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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 RESPONDENT

THE STATE OF RUBENA

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LIST OF 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
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 Respondent however submits preliminary objections as to the jurisdiction of this court, in accordance with Article 79 of the Rules of the Court (1978).

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.

Rubena emerged as a leading destination for outsourcing activities. 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. Various safeguard measures to protect sensitive information were taken by Rubena.

NEWSPAPER REPORTS AND SUBSQUENT ACTION BY ANDRENA:

In March 2007, Andrena Times, a newspaper alleged that sensitive information had been stolen from back office outsourcing support companies based in Rubena. The High Court of East Andrena imposed fines on various companies. Meanwhile, Nationalist Democratic Party (NDP) a hardliner against outsourcing came to power and enacted 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. This was allegedly a measure to protect the local jobs. 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.

ACTION 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 in Rubena, acting as a member of investigative agency. 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 send 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 THERE WAS A VIOLATION OF THE NATIONAL TREATMENT STANDARD CLAUSE BY THE APPLICANT STATE?
3. WHETHER THERE WAS A VIOLATION OF THE ARFTA BY THE INTRODUCTION OF TECHNICAL BARRIERS TO TRADE?
4. WHETHER THE ENACTMENT OF THE RPHSA BY RESPONDENT STATE WAS JUSTIFIED?
5. WHETHER THERE WAS LEGITIMATE EXERCISE OF USE OF FORCE BY THE STATE OF ANDRENA?
6. WHETHER STATE RESPONSIBILITY CAN BE ATTRIBUTED THROUGH THE ACTS OF RAFID?
7. WHETHER THERE WAS BREACH OF INTERNATIONAL OBLIGATIONS BY DESTROYING HERITAGE PROPERTY AND KILLING AND INJURING OF CIVILIANS OF THE RESPONDENT STATE?
8. WHETHER THE INVESTIGATION AND APPREHENSION OF RAFID IS AN INTERNAL MATTER OF THE APPLICANT STATE?
9. WHETHER THERE WAS BREACH OF IP RIGHTS BY RUBENA?

SUMMARY OF ARGUMENTS

1. The ICJ does not have the necessary jurisdiction to adjudicate upon the present claims

- The WTO dispute settlement mechanism is the proper authority to adjudicate upon claims arising out of the ARFTA, as provided in Article 16 of the Agreement.
- The rules of exhaustion of local remedies is a valid objection to the jurisdiction of the ICJ, since the alleged injury was an indirect injury and relief has already been claimed for in the domestic courts, whose decisions are pending.

2. There was violation of the National Treatment Standard (NTS) clause by Andrena

- Protection of data was not the objective sought to be achieved, rather the imposition of the SIS requirement was done to protect local jobs and therefore was in violation of the NTS clause of the ARFTA.

3. The introduction of SIS created a technical barrier to trade

- The introduction of the SIS was in breach of Article 7 of the ARFTA, which obligates both countries to refrain from creating barriers to trade.
- Licences as prescribed by the SIS were not issued even after repeated requests by the Respondent state and this proves that the introduction of the SIS was done to cease outsourcing activities between the two states.
- The imposition of the SIS and licence system violated the Technical Barrier to Trade Agreement and were violative of WTO obligations, whereby Andrena breached its commitments of liberalization and reduction of trade barriers.

4. The Enactment of RPHSA by the Respondent State was justified and reasonable.

- The custom duty imposed by the RPHSA was not excessive and was not countermeasure to the license system introduced by Andrena; it was introduced for domestic and internal reasons.

- *Arguendo,* RPHSA was a retaliatory measure, it was justified in light of the stringent SIS introduction by Andrena.

5. <u>There was use of force by Andrena against the respondent</u>

- Sending of drones constitutes use of force *vide* Article 2 (4) of the UN Charter since it threatened international peace and security, while making temporary incursions into the territorial sovereignty of the Respondent state.

- Self defence cannot be prayed for by Andrena under the UN Charter as the Charter overrides any customary right to self defence**,** since both parties being signatories to it, are to governed by Article 51 rather than customary international law.

- Andrena had no right to exercise its inherent right to self defence under customary international law which requires a high degree of necessity and imminence of a threat; both of which were absent. Also, the force used by Andrena was disproportionate to any possible threat that might have existed due to Rafid's presence in Rubena.

6. <u>The Respondent is not responsible for the acts committed by Rafid</u>

- The state of Rubena cannot be held responsible for the acts committed by Rafid as there is no established link between its legal relationship or de jure link . The ILC Draft Articles on State Responsibility require that there should have been direction as to the specific operation alleged to be wrongful; however in the present case there is nothing to establish such control.

7. <u>The act of destroying heritage property along with the killing and injuring of civilians was wrongful and breach of international obligation.</u>

- A State is under an obligation to compensate for the damage caused by commission of an internationally wrongful act. The destruction of the 700 year old temple in Rubena was in violation of the World Heritage Convention and thereby a breach of an international obligation for which Andrena must compensate the Respondent state.

- The use of force was violative of Article 2(4) of the UN Charter, resulting in a breach of an international obligation; this act had caused the death of 152 civilians and injured 300 others. The state of Andrena is liable to compensate Rubena as per Article 36 of the ILC Draft Articles on State Responsibility.

8. Investigation as regards Rafid are Andrena's internal matter

- Rafid's presence in Rubena is a disputed matter; also he is a retired intelligence officer of Andrena, and no links have been established between him and the Rubenan Government. All occurrences of data theft are a matter personal to Andrena, and Rubena owes no obligation to Andrena to cooperate in matters that are not even founded evidence, which is inadmissible.

