BENCH MEMORANDUM

CASE CONCERNING THE KAYLEFF YAK

Version 2.1

20 March 2019

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1 PURPOSE OF THE BENCH MEMORANDUM

The Bench Memorandum provides judges with basic factual and legal information to evaluate the written memorials and oral pleadings of participating teams. It should be read in conjunction with the Jessup Problem.

The Problem was designed to present the competitors with legal issues that have strengths and weaknesses on each side. Jessup teams should be able to construct logical arguments as both Applicant and Respondent. As a judge, your task is to evaluate the quality of each team's analysis, knowledge of international law, and advocacy skills. Please make sure not to confuse this task with your own personal evaluation of the merits of the case.

The Bench Memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Problem. Judges should be aware that this document has been condensed in favor of breadth. It does not purport to cover every last detail, though we do aim to contextualize the law both within society and within the events of the Problem. In many instances, relevant case law and State practice is alluded to, but not discussed in depth. The participants should address cases and principles of law. The State practice and legal authorities cited herein are illustrative and not intended to be a comprehensive review of all relevant sources of law. As such, judges should not be surprised when participants present arguments or cite authorities that may not be discussed in this memorandum. This is perfectly appropriate, and does not suggest that such arguments are not relevant or credible.

As always, judges are encouraged to engage in their own independent research on the issues or examine the suggested research materials given to students. These materials are available online at www.ilsa.org: the Basic Materials; and the Jessup Problem Expert Panel Discussion (International Law Weekend, Fordham Law School).

One of the most rewarding parts of Jessup for students is being asked questions during oral arguments. This Bench Memorandum provides two tools to help you ask questions:

- There are questions embedded throughout the Bench Memorandum.
- There are many occasions where there are two bullets outlining the principal arguments for, respectively, Aurok (Applicant) and Rakkab (Respondent). When an oralist representing Aurok is speaking, you may consider interjecting with arguments and questions from Rakkab's bullet. And when an oralist representing Rakkab is speaking, you may consider interjecting with arguments and questions from Aurok's bullet.

2 SUMMARY OF THE FACTS

The 2019 Jessup Problem concerns four issues: (1) the responsibility of States with respect to the conduct of a corporate national; (2) the protection of migratory species; (3) the rights to culture and religion; and (4) the rights of indigenous peoples to benefit from their traditional knowledge. Applicant (Aurok) and Respondent (Rakkab) are two neighboring States. Aurok is a small, least-developed, landlocked country. Rakkab is larger and has a multi-ethnic population of roughly 4.5 million.

Rakkab and Aurok share the Gaur Highlands, which encompasses all of Aurok and part of Rakkab. The Highlands are also the exclusive range of *Bos mumuensis* – the Kayleff Yak. The Yak migrate in herds, spending the spring and summer in the Highlands of Aurok, where they graze, and their autumns and winters to the south in Rakkab, where they birth their young. To date, the Yak has remained undomesticated, and captive breeding efforts have failed. It must be hunted in the wild if it is to be exploited. Until the early 2000s at least, the Yak population was consistently around 750,000. A table displaying all Yak population figures available in the *Compromis* may be found below.

The Aurokans are descended from the earliest inhabitants of the Highlands, the Pivzao, and continue to practice major elements of the Yak-centric Pivzao culture and religion. These include adherence to a traditional calendar timed around the migration of the Yak, and the use of the Yak in virtually every aspect of life: food, medicine, building materials, and clothing. One popular and ceremonially important dish is *Tirhinga Nos Lustuk*: Yak-gallbladder soup. To obtain the Yak, Aurokans continue to hunt them, killing roughly 100,000 per year.

In the late 1990s, Dr. Isaac Bello, a Rakkabi medical doctor and research scientist, discovered that *Tirhinga Nos Lustuk* consumption was also medically important. After noticing that the incidence of diabetes and obesity among his Aurokan patients was substantially lower than among his Rakkabi patients, Bello conducted field work in Aurok and further lab research, and discovered that the gallbladder of the Yak contains a unique enzyme, the Lustuk enzyme. Consumption of substantial quantities of this provides the Aurokans their protection against lifestyle-related diseases.

