reached within 20 days after expiry of the “reasonable period of time”, the complainant(s) can request authorisation from the WTO’s Dispute Settlement Body to retaliate.³¹ Rubena should have appealed to the DSB, who in turn could have authorized the imposition of retaliatory measures if would have found violations of trade agreements. Rubena had no authority to implement a retaliatory measure at will.

2.3 Retaliation as a measure was unjust

It is submitted that this was a form of unnecessary retaliation against the allegations of barrier to trade in introducing licenses for SIS, and created an unnecessarily “inflammatory and potentially counterproductive situation.”³² Retaliation adds new incursions, and undermines the entire WTO system, which is based upon mutually agreed trade liberalization.³³ GATT Article VIII: 1 (b) envisages the diversity of custom fees to be reduced.³⁴ A dispute settlement system that relies on prospective retaliation remedy encourages violations and allows a government to contemplate a tariff increase without weighing in the full cost of the tariff increase on the trading partner.³⁵

2.4 Retaliatory measures go against the interest of Rubena

The implementation is an unjust retaliatory measure, and it also goes against the interest of Rubena. As Andrena is the main supplier of the mentioned technology, the buyers in Rubena are purchasing Andrenian technology because it offers an advantage, either in cost or quality.

³¹ Article 22.2 of the Dispute Settlement Understanding; Anderson, *Peculiarities of Retaliation in WTO dispute settlement*, WORLD TRADE REVIEW 123 (2002).

³² Pinto-León, *Fair and Equitable Treatment under International Law: Analyzing the Interpretation of NAFTA*, INTERNATIONAL TRADE LAW JOURNAL, 141 (Winter 2006); Henson & Wilson, *THE WTO AND TECHNICAL BARRIERS TO TRADE: CRITICAL PERSPECTIVE ON THE GLOBAL TRADING SYSTEM AND THE WTO*, 133 (2005).

³³ Grandos, *Investor Protection and Foreign Investment under NAFTA: Prospects for the Western Hemisphere under FTAA*, 13 CARDOZO J. INT’L & COMP. L. 189 (2005).

³⁴ Jackson, *THE JURISPRUDENCE OF GATT AND WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS*, 178 (2000).

³⁵ Section 129(c)(1) of the Uruguay Round Agreements Act (WTO Doc. WT/DS22/R of 15 July 2002).

Thus, the claim of the Rubenan Government that the RPHSA was implemented in public interest does not hold merit. There is no proven justification for enactment in public interest, and is just an unnecessary retaliation against the alleged discriminatory requirement of using SIS or equivalent software technology.

Since 97% of the imports were from Andrena, it is submitted that such legislation was specifically enacted to hurt the Andrenian economy. There was a significant harm done by the retaliation, since a large part of Andrena's export, authorised by a special legislation passed by the Andrenian Assembly, were affected.

3. ENACTMENT OF ASISA DID NOT VIOLATE ANY TRADE AGREEMENT

3.1 Enactment of ASISA did not violate NTS/MFN

The British agreement modal, which calls for most favored nation treatment or national treatment, whichever is more favorable, permits each of the respective parties to accord less than national treatment provided 'its laws so provide in respect of all non-nationals and in relation to particular matters'.³⁶

It is submitted that the requirement for the high quality software to safeguard economic data is for all companies to whom work is being outsourced, and not only Rubenan companies.³⁷ Hence, the measure to introduce licenses is not arbitrarily against Rubenan companies, but rather a measure to protect economic security of its citizens against all companies engaged in outsourcing.

International law imposes a duty on a State to exercise rights in good faith.³⁸ The concept of equitable treatment envisages that the foreign investors have not been well treated by reason of discriminatory or other unfair measures being taken against their interests.³⁹ It is, therefore,

³⁶ See Agreement on the Reciprocal Promotion and Protection of Investments, Mar. 6, 1978, Singapore—Switzerland.

³⁷ *Compromis*, ¶ 10.