9. The was no breach of IP rights by the Respondent state

- The breach of intellectual property rights of the producers of SIS, namely the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, WIPO Copyright Treaty, Patent Cooperation Treaty, Madrid Agreement, and the provisions as mentioned in Articles 4(10), 4(13) and 4(20) of the ARFTA does not concern the state of Rubena.

10. Admissibility of certain evidence

- The report of Andrena Times cannot be accepted as evidence as it emanated from a single source and was not of wide public knowledge.

- Evidence discovered on 18th September is admissible, that is, the report of the Dept. of Homeland Security, Andrena, illegally uploaded on a Rubenan website; but the though the probative value of the same has to be determined by the court.

ARGUMENTS ADVANCED

1. THE ICJ DOES NOT HAVE THE NECESSARY JURISDICTION

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.

While before tribunals, an objection of incompetence must be examined in *limine litis* for the reasons of economy of procedure, in the international field there are more substantial grounds which make it necessary to deal with the questions of jurisdiction as independent and preliminary issues.[1] A party should not have to give an account of itself on the issues of merit before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established.[2]

Article 16 of the ARFTA provides that all disputes in respect of the agreement is to be settled through consultations, failing which any method of settlement enumerated under Article 33 of the UN Charter may be resorted to.[3] The Article also stipulates the WTO dispute settlement mechanism as a method of settlement.

1.1 The WTO dispute settlement mechanism is the proper authority to adjudicate upon claims arising out of the ARFTA.

All disputes arising from the Agreement Establishing the World Trade Organization, General Agreement on Trade in Services Agreement on Trade-Related Aspects of Intellectual Property Rights, etc. are to be resolved according to the Understanding on Rules and Procedures Governing the Settlement of Disputes.[4]

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[1]Arechaga, *Peaceful Settlements of disputes and the International Court of Justice: General Course on public international law,* 159 RECUEIL DES COURS 1, 156 (1978 I).
[2] ICAO Council case, ICJ Reports (1972) at 56.
[3] *Compromis*, Annexure Article 16 of ARFTA.
[4] 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).

Article XXIII of the GATS stipulates that if any Member fails to carry out its obligations or specific commitments under this Agreement, recourse to the DSU shall be made.[5] Additionally the Agreement on Technical Barriers to Trade[6] through Article 14 establishes that settlement of disputes with respect to operation of the agreement is to be done in accordance with Article XXIII of the GATT, 1994.

Each of these takes recourse to the DSU in case of a failure to perform an obligation by a contracting party. Article 16 of the ARFTA also does the same, in that it stipulates that the WTO DSU may be resorted to.

Also, all the major alternative dispute settlement methods under Article 33 of the UN Charter, like bilateral and multilateral consultations, good offices, conciliation, mediation, panel and appellate review procedures, arbitration, and national and international adjudication are available in WTO DSU.

Therefore, the dispute settlement mechanism as available under the WTO may be resorted to with respect to all claims arising from agreements under the same.

1.2 Local remedies available must be exhausted before submission of dispute to the ICJ

1.2.1 The injury caused was an indirect injury

Under international law, as per the ICJ, local remedies must be exhausted before international proceedings are instituted.[7] This stems from the basic rule of international law preserving a state's sovereignty; that is, the state where the violation occurred should have an opportunity to redress it by its own means, within the framework of its domestic legal system.[8]

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[5] WTO Agreements: Article XXIII of the GATS.
[6] Article 14 of The Technical Barriers to Trade Agreement
[7] Interhandel case, *USA v. Switzerland* ICJ Reports (1959) 6 ["Interhandel case" hereinafter]; Briggs, *Domestic Jurisdiction Reservations,* 93 RECUEIL DES COURS 309, 323 (1958 I).
[8] Finnish Ships Case, 3 RIAA 1479; Interhandel case, *Supra* note 7, at 26-7.

The rule of local remedies is established to be applicable in all cases of indirect injury to a state, that is, injury caused to its nationals.[9] In cases of indirect injury where the injured alien has established a link with the State whose actions are impugned, the rule of local remedies is applicable.[10] This link between the alien and a particular state confers jurisdiction on domestic courts and renders the issue subject to the application of the local law.[11]

The relief prayed for by the State is essential in determining whether the injury was direct or indirect.[12]In the *Interhandel* case[13] the Court upheld a preliminary objection of the United States and in doing so stressed the essential similarity of interests and actions of Internhandel (in the proceedings instituted by it in the Courts of the United States) and of Switzerland (in the ICJ) and the absence of any distinct interest as a State in the claim. In cases of diplomatic protection, that is, indirect injury to a State through injury to its national's interests, the rule of exhaustion of local remedies is applicable.

The present claims are made by the Applicant on behalf of its injured nationals due to alleged breach of privacy by the Respondent. The interests of the state are not distinct from that of its injured nationals and therefore the relief prayed for is to remedy the injury done to it citizens without involving any distinct interest of the state. Therefore, the rule of local remedies being applicable to indirect injuries, it is submitted that the Applicant exhaust the same before submitting its claims before this Court.

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[9] Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 497-8 (1963); Waldock, *Plea of Domestic Jurisdiction before International Legal Tribunals,* 31 BRIT. Y.B. INT'L L 96, 114 (1954); Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1954-9: General Principles and Sources of International Law,* 35 BRIT. Y.B. INT'L L 183, 200 (1959)

[10] Interhandel case, *Supra* note 7.

[11] Meron, *The incidence of the rule of exhaustion of local remedies,* 35 BRIT. Y.B. INT'L L 84, 95 (1959).

[12] *The I'm Alone* case (*Canada* v. *U.S.A*). R.I.A.A., 1935, vol.3, at 1618; Ambatielos case (*Greece* v. *United Kingdom)* (Merits: Obligation to Arbitrate), ICJ Reports (1953) 10.