At all relevant times, Isaac Bello was employed by DORTA M/S, a Rakkabi corporation. DORTA was founded in 1996, when the Rakkabi Department of Research, Technology & Application was privatized. The Rakkabi government retains 12% of its stock. Today, it is the world's 8th largest pharmaceutical manufacturer, and has subsidiaries in over 50 countries. Under Rakkabi law, it has a monopoly on the retail of prescription medication in Rakkab. Additionally, Rakkab subsidizes its research activities worldwide. While its charter prohibits current government officials from serving as employees or board members, several prominent former government leaders are on its board. Government representatives and DORTA executives regularly meet to discuss Rakkab's national priorities.

By 2003, Bello and DORTA were developing a medication based on the Lustuk enzyme. They were able to develop a medication—Gallvectra—that is highly effective in the treatment of diabetes and other related disorders. In 2004, DORTA sought patent protection for Gallvectra in Rakkab. This generated controversy, both in academic circles and with the government and citizens of Aurok, which protested that the patent application failed to take into account the

origin of Gallvectra in Aurokan cultural practices. In 2005, Rakkab issued the patent. DORTA proceeded to pursue protection in all countries where it has subsidiaries. DORTA began marketing Gallvectra in 2011, and it has become widely popular. It is now available in more than 85 countries and has generated annual sales of over €2 bn.

Where does DORTA get its Lustuk Enzyme? It hunts Yak. According to a 2016 investigative report, DORTA was offering a substantial bounty for Yak gallbladders to private hunters in Rakkab. According to the report, in winter 2015/16, such hunters killed nearly 30,000 Yak in Rakkab. In summer 2016, the Yak Life Sciences Academy (YLSA) published a report expressing concern about the consequences for the Yak population, indicating that the Yak would likely be extinct by 2040.

The decline in the Yak population has spurred protests in Aurok and increasingly tense consultations between Aurok and Rakkab.

In November 2016, the Rakkabi Ministry of Agriculture published a software application called YakTrakker, drawing on government drones and satellites to track Yak herds in Rakkab in real time. While the Ministry states the purpose of the application is to aid conservation, YSLA reports anecdotal evidence that hunters are using it to facilitate their work. Over winter 2016/17, DORTA hunters killed roughly 30,000 Yak.

Over the course of 2017, Aurok initiated the listing of the Yak in both Appendix III of the CITES and Appendix I of the CMS. Rakkab objected to the latter. Additionally, in summer 2017, Aurok adopted a Yak Protection Act. Under the Act, Yak products may not be exported from Aurok, and Yak hunting licenses are limited to hunting for traditional purposes using traditional means.

In response to the CMS listing, Rakkab initiated an administrative review of Yak hunting and adopted a new licensing regime in regulation AG-2017/0300. Under the new regime, the Ministry of Agriculture may only issue licenses it considers consistent with the CMS. The review included an environmental impact assessment, which concluded that the licensing regime would protect the sustainability of the Yak population.

Shortly after the promulgation of AG-2017/0300, DORTA received a license to hunt up to ~30,000 Yak per year for three years "in view of the important scientific and medical benefits of the gallbladder." DORTA shifted its hunting activity into the new licensing regime. In January 2018, DORTA began offering payment for gallbladders only to its registered agents under its new license. According to YSLA estimates, over the following two months, DORTA agents killed roughly 28,500 Yak.

In spring 2018, the Parties agreed to bring their disputes to the ICJ. Accordingly, the *Compromis* was jointly notified to the Court on 14 September 2018.

Table of known Yak population figures and estimates (and arithmetical implications)

	Yak hunted in Aurok	Yak hunted in Rakkab	Yak population	*Compromis* paragraph
early 90s to mid 00s			~750,000	1
until 2011	~140,000 (Y)			27
Winter 2014/15			~ 670,000 (Y)	36
Summer 2015	~120,000 (Y)			27
Winter 2015/16		~30,000 (C, Y)	~680,000 (D)	24, 27
Summer 2016	~ 90,000			36
Winter 2016/17		~ 30,000	~ 600,000	36
Winter 2017/18		~ 28,500 (Y)		45

Sources:

(C) : *Courier Mail*

(D) : DORTA

(Y) : YLSA

Unsourced figures are stipulated as fact.

3 PRELIMINARY AND GENERAL LEGAL MATTERS

While this problem is not anticipated to raise any serious arguments on jurisdiction or admissibility, these questions are nevertheless briefly addressed and may be the topic of questions to oralists.