³⁸ Van Kleffens., *Sovereignty in International Law*, 82 RECUEIL DES COURS, 1-131, 114 (1953-I).

³⁹ Villanueva, THE FAIR AND EQUITABLE TREATMENT STANDARD, 144 (2004).

a concept that depends on the interpretation of specific facts for its content. Andrena was concerned with modernization and efficiency in the outsourcing sector to protect its citizens from fraud and to protect its economic interests. It was not taking any unfair measures against Rubena.

There is no violation of the NTS principle as the legislation just requires all Andrenian companies to comply with a norm to ensure economic security while outsourcing work to any third party. Such a requirement will be necessary even if any Andrenian company outsources work to any Andrenian company also.⁴⁰ Thus, there is no discriminatory policy against any foreign investor or any violation of the national treatment standard.

Furthermore, the MFN principle was not violated at any stage. All the countries or third parties engaged in outsourcing were required to use the high quality software to protect the security of the Andrenian citizens and its economy.⁴¹

3.2 Enactment of ASISA did not create a barrier to trade

3.2.1 The introduction of the licences was to protect national economic security

It is submitted that there was no barrier to trade created and the current licensing process is justified as the monitoring brings solid technical analysis to bear on export control matters⁴² in a manner that is effective in protecting Andrenian national security interests. National Security and commerce are mutually reinforcing, not competing interests.⁴³ The move to introduce licences is an endeavour to protect the economic security of the Andrenian citizens.

The licenses for outsourcing software [SIS], issued by the Bureau of Export Administration, act as mandatory safeguards to protect national security and

⁴⁰ *Compromis*, ¶ 10.

⁴¹ *Compromis*, ¶ 10.

⁴² Henson & Wilson, *THE WTO AND TECHNICAL BARRIERS TO TRADE: CRITICAL PERSPECTIVE ON THE GLOBAL TRADING SYSTEM AND THE WTO*, 141 (2005); Schmitthoff, *EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE* 159 (2007).

⁴³ Oliver, Firmage, Blakesley, Scott and Williams, *CASES AND MATERIAL ON THE INTERNATIONAL SYSTEM*, 1113 (1995).

foreign policy concerns. It helps to develop a technology transfer control plan which identifies the level and extent of technical data which will be securely transferred. It will enable to have a separate cryptographic equipment safeguard plan for outsourcing security equipment. Classifications, even if based on nationality, that are rationally related to the State's security or economic policies might not be unreasonable.⁴⁴ According to Article 2.2 of the TBT Agreement⁴⁵, national security is a legitimate reason for technical regulation.

The action to enact ASISA was taken after the Andrenian High Court ordered the discovery of documents and sensitive information was leaked by the companies to whom the information was outsourced.⁴⁶ Thus the enactment of ASISA was a policy decision to protect internal economic security.

3.2.2 The introduction of the licences was to promote efficiency

The introduction of licences brings in efficiency and success in enhancing consumer welfare.⁴⁷ The Preamble to the TBT Agreement does not prevent the country from taking measures necessary to ensure the quality of exports for prevention of its economic health, subject to the requirement that they are not applied in a manner which constitutes means of arbitrary or unjustifiable discrimination.⁴⁸ With compliance of the SIS 128 bit encryption technology, greater quality and hence efficiency as regards outsourced economic information can be ensured.

It is submitted that the SIS requirement was a specific requirement aimed at data protection, same for every third party. Thus it was not arbitrary or discriminatory, and the regulation was not against the objectives of the Technical Barriers to Trade Agreement or any trade agreement entered in by the Applicants.

⁴⁴ Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, 81 (2002); Jessup, A MODERN LAW OF NATIONS, 97 (1968).

⁴⁵ Article 2.2, The Technical Barriers to Trade Agreement.

⁴⁶ *Compromis*, ¶ 10.

⁴⁷ *Article 82 of the E.C. Treaty and Trademark Rights*, 93 TMR 1314 NOVEMBER-DECEMBER, (2003).