[13] Interhandel Case, *Supra* note 7.

1.2.2 Local remedies have not been exhausted even by the injured nationals

The decision in allowing the preliminary objection in the Interhandel case[14], was dissented from and criticized on the ground that the proceedings instituted in the domestic courts had lasted, for ten years and therefore could not be regarded as adequate or effective. Furthermore, it was put forth that there was no remedy available to the State of Switzerland in the domestic courts.[15]

In the present case there has been injury caused to individuals and corporations and they have proceeded to institute suits in the domestic courts.

The High Court of South East Andrena has already heard the claims of parties injured due to the leakage of sensitive client information, where SBI, IPL and other parties acted as respondents. The court also passed an order against IPL imposing a fine of US$ 1,000,000 on it. An appeal with regard to this order is pending in the Supreme Court of Andrena.[16]

In the second instance of release of sensitive data in the international market by Rafid, Andrenian citizens sued IPL and SBI, in Andrena; and the claim is yet to be adjudicated upon. SBI has in turn sued IPL in Rubena, for breach of contract and confidentiality clauses; this suit was however dismissed.[17]

The local remedies cannot be declared to be ineffective or inadequate since the appeals are pending in the domestic courts. Also, the private injured parties have initiated proceedings for recovery of damages according to the breach alleged. It is submitted that the decision of the courts in these matters should be awaited before adjudication on the merits of the present dispute to avoid duplicative claims for recovery, even if under separate causes of action, and unjust enrichment of the injured parties.[18]

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[14] *Id*.
[15] Interhandel case, supra note 7, Dissenting opinions of Judge Carry at 32 and Judge Winiarski at 83.
[16] *Compromis*, ¶ 9.
[17] *Compromis*, ¶ 18.
[18] Volkovitsch, *Righting Wrongs: A New Theory of State Succession to Responsibility for International Delicts*, 92.Colum L.Rev. 2162 (1992).

2. THERE WAS VIOLATION OF THE NATIONAL TREATMENT STANDARD (NTS) CLAUSE BY ANDRENA

According to equality principle, every country shall not in its territory subject investments or turns of nationals or companies of the other party to treatment less favourable than that which it accords in the same circumstances to investment or returns of its own nationals.19 National treatment and Most Favored Nation (MFN) treatment require that each party treat other investors and their investments no less favorably than it treats its own investors and their investments (national treatment) or investors or investments of third parties (MFN treatment).[20]

The principle of equality has been set by international law as "the treatment due by each State with regard to the foreign nations, conforming with the minimum standard of treatment to aliens". [21]

There was a violation of the NTS as the regulation for the licences was only for third parties engaged in outsourced activities,[22] and not all local companies engaged in credit card operations, 23 and hence no protection was data was sought to be achieved [2.1] It is submitted that the imposition of licenses were a violation of NTS clause and aimed to protect local jobs.

2.1 Protection of data was not the objective sought to be achieved

It is submitted that Article 2(3) of the ARFTA was violated by Andrena while enacting the ASISA.[24] The requirement for the propriety software Secure Information System (SIS) was only for third countries to which Andrenian companies were outsourcing confidential information. If security of confidential information was the main aim of the Andrenian

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[19] Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice,* 70 BRIT. Y.B. OF INT'L L., 99, 100 (2000); Simma, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 296 (1995); Matsushita et al., THE WORLD TRADE ORGANISATION: LAW, PRACTICE AND POLICY 144 (2003).
[20] *Compromis*, ¶ 10.
[21] Charles Brower, Il et al., *Fair and Equitable Treatment under NAFTA's Investment Chapter*, 96 AM. SOC'Y INT'L L. PROC. 9, 19-20 (2002); Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place,* EUROPEAN JOURNAL OF INTERNATIONAL LAW, 11(4) 777, 763-813 (2000).
[22] Jackson, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS, 57 (2000).
[23] *Compromis*, ¶ 10.
[24] Accordance of National Treatment following Article III, GATT, 1994.

government, then it would have made the use of SIS compulsory for all companies, including its own nationals engaged in all credit card operations.

2.2 <u>The main aim of imposing SIS requirement was to protect local jobs</u>

It is submitted that with the specific aim of curbing the rising unemployment, the decision to introduce license fee based SIS was taken by Andrena.

The imposition of license regulation only for third parties engaged in outsourcing, and not all companies engaged in credit card operations,[25] entails like persons being treated in an inequivalent manner.[26] Invidious distinctions are undoubtedly prohibited by international law, and are actionable.[27]

The State's exercise of sovereign authority is subject to the restrictions imposed by international law such as the principle of non-discrimination.[28] It is argued that, while Andrena agreed on the international level to allow outsourcing initially, after the problem of outsourcing, it began a process of restructuring its industry through various measures to offset the effects of outsourcing. It is in furtherance of this objective to protect local jobs, and not to protect sensitive data, that SIS was made compulsory for third parties engaged in outsourcing.

Rubena expects that the parties involved in outsourcing transactions understand the need for trade rationalization, and will make voluntary efforts, and not prohibitory ones, to achieve this purpose. It recognises the need that protection of sensitive client information is necessary. In the light of the same it has passed the Rubena Outsourcing Activity Act (ROAA), which authorizes the setting up of Outsourcing Activity Protection Agency (OAPA). Thus, it was taking all possible steps towards privacy protection, and the license requirement only for third parties was a violation of the NTS clause.