The line between jurisdiction and admissibility is fuzzy at best, and the Courts, States and academic commentators are not always consistent in what kind of objections relate to either category. It may be useful to think of jurisdiction relating to the Court's power to hear a case. Can the Court hear the case consistently with its Statute? Have the parties consented to submit the case to the Court? By contrast, admissibility comprises reasons why the Court, having jurisdiction, should nevertheless decline to hear a claim. Examples include rules relating to standing, exhaustion of domestic remedies and the protection of the interests of third parties.

3.1 JURISDICTION

The jurisdiction of the Court in the present case is based solely on the *Compromis*. Under Article 36(1) of the Statute of the Court, the Court's jurisdiction comprises, *inter alia*, "all cases which the parties refer to it." The *Compromis* is a treaty that, as reflected on its cover page, has been concluded specifically for the purpose of submitting this dispute to the Court. There is no reason why either party is anticipated to question its validity or the Court's jurisdiction.

Q:	Agent, what is the basis for the Court's jurisdiction over this claim? • Article 36(1) of the Statute of the Court and the *Compromis*.
Q:	Agent, what are the bases for the Court's jurisdiction generally? • optional clause declarations (under Article 36(2) of the ICJ Statute) • *compromis* (*i.e.*, special agreement) • compromissory clause (*i.e.*, dispute resolution clause, dispute settlement clause) • *forum prorogatum*

3.2 ADMISSIBILITY – DIPLOMATIC PROTECTION AND EXHAUSTION OF LOCAL REMEDIES

While there are many questions relating to admissibility that might conceivably be raised in a case, in this case the only questions that might be raised relate to the right of Aurok to bring these claims on behalf of its nationals. The process by which States bring claims on behalf of their nationals is known in international law as "diplomatic protection."

Diplomatic protection is the right of a State to espouse a claim on behalf of its nationals who are injured by the wrongful conduct of another State.[1] This doctrine is based upon a centuries-old

[1] First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur, UN Doc A/CN.4/506 (2000) at p. 11.

legal fiction that an injury to an individual is an injury to the State of his nationality.[2] In this case, Applicant seeks to bring a claim on behalf of its Pivzao citizens.[3]

There are two important prerequisites to the lawful exercise of diplomatic protection: first, the injured party must have a genuine link with the protected party, usually because the party is a national of the protecting State; second, all local remedies must be exhausted. In the present case, the question of a "genuine link" does not meaningfully arise, as the individuals harmed are unquestionably citizens of Applicant.

The doctrine of exhaustion of local remedies requires that, before a State can bring an international claim on behalf of its national, the national must have exhausted all legal remedies in the judicial or administrative courts of the State alleged to have caused the injury.[4] In this case, Applicant may not bring a claim on behalf of its citizens until those citizens have sought (and been denied) adequate remedy in the courts of Rakkab.

According to Clarification #3, three religious leaders from the Rakkabi Pivzao community and 20 village leaders from Aurok filed a civil suit in Rakkab against DORTA and the Rakkabi Ministry of Agriculture. The suit alleged that "the depletion of the Yak population and the appropriation of Pivzao traditional knowledge were violations of the plaintiffs' cultural and religious rights." The Rakkabi court dismissed the Aurokan plaintiffs on the grounds that they lacked standing to allege violations of Rakkabi law, and later dismissed the Rakkabis' claims, finding that the plaintiffs could not show that any actions of DORTA or the Ministry had caused the injuries "through actions or omissions that are cognizable under Rakkabi law." The Rakkabi Supreme Court upheld those decisions, and no further review is possible under Rakkabi law.

As the ICJ found in its 1989 judgment in the *ELSI* case, exhaustion is evaluated based on whether the issue was put before the adversarial State's domestic court and not on whether all parties claiming injury had been party to the suit.[5] In that case, Italy argued that the two corporations on whose behalf the United States sought to exercise diplomatic protection had failed to exhaust legal remedies available in Italy, including their failure to bring a particular form of action available under a bilateral treaty.[6] The ICJ rejected this argument, emphasizing that the "very question ... was already in issue in the action brought by [ELSI's] trustee in

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[2] *Ibid.* at p.12 (quoting de Vattel for the proposition that "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.")