⁴⁸ Preamble, The Technical Barriers to Trade Agreement.

3.2.3 Equivalent Technical Regulations are permitted

In pursuance of Article 2.7 of The Technical Barrier to Trade Agreement⁴⁹, Andrena has given positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations. Thus there was no complete barrier to trade. Adequate alternatives options have been provided to the third parties to comply with the security standards.⁵⁰

3.3 Arguendo, the ASISA was enacted to protect local jobs, the same was in compliance with the ARFTA

According to the International Court of Justice, only if conventions or directives are recognized expressly and mutually by the parties, will they be binding and applicable in court.⁵¹ Thus, all the treaties, conventions and directives, including the ICCPR, that have been mentioned in the ARFTA can be used as the basis of the arguments of either party.

It is submitted that various agreements mentioned in ARFTA, like Article 1 of ICCPR, stress on the fact that people have a right to self determination.⁵² Furthermore, in order to pursue the same, they have the right to ensure their economic, social and cultural development.⁵³ Guaranteeing human rights in general and the right to work in particular⁵⁴ is quite definitely the primary objective of nations.⁵⁵

ARFTA has maintained that full compliance with the ICCPR is essential to the Agreement, and violation of the same would amount to the termination of the Agreement.⁵⁶ Therefore, it is submitted that in compliance with the ICCPR and the ILO Declaration on Fundamental Principles and Rights at Work, the ASISA was implemented. Furthermore, TRIPS, ratified by

⁴⁹ Article 2.7, The Technical Barriers to Trade Agreement.

⁵⁰ *Compromis*, ¶ 10.

⁵¹ Article 38(1) of the Statute of the International Court of Justice.

⁵² Article 1, The International Covenant on Civil and Political Rights.

⁵³ *Id.*

⁵⁴ The Right to work is a Human Right according to article 23(1) of the Universal Declaration of Human Rights.; See also General Comment No. 12: The right to self-determination of peoples (Art. 1), 1984.

⁵⁵ *Supra* note 52.

⁵⁶ Article 12, ARFTA.

both parties, says that members can formulate or amend laws and regulations to adopt measures essential to protect and promote public interest in important socio-economic and technological sectors.⁵⁷

There was increased unemployment owing to the economic slowdown in Andrena. Also, subsequent to the theft of data from the premises of Protech BPO, the public created a furor, and demanded stricter regulation of outsourced information. Thus, the implementation is purely welfare-based in nature and is in accordance with all the relevant agreements entered into by both parties. Even if it is alleged that the ASISA was enacted to protect local jobs, the same is in compliance with the ARFTA, and Andrena, is in no breach of any international multilateral or bilateral agreement.

The claim that the Secure Information System was deficient was raised on 18 September 2008, much after proceedings had been initiated in the ICJ. Also, these claims are unsubstantiated and unverified as they have not been authorized for release by the Department of Homeland Security. In addition, it is submitted that since the data was illegally uploaded on a website, that too Rubenan, serious aspersions can be cast over the reliability of the material thus obtained.

4. BREACH OF PRIVACY AND CONFIDENTIALITY HAS BEEN COMMITTED BY THE RUBENAN BPO COMPANIES

4.1 Sensitive information was leaked by Rubenan BPO companies

In the present case, the credit card companies require client data to be processed. So, the disclosure of data by Andrenian companies to the BPOs is justified. Publication of the data is allowed in cases concerning public interest, but it is the duty of both parties to protect such

⁵⁷ Article 8(1), TRIPS.