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[25] *Compromis*, ¶ 10.
[26] Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Investment: An Overview*, JOURNAL OF TRANSNATIONAL LAW AND POLICY 348 (Fall, 1998).
[27] Ignacio Pinto-León, *Fair and Equitable Treatment under International Law: Analyzing the interpretation of NAFTA*, INTERNATIONAL TRADE LAW JOURNAL, 142 (Winter 2006); Schwartz & Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organisation,* JOURNAL OF LEGAL STUDIES XXXI , 179-204, 181 (JANUARY1, 2002, PART 2).
[28] Van Kleffens, *Sovereignty in International Law* , 82 RECUEIL DES COURS, 1-131, 117 (1953-I); Schmitthoff, EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE 101 (2007).

It is humbly submitted by the Respondents that in case of nationals of trading States, the parties involved should not apply impositions in excess of that reasonably allocable or apportionable to its territories.[29] Limited access to markets and the subsequent monopolistic control will have harmful effects upon commerce between their respective territories.[30]

The measures for SIS under the licensing and technical agreement are specifically aimed at providing protection for the Andrenian jobs, and are hence in violation of the ARFTA and international trade commitments.

3. THERE WAS A BARRIER TO TRADE WHEN SIS WAS INTRODUCED

It is submitted that the legislation mandating the use of SIS for all third parties engaged in outsourcing amounts to a barrier to trade, and was in violation of the ARFTA.[31] Technical barriers to trade, such as licensing requirements impede the free flow of products and services between trading partners.[32] Legal barriers include strict control of licensing and licenses.[33] Among NAFTA's objectives are the elimination of trade barriers, the promotion of fair competition, and the expansion of investment opportunities within the free trade area.[34]

3.1 There was a breach of ARFTA

Article 7 1 (b) of the ARFTA obligates both nations to refrain from imposing unnecessary barriers on electronic transmissions, including digitized products.[35] The compulsory use of the SIS software for third parties,[36] the high licensing fee of $64000,[37] and the subsequent non issuance of licences was an unnecessary barrier on electronic

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[29] Matsushita et al., THE WORLD TRADE ORGANISATION: LAW, PRACTICE AND POLICY 148 (2003).
[30] P. Gallagher, THE FIRST TEN YEARS OF THE WTO: 1995 TO 2005, 93 (2005); Stoll, Schorkopf, Steinmann, WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW, 155 (2006).
[31] *Compromis*, ¶ 10.
[32] Mengozzi, *Private International Law and the WTO Law* 292 RECUEIL DES COURS 265, 314 (2001); Henson & Wilson, THE WTO AND TECHNICAL BARRIERS TO TRADE: CRITICAL PERSPECTIVE ON THE GLOBAL TRADING SYSTEM AND THE WTO 133 (2005).
[33] Perroni & Wigle, *International Process Standards and the North-South Trade,* REVIEW OF DEVELOPMENT ECONOMICS, 3(1) 11-26, 14 (1999); Makus et al., QUANTIFYING THE IMPACT OF TECHNICAL BARRIERS TO TRADE: CAN IT BE DONE? , 128 (2001).
[34] North American Free Trade Agreement, Dec 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (entered into force Jan. 1, 1994) Article 101.
[35] Article 7(1) (b), ARFTA.
[36] *Compromis*,¶ 10
[37] *Compromis*,¶ 11

transmission, which violates the trade agreements and obligations of Andrena. Article 13 (b) of the ARFTA is also violated, as under that, Andrena sought to furnish Rubena with economic technical assistance, in view of Rubena's developing status and the size of its economy.[38]

3.2 Licences were not issued even after repeated requests

The required SIS software and the export of dual use technology were prohibited unless it was made under a special permit granted by the Department of Export Administration.[39] Till date, not even a single Andrenian Company has received the permission to export such technology.[40] Even after Andrena invited contracting parties to apply for licences on behest of intervention of the Rubenan government, no licences were issued.[41] This clearly amounts to a barrier to trade, with the aim to crushing foreign investment. With the per capita income of Rubena established at $3000, the requirement of software for $64000 per user is another barrier to trade.

3.3 The Technical Barrier to Trade Agreement was violated

Pursuant to Article 11.2 of the WTO Agreement, Technical Barrier to Trade Agreement is binding on all members, being sources of WTO law.[42] It aims to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles and that arbitrarily set regulations are not used as an excuse for protectionism.[43]

Article 2.3 of the Agreement envisages that technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.[44] It is submitted that Rubena took sufficient steps by enacting the Rubena Outsourcing

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[38] Article 13(b), ARFTA
[39] *Compromis*,¶ 10.
[40] *Compromis*,¶ 12.
[41] *Id.*
[42] Hudec, Kennedy and Southwick, THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW, 455 (2002); Henson & Wilson, THE WTO AND TECHNICAL BARRIERS TO TRADE: CRITICAL PERSPECTIVE ON THE GLOBAL TRADING SYSTEM AND THE WTO, 78 (2005).
[43] Bhagwati & Hudec eds., FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?, 119 (1996).
[44] Article 2.3 of The Technical Barriers to Trade Agreement, WTO.

Activity Act (ROAA), which authorizes the setting up of Outsourcing Activity Protection Agency (OAPA), which conducts checks to ensure protection of data.[45] Thus, issues relating to protection of data could have been addressed in a less trade-restrictive manner.

Article 12.7 of the agreement envisages that Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members.[46] In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members. Non issuance of licences proves that no such assistance was accorded and unnecessary.

3.4 Imposition of licences are violative of WTO obligations

In connection with its accession to the WTO, Andrena has made certain commitments to liberalize and reform its economy.[47]

Multilateral trade agreements do not provide a process by which private initiatives can apply to have the initiative and its standards for compliance included in the agreement. Thus, the process for adopting and maintaining standards under a trade agreement should be as clear and accessible as possible, and the people charged with reviewing these applications should have autonomy to make decisions as they see fit without unnecessary bureaucratic obstacles.[48] The fact that a special permit for the export of licences had to be obtained from Department of Export Administration violates such an obligation.