[3] Traditionally, diplomatic protection involves a state asserting a claim on behalf of one of its nationals against a foreign state when the individual was harmed in the foreign state. Here, diplomatic protection for transboundary harms would be in a sense "reverse" diplomatic protection: Aurok is making a claim on behalf of its nationals who are arguably injured within Aurok's own borders by Rakkab's acts. *See* Third report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur, UN Doc A/CN.4/523 (2002) at p. 66, para. 68 ("Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State, ... an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm . . . .").

[4] *Ibid.* at p.29.

[5] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989,* p. 15.

[6] *Ibid.* at p.31.

bankruptcy."[7] In 2006, the Special Rapporteur of the International Law Commission ("ILC") agreed, stating, "a claim could be exhausted for international law purposes when the essence of the claim was considered by municipal tribunals, irrespective of whether the same person or entity pursued the municipal claim as was being diplomatically protected."[8] Since the essence of the failed suit in Rakkab is the same as the interests that Aurok seeks to pursue on behalf of its citizens, the exhaustion requirement has been met.

Q:	Agent, does Applicant have standing to bring this claim? • Aurok has standing based on diplomatic protection to raise claims on behalf of its nationals.
Q:	Agent, have your nationals exhausted their remedies in Rakkab? • Aurokan teams should be able to point to Clarification #3 and litigation in Rakkab to show that there are not local remedies capable of providing redress.

3.3 NECESSITY

Rakkab may argue that it is not responsible for any of the conduct Aurok alleges was wrongful because the conduct was necessary. Necessity is one of several "circumstances precluding wrongfulness" that exist in international law, particularly in the international law of State responsibility.[9] According to the ILC Articles on Responsibility of States for Internationally Wrongful Acts, a State may only invoke necessity to preclude wrongfulness when its action was the only way to safeguard an essential interest against grave peril, the action does not impair an essential interest of the State towards which its obligation exists, and the State did not contribute to the situation.

In the present case, Rakkab's "necessity" argument is not strong. Rakkab has no stated public policy concerning Gallvectra or the Yak, and the public health problems addressed by Gallvectra or the harvest of the Yak arguably do not rise to an "essential interest" of Rakkab. Aurok may also argue that Gallvectra is not necessary for the treatment of specific diseases because other treatments exist.

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[7] *Ibid.* at p.35.

[8] Seventh report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur, UN Doc A/CN.4/567 (2006), at p. 19.

[9] For more on State responsibility, see section 4.1

4 LEGAL ANALYSIS OF QUESTIONS PRESENTED

4.1 QUESTION 1: STATE RESPONSIBILITY RELATING TO CORPORATE ACTS

Aurok's Claim	*Rakkab's Claim*
Rakkab is responsible for internationally wrongful acts described in [Questions 2,3, and 4] because DORTA's actions are attributable to Rakkab, or in the alternative, Rakkab is responsible for its own failure to prevent DORTA from committing those wrongful acts	The Court should dismiss Aurok's claim.
Aurok's Anticipated Argument	***Rakkab's Anticipated Argument***
Rakkab is responsible for DORTA's behavior because DORTA's acts are attributable to Rakkab under the law of State responsibility. In particular, DORTA is an organ of Rakkab, exercises elements of Rakkabi governmental authority and/or acts under the direction or control of Rakkab. Moreover, Rakkab failed to exercise its positive obligations under the ICCPR and the ICESCR to regulate, in accordance with the UN Guiding Principles on Business and Human Rights, the activity of DORTA to ensure the human rights of Aurokans were respected.	Rakkab has no responsibility with respect to DORTA's hunting because DORTA is an independent actor whose behavior is not attributable to Rakkab. Furthermore, Rakkab does not have any positive obligations to protect the rights to culture or religion from the actions of DORTA. Even if Rakkab has such obligations, Rakkab fulfilled them by limiting the hunting of Yak and taking into account the views of Aurok and members of the general public in its environmental impact assessment.

Question 1 concerns the relationship between the actions of (private) corporations and State responsibility, namely whether Rakkab can ever be responsible for the acts of DORTA M/S, a private entity, and whether DORTA is subject to the same international human rights standards as Rakkab.

Public international law can reach the conduct of private actors through two different routes. First, as reflected in Aurok's main submission, such acts may be attributed to the State under the law of State responsibility. Second, in Aurok's alternative submission, States may have obligations with respect to private conduct on their territory or subject to their jurisdiction.