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sensitive information, according to European Union directives.⁵⁸ The EU Convention on Human Rights mentions the right to respect the privacy of the person.⁵⁹

No public interest is evident from the available facts, and the issue concerns simple theft and not voluntary disclosure. The volume of information thus stolen, being an organized compilation of collected data, is protected under the WIPO Copyright Treaty. According to the WCT, compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected.⁶⁰ The OECD has also guaranteed protection against the illegal flow of personal data.⁶¹

It is submitted that, the Data Protection Act, that has EU recognition, mentions that there are some categories of sensitive data that are extremely confidential and cannot be processed unless the processing is essential for carrying out the business.⁶²

The authority to distribute and reveal the data to the public also lies with the author of the compiled data, and any breach of these right results in the violation of intellectual property rights.⁶³ Thus, it was just the credit card companies which could reveal the data. It is specifically these companies which can be deemed to be the authors of the compilation as they collected and organized the data. The BPO firms are only in possession of the data for processing purposes, and that is where their rights cease.

The information in question was beyond doubt of a sensitive nature. Global organizations have granted individual privacy a special status.⁶⁴ The notions of individual integrity and privacy are in many respects particular and should not be treated in the same way as the integrity of a group of persons, or corporate security and confidentiality.⁶⁵ The needs for protection are different, and a greater effort is required to ensure that no compromise

⁵⁸ Specifically Directive 95/46/EC.

⁵⁹ Article 8, EHCR; The Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data, 1981.

⁶⁰ Article 5, WIPO Copyright Treaty, 1996.

⁶¹ Article 20, OECD, Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. Similarly, see the Privacy Act, 1988; Information Technology Act, 2000.

⁶² Article 8, The Data Protection Act, 1998.

⁶³ Articles 6 and 8, WIPO Copyright Treaty, 1996.

⁶⁴ Walden and Savage, *Data Protection and Privacy Laws: Should Organisations Be Protected?*, 37(2) INT'L & COMP. L.Q. 342(1988).

⁶⁵ *Id.*

occurs.⁶⁶ This special status granted to individual privacy, and thus to the credit card data, requires an added effort on the part of the Rubenan BPO firms to protect the data from being leaked.

In assessment of the facts at hand, allegedly between March and September 2006, sensitive client information was stolen from Protech BPO, a support company working for Andrenian credit card companies.⁶⁷ This theft created a demand for more concrete regulation of outsourced information.

4.2 No action was taken by Rubena pursuant to leak of information

It is argued that subsequent to the above mentioned leak, no action has been taken by the Rubenan Government to curb the use of this sensitive information. This inaction violates Article 4(7) of the ARFTA and Article 12 of the WCT, both of which, coupled with the above arguments, establish that the owner of the collected data has an exclusive rights, and any breach shall qualify a remedy and compensation for the owner of the rights. This infringement, according to Article 4(24) of the ARFTA, also obliges the judicial authorities to order the infringer to pay the right holder damages to compensate for the loss or injury caused due to the leak.

In pursuance of the WCT, contracting parties are supposed to provide legal protection and remedy in case such copyrighted material or compilation is copied and broadcast without authorization.⁶⁸ Also, it is submitted that the data stolen definitely contained sensitive material, the revelation of which might result in the contravention of the ICCPR, due to which the ARFTA shall cease to be effective.

In conclusion, it is humbly submitted that the companies have failed to protect the data which was entrusted to them, and the Respondent is liable for not conforming to binding agreements, both bilateral and multilateral.

⁶⁶ OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1981), Appendix, para.3.

⁶⁷ *Compromis*, ¶ 7.

⁶⁸ Article 12(1), WIPO Copyright Treaty, 1996.

5. THERE WAS A BREACH OF AN INTERNATIONAL OBLIGATION BY RUBENA

5.1 A wrongful act had been committed

Article 2 of the Articles on State Responsibility stipulates two conditions while classifying an act as a wrongful; namely that the given act should be sufficiently connected to conduct attributable to a State, and additionally there must be a breach of an international obligation of that State.⁶⁹

This obligation under consideration can be extrapolated from the relevant international agreements or customs⁷⁰ which envisage that the non-fulfilment of a duty to prevent harm even in the absence of such intention breaches an international obligation.⁷¹

Rafid's action of illegally downloading data and releasing it in the international market was in violation of Article 6^{bis}(1), Paris Convention for the Protection of Industrial Property; Articles 9, 10 and 16, TRIPS; Articles 4, 5, 6, 8, 11, 12(1) and 14(2), WIPO Copyright Treaty, 1996; Article 2, Berne Convention; and therefore a wrongful act has been committed.