In addition, a set of prerequisites should be established before an initiative can begin the application process. It is submitted that once an initiative has satisfied the prerequisites, a step-by-step application procedure should follow which allows for a short application and decision process. Finally, information about the standards that are adopted in an

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[45] *Compromis*,¶ 4.
[46] Article 12.7 of The Technical Barriers to Trade Agreement, WTO.
[47] According to WTO Guidelines, 1994; Mengozzi, *Private International Law and the WTO Law* 292 RECUEIL DES COURS 265, 304-7(2001);
[48] Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: "Treaty Interpretation and other Treaty Points"*, 28 BRIT. Y.B. INT'L L 202, 230 (1951).

agreement needs to be readily available to consumers, including any agreed upon labelling.[49]

Andrena's defensive edge is part and parcel of its commercial prowess, and that prowess depends on exports and a global leadership role for Andrenian business. Indeed, banning high-tech companies from competing for outsourcing business would probably harm Andrena's national interest more than saving jobs by introducing trade barriers.

The fact that a crack code for SIS is available shows that it is not secure software, and has deficiencies.[50] Thus, there are definitely loopholes in the security system owing to deficiencies in SIS which was produced by Andrena.

It his humbly submitted before the Court that this proves beyond doubt that the implementation of ASISA was primarily meant as a barrier to trade between the two countries. It is a generally accepted fact backed by the UN that superior economic strength triggers off tendencies directed to the exploitation of the advantages offered by this position.[51] This act of the Andrenian Government is a prime example of this belief. Such a move would not have protected the economic security of Andrenian citizens, but only acted as a barrier to market access.

4. THE ENACTMENT OF RPHSA WAS JUSTIFIED

4.1 The custom duty is not excessive

It is submitted that the custom duty of 150% on wine and spirits and 75% on heavy water manufacturing equipment and nuclear exported into Rubena is not excessive or discriminatory. In the recent 2008 decision of WTO in the *Additional Duties* case[52], even though India was found on appeal guilty of imposing high duty on wine and spirits, the same amounted to more than 550% in total. In the present case there are no excessive

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[49] Trebilcock & Howse, THE REGULATION OF INTERNATIONAL TRADE 87 (2005).
[50] *Compromis*,¶ 21.
[51] Eorsi, *Contracts of Adhesion and the Protection of the Weaker Party in International Trade Relations*, UNDROIT: NEW DIRECTIONS IN INTERNATIONAL TRADE LAW 259 (1977);
[52] India-U.S. WT/DS360/AB/R.

"additional" duties imposed by the Respondents.[53] A measure to impose high custom duty is a measure to offset certain domestic burdens, like local taxes and is thus in public interest.

The Respondent denies the Applicant's contention that RPHSA was only enacted as a counter to the license regulations of Applicant. It is submitted that the discrimination inherent in an imposition is the *effect* of the imposition of the tariff, and not the *purpose* behind it.[54] The effect of the imposition was not discriminatory, and was an accepted norm in the international trade, enacted in public interest.

4.2 *Arguendo*, RPHSA was a retaliatory measure, it was justified.

The alternative to a retaliatory treatment can be compensation for the suffering party.[55] A possible compensation for the unjust imposition of license based SIS was opening up of the outsourcing sector which would require a larger degree of access to Rubenan companies than if access were able to be provided on a NTS basis. Even though greater openness would have improved economic welfare for the Respondent, the political economy of trade policy of the Andrena is such that the political leadership of the country would never let such a unilateral reform happen. The Nationalist Democratic Party (NDP) was a hardliner against outsourcing,[56] and would have made such a compensatory measure impossible. Thus retaliatory enactment was the only viable option for the Respondents.

5. THERE WAS USE OF FORCE BY ANDRENA AGAINST THE RESPONDENT

Andrena sent an armed military force into Rubena's territory without their consent which violated Art. 2(4) of the U.N. Charter for which the customary right to self defence cannot be prayed for. Moreover, the conduct cannot be justified under Art. 51 of the U.N. Charter for not conforming to the requirements necessity and proportionality.

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[53] *Compromis*,¶ 14.
[54] Section 129 (c) (1) of the Uruguay Round Agreements Act (WTO Doc. WT/DS22/R of July 15, 2002).
[55] Anderson, *Peculiarities of retaliation in WTO dispute settlement*, WORLD TRADE REVIEW 1(2) 132 (2002).
[56] *Compromis*,¶ 6.

5.1 Sending of drones constitutes use of force vide Article 2 (4) of the UN Charter

Article 2(4) of the UN Charter prohibits the use of force in instances such as an armed incursion into the territory of another state without their consent;[57] even if it is not intended to deprive it of a part of its territory.[58] It is an important norm of international law and even prohibits the *threat of use of force*, by signatory members[59]; thereby upholding the primacy of peace not only for protecting State autonomy but also human rights.[60]

In the present case, Andrena sent drones into the border areas of Rubena, which fired missiles, killing 152 peoples and injuring 300 others. Further, the missiles destroyed a 700 year old temple in Rubena.[61] This violated the territorial integrity of Rubena, since use of force is a violation of territorial sovereignty even if done for a limited purpose or for a temporary period[62]. Here the alleged purpose of locating Rafid cannot be used as a justification for the use of force.