5.2 The wrongful act is attributed to the State of Rubena

Article 4 of the ILC Articles attribute to the state acts committed by any organ, legislative, executive or judicial, of the Government⁷² or any organ that is recognized by the internal law.⁷³ Here, an entity refers to both a natural person as well as a legal entity.⁷⁴ Furthermore, Article 8 of the ILC Articles provides that the conduct of a person or a group of persons shall be considered as an act of state under international law if the person or group of persons is in

⁶⁹ Crawford, *supra* note 44, at 81; *Rainbow Warrior (New Zealand v. France)*, 20 R.I.A.A. 217, 251 (1990), ¶ 75; *United States Diplomatic and Consular Staff in Tehran case: Judgment*, 1980 I.C.J. 2, 29, ¶ 56; Commentary, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 2, ¶ 1 [“ILC Draft Articles” hereinafter].

⁷⁰ ILC report on the work of its Fifty-Third Session, Official Records Fifty-Sixth Session 31 Supp. No. 10(A/56/10); DiPerna, *Small Arms and Light Weapons: Complicity With A View Toward Extended State Responsibility*, 20 FLA. J. INT'L L. 25, 64 (2008).

⁷¹ Crawford, *supra* note 44, at 84.

⁷² Article 4 (1), ILC Draft Articles.

⁷³ Article 4 (2), ILC Draft Articles.

⁷⁴ Commentary, ILC Draft Articles, Article 4, ¶ 11.

fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct. It would have to be proved that the state had effective control of the operation in the course of which the alleged violations were committed.⁷⁵

Spies and clandestine agents are secret agents of a state sent abroad for the purpose of obtaining clandestinely information in regard to military, political or industrial value to the state.⁷⁶ It is submitted that Rafid was a counter intelligence spy of the Government of Rubena and was a part of the Government organ under the international law. Additionally, he does come under the wider scope of persons acting under the directive of the state since certain documents were exchanged with the Rubena intelligence agency just before the security breach.⁷⁷

Articles on State Responsibility obligate Rubena to compensate Andrena for the breach of security and consequent losses incurred by the Andrenian citizens.⁷⁸

5.3 There was lack of due diligence with respect to internet websites

A Rubenan website displayed the crack-code for the Secure Information System encryption software. This breach proves the inability of the Rubenan Government to exercise diligence in the monitoring of its internet sites.

The software and its crack code are the patented and licensed property of the producers. Thus, the failure to check the spread of the code also violates the IP rights mentioned in the ARFTA.⁷⁹ Both the Berne Convention and the WIPO Copyright Treaty mention that computer programs are protected as literary works, and the protection applies, whatever the *mode or form of expression* of these computer programs maybe.⁸⁰

⁷⁵ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), *I.C.J. Reports (1986) 14*.

⁷⁶ Jennings and Watts ed., *OPPENHEIM'S INTERNATIONAL LAW*, (2003) 1176-7; See also, Rainbow Warrior affair, UNRIAA, XX 165 (Sales no. E/F.93.V.3).

⁷⁷ *Compromis*, ¶ 18.

⁷⁸ Article 36 of Articles on State Responsibility.

⁷⁹ Articles 4(1)(a); 4(1)(c); 2; 7; 10; 13; 20, ARFTA.

⁸⁰ Article 2, Berne Convention; Article 4, WIPO Copyright Treaty.