5.2 Self defense cannot be prayed for under the UN Charter or under customary international law

5.2.1 The U.N. Charter overrides any customary right to self defence.

The only exception to Article 2 paragraph 4 of the Charter which prohibits the use of force is Article 51 of the Charter which stipulates that there is an inherent right of individual or collective self-defense in case of an armed attack.[63] Article 51 is very explicit in its formulation of a condition that individual or collective self-defence is

[57] Waldock, *The regulation of the use of force by individual states in international law*, 81 RECUEIL DES COURS, 451, 492 (1952-II); Fitzmaurice, *The General principles of international law considered from the standpoint of the rule of law*, 92 RECUEIL DES COURS 1, 174 (1957-II).
[58] Simma, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 117 (1995).
[59] Henkin, *Non-Intervention and the Use of Force: General Course on public international law*, 216 RECUEIL DES COURS 1, 144(1989 IV); Schachter, *The Use of Force: Self-Defence*,178 RECUEIL DES COURS 151(1982 V).
[60]Henkin, *Ibid*. at 146.
[61] *Compromis*,¶ 19.
[62] Arechaga, *Supra* note 1, at 159.
[63] Article 51of the UN Charter.

lawful "if an armed attack occurs against a Member of the United Nations."[64]

Therefore, Article 51 should be bound by *lex scripta* to give effect to the conditionality imposed by the term 'if' [65] or the limits imposed would be meaningless.[66] Accounting for the deliberate use of the term 'armed attack' in contrast to 'aggression' as in Articles 1(1), 39 and 53 (1); a narrow reading should be attributed. The exception embodied in Article 51 has been interpreted restrictively by the decisions of the I.C.J. [67] and a majority of jurists,[68] evidencing international recognition to limit it to '*actual use of military force against the territory of the attacked state*'.[69] When members involved are both signatories to the UN Charter, their right of self defence is provided by the Charter itself.

In the present case, there was no actual use of military force by the state of Rubena and the Applicant state's act was not in exercise of its right to self-defence under Article 51 of the Charter.

Furthermore, Art. 3 of G.A. Resolution #3314 defines aggression (which is a broader form of armed attack) in terms of military invasions, attacks and sanctions.[70] The bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State is also an act of aggression as per this definition. It is submitted that the act of sending drones was not in response to an armed attack by Rubena; it was merely to locate Rafid in the territory of Rubena[71] and therefore is not an exercise of the right of self-defence as per Article 51 of the Charter.

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[64] Brownlie, *The Use of Force by States*, 255 RECUEIL DES COURS 195, 203 (1995).
[65] Brownlie, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 274 (1963).
[66] Brownlie, *Ibid* at 275.
[67] Military and Paramilitary Activities in and against Nicaragua (*Nicargua v. U.S),* 1986 ICJ Reports.14,195 ["Nicaragua case" hereinafter]; The Corfu Channel Case (*United Kingdom and Northern Ireland* v. *People's Republic of Albania*), 1949 I.C.J. 4, 31 (Apr. 9) ["Corfu Channel case" hereinafter]; Oil Platforms (*Iran* v. *USA*), ICJ Reports (2003) 161.
[68] Frowein, *Reactions by not directly affected states to breaches of public international law*, 248 RECUEIL DES COURS 345, (1994-IV); Lachs, "*The Development and general trends of International Law in our time: General Course in Public International Law*, 169 RECUEIL DES COURS 9, 163 (1980-IV); Brownlie, *Supra* note 65, at 179
[69] Franck, *Who killed Article 2(4)? Changing Norms governing the use of forces of states*, 64(4) AM. J. INT'L L. 809, 822 (1970); Brownlie, *Supra* note 65, at 274 .
[70] Article 3, United Nations General Assembly Resolution 3314 (XXIX).
[71] *Compromis*,¶ 19.

5.2.2 Andrena had no right to exercise its inherent right to self defence under customary international law

The *Caroline* incident[72] of 1837 had established that there had to "exist a necessity of self defence, instant, over-whelming, leaving no choice of means, and no moment for deliberation".[73] Apart from these conditions the act of self-defense is limited to acts that are not unreasonable or excessive.[74]

The tests of necessity and proportionality are essential and enshrined in customary law such that an action in self defense must conform to them.[75] The test of necessity requires the Applicant, to establish that the situation is 'absolute' with no alternate solution foreseeable; and not 'apprehended'. [76] Proportionality demands reasonableness related to the size, duration and target of response.[77]

There existed no such imminence or necessity established, since the information allegedly possessed by Rafid was released in the international market; his apprehension by the Applicant state by the sending of drone is not a proportionate to the threat posed. It is therefore submitted that the Applicant state's act was not a legitimate exercise of its right to self defence under international customary law.

6. *ARGUENDO*, THE ACTS COMMITTED BY RAFID WERE WRONGFUL, THE RESPONDENT IS NOT RESPONSIBLE FOR THEM

The acts committed by Rafid can be attributed to the Respondent state only if state responsibility is established as per the ILC Draft Articles.[78] In attributing such responsibility

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[72] Jennings, *The Caroline and McLeod Cases*, 32 AJIL, 82 (1938).
[73] Jennings, *Ibid* at 85.
[74] Brownlie, *Supra* note 65, at 112-113; Brownlie, *Supra* note 64, at 209.
[75] Case concerning the Gabcíkovo-Nagymaros Project 1997 I.C.J. at 92 (Sept. 25); *Nicaragua* case, *Supra* note 67 at 14, ¶ 237.
[76] Oppenheim, INTERNATIONAL LAW 421(1996); Dinstein, WAR, AGGRESSION AND SELF DEFENSE 184 (2001).
[77] Waldock, *Supra* note 57, at 453.
[78] Article 2 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ["ILC Draft Articles" hereinafter].

the Court in the *Nicaragua* judgment held that it has to be determined, "*whether or not the relationship of the individuals to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras (individuals), for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.*"[79]

The Court's reasoning reflects traditional State responsibility, whereby some relationship of control and dependence exists between the State, acting through its competent organ (usually the government) and the entity actually performing the impugned acts, whether those acts are war crimes or otherwise in violation of international law.[80] There has to be a legal or de jure link between the State and the individual before attribution can take place.[81] Also, where a particular act is to be attributed it has to be established that the specific operation was carried out under its direction and control, provided that the complaint related to conduct constitutes a necessary, integral or intended part of the operation.[82]

In the present case, there is no evidence establishing such a degree of control and dependency between Rafid's actions and the State of Rubena. Rafid was a retired intelligence officer for the state of Andrena and therefore his actions cannot be attributed to the state of Rubena; hence, no state responsibility attributable to the Respondent state is established.