The registered mark has a copyright period of 20 years from the date of obtaining the copyright, according to the Madrid Agreement Concerning the International Registration of Marks.⁸¹ The obligation of the contracting parties in case of broadcast of unauthorized data holds in cases of computer software and its illegal circumvention.⁸² Article 6^{bis} of the Paris Convention also binds the government to take action against the unauthorized use of the mark.⁸³ The State of Rubena has failed in all these regards as well.

6. USE OF FORCE EMPLOYED BY THE APPLICANT WAS A LEGITIMATE EXERCISE OF ITS RIGHT OF SELF-DEFENSE

6.1 There was an armed attack in response to which the right of self defence was exercised against the respondent

Self defense may be exercised as per Article 51 of the UN Charter as an exception to prohibition of the use of force under Article 2(4).⁸⁴ However, a strict and literalist interpretation of Articles 2(4) and 51 reveals the gap between them for cases of threats of use of force, not amounting to an armed attack.

Thus, many jurists read them harmoniously⁸⁵ by giving a broader interpretation to ‘armed attack’ to take into consideration the actual state of affairs with *common sense*, in full awareness of political realities;⁸⁶ since at the time of drafting, the Charter was designed only to address military hostility and “*never envisaged the new types of violence and the social conditions that were their origin and consequence.*”⁸⁷

⁸¹ Article 6, The Madrid Agreement Concerning the International Registration of Marks.

⁸² Articles 11 and 14(2), WIPO Copyright Treaty, 1996; Article 9 and 10, TRIPS.

⁸³ Article 6^{bis} (1), Paris Convention for the Protection of Industrial Property; Article 16, TRIPS.

⁸⁴ Article 24, 51 of the UN Charter.

⁸⁵ Goodrich, Hambro *et al.*, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 297-308 (1969); Tomuschat, *International Law : Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 RECUEIL DES COURS, 9, 217 (1999); Schwarzenberger, A MANUAL OF INTERNATIONAL LAW 311 (2003).; Jennings, *General Course on Principles of International Law*, RECUEIL DES COURS 323, 588 (1967).

⁸⁶ Schwarzenberger, A MANUAL OF INTERNATIONAL LAW 339 (2003).

⁸⁷ Higgins, *International Law and the Avoidance. Containment and Resolution of Disputes: General Course on Public International Law*, 230 RECUEIL DES COURS, 9, 310 (1991-V).

After Rafid downloaded the data and threatened to release the data in the international market; the applicant had sent a note *verbale* to the respondent to apprehend and arrest Rafid; however there was no cooperation by Rubena to effectuate the same and in place denied any involvement stipulating it to be Andrena's internal problem. This was an express non cooperation on part of Rubena, which was under the principle of state responsibility since Rafid was a counter intelligence spy of Rubena, who carried out the illegal act in the state of Rubena to harm the interests of the Andrenian citizens. Andrena faced the prospect of a jeopardizing the interests of its citizens and their business activities this constituted a 'grave breach of peace' amounting to an armed attack.⁸⁸ Therefore, in trying to locate Rafid by the sending in of the drones by Andrena to protect their nationals is justified.

6.2 *Arguendo, Rafid is a non-state actor, the Applicant still had a right to exercise self defence against him*

Rafid's action amounted to a breach of international peace and security, an objective all signatories of the charter are committed to.⁸⁹ The applicant could exercise its right of self defense against Rafid as an individual or a non-state actor.

Article 51 of the Charter stipulates the right of self-defense by a "member of the United Nations" against an armed attack without any qualification as to who or what is conducting the armed attack. The ordinary meaning of the terms of Article 51 provides no basis for reading into the text a restriction on who the attacker must be.⁹⁰ Where Article 2(4) of the Charter which speaks of use of force by a "member" against "any State", the same construct is not repeated in Article 51.

The right of self defense against non-state actors has gained support with state practice supporting the permissibility of responding in self defence to an attack by a non-state actor. An example being the response by the Security Council to the terrorist attacks on the territory of the United States by passing Resolution 1368 which affirmed inherent right of

⁸⁸ Waldock, *The regulation of the use of force by individual states in International Law*, 81 RECUEIL DES COURS, 451, 497 (1952-II).