[79] *Nicaragua* case, Supra note 56 , at 14, ¶ 171.
[80] Hoogh, *Article 4 and 8 of the 2001 ILC: Articles on State Responsibility*, 72 BRIT. Y.B. INT'L L 264, 264 (2001).
[81] *Id*; Commentary ILC Draft Articles 8- ¶ 5.
[82] Crawford, First Report on State Responsibility, A/CN.4/490/Add.5, 22 July 1998, ¶ 16-24.

7. THE ACT OF DESTROYING HERITAGE PROPERTY ALONG WITH THE KILLING AND INJURING OF CIVILIANS WAS WRONGFUL AND BREACH OF INTERNATIONAL OBLIGATION.

A State is under an obligation to compensate for the damage caused by commission of an internationally wrongful act.[83]

7.1 The State of Andrena breached an international obligation by destroying heritage property

Andrena is responsible for the same under the Articles on State Responsibility, having sent drones into the border areas of Rubena, as there exists an international obligation *vide* Article2(4) of the UN Charter with respect to the use of force and the World Heritage Convention[84]; which seeks to identify cultural and national heritage of outstanding universal value throughout the world, and ensure its protection through international cooperation.[85]

In 2001, the General Conference of UNESCO adopted a similar resolution entitled "Acts Constituting a Crime Against the Common Heritage of Humanity."[86] The UNESCO Declaration focuses on the conduct of member states during times of peace and war by emphasizing the need for member states to comply with customary international law and the principles and objectives embodied in a number of international agreements and recommendations concerning the protection of cultural heritage.

Article 6 of the Declaration provides for state responsibility, in that, a State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, intentional destruction of cultural heritage, bears the responsibility for such destruction, to the extent provided for by international law.[87] It is thereby submitted that

[83] Art. 36, International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Supp. No. 10 (A/56/10) (November 2001).
[84] Convention Concerning the Protection of World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37 .
[85] Provost, *Reciprocity in Human Rights and Humanitarian Law*, 65 BRIT. Y.B. INT'L L 383, 391 (1994).
[85] *Id*; Commentary ILC Draft Art 8- ¶ 5.
[86] See Acts Constituting "A Crime Against The Common Heritage Of Humanity," UNESCO Doc 31C/Res 26.
[87] Article 6 of UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage.

Andrena for destroying a 700 year old world heritage property[88] has to compensate the Respondent State for its breach of international obligations as under the above conventions

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7.2 The State of Andrena has to pay compensation for loss of life and injury to civilians

The Applicant is responsible under the Articles on State Responsibility[89], having sent drones into the border areas of Rubena and thereby killing 152 civilians and injuring 300 others, as there exists an international obligation *vide* Article2(4) of the UN Charter with respect to the use of force and a principle of customary international law to spare civilian population; as no civilian population is to be a target of military attacks.[90]

It is submitted that the Applicant must pay compensation for the loss of life and injuries caused as per Article 36 of the ILC Draft Articles.

8. INVESTIGATION AS REGARDS RAFID ARE ANDRENA'S INTERNAL MATTER

All evidence regarding the issue is unsubstantiated and is non-admissible in the ICJ, as will be discussed in further arguments. Article 4(12) of the ARFTA and Article 11 of the WCT are not applicable in this matter, as the ARFTA only calls for cooperation in economic matters.[91]

The Rubenan Government is not obliged to cooperate in the investigation into what is definitely a private matter for Andrena The fact that Mr. Rafid had been granted political asylum in Rubena is a disputed topic and there is no proof backing the same. Also, Mr. Rafid is just a retired intelligence officer of Andrena,[92] and no links have been established between him and the Rubenan Government. All occurrences of data theft are a matter personal to

[88] *Compromis*,¶ 19.

[89] Article 2, ILC Draft Articles.
[90] Provost, *Supra* note 85, at 385.
[91] Article 13, ARFTA. See also R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L 283 (1966).
[92] *Compromis*, ¶ 17.

Andrena, and Rubena owes no obligation to Andrena to cooperate in matters that are not even founded on solid ground.

According to the ICJ directives on the admissibility of evidence,[93] the evidence cited by the Andrenian Government is unverified and inadmissible, having been mainly based on a single newspaper report and rumours. The investigation and subsequent findings of the Rubenan Government on the alleged link between Rubenan intelligence and Mr. Rafid are confidential and relevant to the security interests of the country. Any disclosure shall breach Article 11(2)(a) of the ARFTA,[94] and will compromise national security.

9. THERE WAS NO BREACH OF IP RIGHTS

The breach of intellectual property rights of the producers of SIS, namely the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks,[95] WIPO Copyright Treaty,[96] Patent Cooperation Treaty,[97] Madrid Agreement,[98] and the provisions as mentioned in Articles 4(10),[99] 4(13)[100] and 4(20)[101] of the ARFTA is not a matter of concern to the Government of Rubena.