⁸⁹ Article 1 of the UN Charter.

⁹⁰ See Vienna Convention on the Law of Treaties, Article 31(1), 1155 UNTS 331, 340 ("A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.")

self-defense in accordance with the charter and the need to “combat by all means” the “threats to international peace and security caused by terrorist acts”.⁹¹

The Court has repeatedly stated that the rule of customary international law must be given adhered to in determining the principles of necessity and proportionality applicable to the right of self-defense under Article 51.⁹² In the Caroline incident, regarding self-defense as a reaction to attacks by non-state actors, the governments of the United Kingdom and the United States settled upon the principles of necessity and proportionality being the basic contours of self defense.⁹³

The terrorist acts need not be imputed to a state for the purpose of invoking the right to self defense. The September 11 attacks were committed by nineteen men resident in the United States who seized aircraft in the United States and crashed them into buildings of the United States⁹⁴; even though the threat originated and was carried out in the territory of the US, the US was able to use the right of self defense in deploying troops into Afghanistan.⁹⁵

It is submitted that the applicants had a right to exercise self-defence under Article 51 against state and non-state actors.

6.3 The principle of necessity and proportionality in customary international law with respect to the use of self defence has been adhered to by Andrena

Article 51 of the Charter did not create a right to self-defense; rather, it preserved an “inherent” right of self defense, one that existed in customary international law prior to enactment of the Charter in 1945.⁹⁶ Therefore, the principles of customary international law should be adhered to.

⁹¹ Security Council Res.1368, Preamble. (Sept. 12, 2001); 40 ILM 1277 (2001).

⁹² See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996) 226 ¶ 4; Oil Platforms (Iran v. U.S.) ICJ Reports (2003) 161, ¶ 51.

⁹³ See Jennings, *The Caroline and McLeod Cases*, 32 AJIL 82, 89 (1938).

⁹⁴ See generally The 9/11 Commission Report: *Final Report of the National Commission on Terrorist Attack Upon the United States* (2004).

⁹⁵ Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations, Addressed to the President of the Security Council, UN Doc.S/2001/946 (Oct.7, 2001). (AJIL, Vol.99, No.1 (Jan 2005),

⁹⁶ Military and Paramilitary Activities in and against Nicaragua, *Supra* note 75, at 14, ¶ 176..

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The condition of necessity in international customary law requires that, before resorting to self-defense, a state must satisfy itself that the state in which the non state actor is located is unwilling or unable to take necessary steps to remove the threat cause by the non-state actor.⁹⁷

In the present case, Rafid, a counter intelligence spy of Rubena, had downloaded sensitive data illegally in the territory of Rubena and had taken political asylum in Rubena;⁹⁸ if state responsibility is not established, the applicant could take measures to locate him in the territory of Rubena as a measure of self-defence against the threat posed by him; since in light of the circumstances, the note *verbale* sent to the respondent to apprehend him was not taken action upon.

It is therefore submitted that the Applicant had the right to send drones in search for Rafid as an exercise of its right of self defence.

⁹⁷ Oil Platforms (*Iran v. USA*), ICJ Reports (2003) 161 ¶ 76.

⁹⁸ Compromis ¶ 17.

FINAL SUBMISSION/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. Rubena's enactment of the RPHSA was in violation of ARFTA and WTO Dispute Settlement Understanding and hence should be repealed.
- II. The enactment of ASISA did not violate any trade agreement and no consequent breach was committed.
- III. Rubena should pay damages resulting from its failure to take action against the breach of privacy committed by Rubenan BPO companies.
- IV. Rubena is responsible for the wrongful acts committed by Rafid and therefore must compensate Andrena adequately for the breach of privacy and data protection laws.
- V. Andrena's actions did not violate the U.N. Charter and can claim the exemption of self defense.

All of which is respectfully affirmed and submitted

Agents for the Applicant