Internet content cannot be regulated completely, and Rubena can only offer cooperation in preventing the spread of the crack code, which it has not denied. The matter of claiming compensation can only be settled in Andrenian or Rubenan courts as it concerns breach of IP laws by individuals, and not the nation of Rubena as a whole.[102]

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[93] R. Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, 23 RECUEIL DES COURS 9, 310 (1991 V).
[94] Article 11(2)(a), ARFTA says that "*Nothing in this agreement shall be construed to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.*"
[95] Article 4(1)(a), ARFTA.
[96] Article 2, ARFTA.
[97] Article 2, ARFTA.
[98] *Id*.
[99] Article 1(4), WCT orders compliance with the provisions of the Treaty and the Berne Convention.
[100] Article 11, WCT mentions the obligation of states to protect against circumvention of technical measures.
[101] Article 4(20) enumerates the exceptional cases in which infringement of a patent right can be allowed.
[102] L. Reed, *Mixed Private and Public International Law Solutions to International Crises*, 209 RECUEIL DES COURS 306 (2003).

According to the Joint Recommendation Concerning Provisions on the Protection of Well Known Marks, a few of the requirements that qualify a mark (in this case SIS) as well-known are the *duration, extent and geographical area of use, promotion and registration of the mark.*[103] The use of SIS was hardly prevalent over any geographical area as licenses for export and import of the software was not made available by the Andrenian Government. Thus, this provision does not make the software a recognized mark.

The value attached with the mark is of prime importance.[104] SIS had neither been used in Rubena nor was it registered or promoted around the world and thus, it does not qualify as a well known mark.

Also, findings by the Department of Homeland Security, Andrena, have proven that the software was defective and was deficient on some counts.[105] Thus, no significant value can be attached to the mark because if used, the software may fail to perform the function it was created to perform.

As a result of the same, the software is disqualified from receiving any protection under the Joint Recommendation Concerning Provisions on the Protection of Well Known Marks and the Rubenan Government has no duty to safeguard the software against any breach of IP rights. Similarly, the provisions of the Paris Convention for the Protection of Industrial Property cannot be enforced as the Convention explicitly states that the mark in question should be a well known mark.[106]

Arguendo, the ARFTA says that a breach of IP rights may be allowed in case of failure to meet working requirements and to *remedy a practice determined after judicial or administrative process to be anti-competitive.*[107] The *demarche* submitted to the Andrenian Ambassador is an administrative process recognising the implementation of the ASISA and introduction of the SIS to be anti-competitive. TRIPS,[108] on which Article 4(20) of the ARFTA is based, declares that unauthorized reproduction of the crack code is justified when the user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and such efforts have not been successful within a

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[103] Article 2(1)(b), The Joint Recommendation Concerning Provisions on the Protection of Well Known Marks.
[104] *Id.*
[105] *Compromis*, ¶ 20.
[106] Article 6[bis,] Paris Convention.
[107] Article 4(20), ARFTA.
[108] Article 31(b) in particular.

reasonable period of time. In the present case, despite repeated attempts by SBI and IPL to obtain the license and the software, the Andrenian Government denied them the permission.

10. ADMISSIBILITY OF EVIDENCE

10.1 The report of Andrena Times cannot be accepted as evidence

According to developments in the ICJ, the court has shown willingness to accept facts which are public knowledge, primarily through media dissemination, provided that caution was shown and that the reports did not emanate from a single source.[109]

As this particular story was published only in the Andrena Times, it is not admissible as convincing evidence. The burden of proof, thus, lies on the Government of Andrena to substantiate its claim.

There are reports that the Rubenan Government conducted investigations into the alleged involvement of Rafid in the theft and publication of sensitive information possessed by Protech and IPL.

Apparently, these reports claim that e-mails and documents were found to have been exchanged between Rafid and the Rubenan intelligence. Such claims are baseless and unsubstantiated, and so cannot be accepted as evidence in court. Also, such information, if disclosed by Rubena, will result in the violation of Article 11 (2) (a) of the ARFTA, which says that no government can be compelled to disclose information that may compromise its security.[110] The state cannot be held accountable for acts of individuals who have no link at all to that particular state.[111]

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[109] Nicaragua case, *Supra* note 67 at 14; *Armed Activities on the Territory of Congo* (*Democratic Republic of Congo* v. *Uganda*), ICJ Reports (2005) 168 ; R. Higgins, *Supra* note 93, at 232.
[110] Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 81(1), 116 (Jan., 1987).
[111] Friedmann, *General Courses in International Law*, 127 RECEIL DES COURS 114 (1969); McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137 (1953).

10.2 Evidence discovered on 18th September is admissible

The judgments of the ICJ also prove that evidence which has been illegally or improperly acquired may also be taken into account,[112] though the probative value of the same has to be determined by the court. Thus, the report of the Dept. of Homeland Security, Andrena, can also be considered as evidence, even though it was illegally uploaded on a Rubenan website**.**

In some cases evidence has also been accepted just prior the oral hearing commences.[113] As hearing had not commenced till 18 September 2008, the evidence discovered on 18th September is acceptable.

[112] The Corfu Channel Case, *Supra* note 67 at 14.
[113] Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 1993 I.C.J. 3, 29, 325 (Sept. 13).

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. Andrena's ASISA enactment was a breach of the NTS clause and was inconsistent with the ARFTA; due to which it must pay compensation for the economic loss caused to the citizens of Rubena.

II. Rubena is not responsible for breach of any IP Rights, as SIS does not qualify for protection.

III. Rubena cannot be held responsible for the individual act of Rafid and no state responsibility is thus attributed.

IV. Andrena's actions violate the U.N. Charter and it cannot claim the exemption of self defense.

V. Andrena is responsible for causing the destruction of cultural heritage, civilian deaths and injury to the civilians of Rubena and therefore should compensate accordingly.

All of which is respectfully affirmed and submitted

Agents for the Respondent