This question highlights a core challenge in ensuring corporate accountability for human rights and environmental abuses. Under Article 34(1) of the Statute of the Court, "[o]nly states may be parties in cases before the Court." Accordingly, the Court can only rule on the responsibility of Rakkab; it is not a forum in which DORTA might be held directly accountable for its actions.

Note: Even if Aurok cannot establish that Rakkab is responsible for the actions of DORTA, it does not follow that Rakkab cannot be responsible in respect of its own actions. These include, in particular, the publication of YakTrakker and the ways in which it applied its licensing regimes pre- and post-Regulation AG/2017-0300.

Q:	Agent, how much of Aurok's case is left if we dismiss Aurok's points on this issue? Does the Court even get to points 2, 3 and 4? • Teams should be able to distinguish the conduct of Rakkab from the conduct of DORTA. Aurok can argue that the conduct of Rakkab is enough to support its other claims, and Rakkab can argue that it is not.

4.1.1 State Responsibility and Attribution

The legal consequences for States that follow from an unlawful act are governed by the law of State responsibility for internationally wrongful acts, a creation of customary international law. In particular, this doctrine is the subject of a highly influential and decades-long codification effort by the ILC,[10] which culminated in the adoption of the *Articles on Responsibility of States for Internationally Wrongful Acts* ("ARSIWA"). However, oralists should be able to support their reliance on ARSIWA with further indications that the rules it codifies are customary. These could be judgments, arbitral awards, or instances of State practice.

Under Article 1 of ARSIWA, "Every internationally wrongful act of a State entails the international responsibility of that State." Article 2 establishes that:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
>
> (b) constitutes a breach of an international obligation of the State.

The first element is at issue in Question 1, the second being the subject of the later Questions.

Q:	What are the two conditions under the Articles of State Responsibility for an act or omission of a State to amount to an internationally wrongful act? • The act must be attributable to that State under international law and must constitute a breach of an international obligation of that State.
Q:	What kind of source are the Articles on State Responsibility? • Because they are the work of the ILC, a body of highly qualified publicists, they are a work of qualified publicists under Article 38(1)(d) of the Statute of the Court.
Q:	What is the International Law Commission, and why should we give weight to its works? • The International Law Commission is a commission of the General Assembly established to promote the progressive development of international law and its codification.
Q:	[With respect to any particular point in ARSIWA] Does that point reflect a codification of customary international law or the progressive development of the

[10] For more on the ILC, see section 5.1.4, below.

law? How should the Court distinguish between the two?

- [Good answers will look to the commentary prepared by the ILC, to comments of States in the Sixth Committee of the General Assembly (Legal Committee) or to subsequent judicial or arbitral practice].

The key question the *Compromis* presents regarding State responsibility is whether the actions of DORTA, a private corporation with certain ties to Rakkab, are attributable to Rakkab. This can be determined by the application of the rules of attribution in the law of State responsibility. The most likely rules to be raised by the parties are: Conduct directed or controlled by a State, conduct of entities exercising elements of governmental authority and conduct of State organs.

4.1.1.1 Conduct directed or controlled by a State

One test under ARSIWA Article 8 is the direction or control test:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

According to the ILC commentary on ARSIWA, "conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation."[11] The Court addressed this question in *Military and Paramilitary Activities in and against Nicaragua,* concluding that the proper legal standard was to consider whether a State "exercise[s] such a degree of control in all fields as to justify treating [private actors] as acting on its behalf."[12] To determine this, the Court applied a standard of "effective control." In determining that the United States effectively controlled the non-State actors, the Court considered both whether these actors were in "complete dependence" on U.S. aid and whether the United States "made use of the potential for control inherent in that dependence", considering that dependence alone would be insufficient to meet the effective control test.[13]

- **Aurok:** Rakkab exercises effective control over DORTA through its influence on the Board and through the regular consultations with DORTA management.

- **Rakkab:** No relevant activity of DORTA was undertaken under the direction or control of Rakkab. Rakkab does not possess a sufficient share in DORTA to be able to control its actions. Additionally, there is no evidence of instructions to DORTA by Rakkab that would compel DORTA's actions. Indeed, Rakkab *regulates* DORTA, limiting its hunting activities. Accordingly, Rakkab cannot bear responsibility for DORTA's actions.

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[11] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in UN Doc A/56/10 (2001), at p. 47 ("ARSIWA Commentary").

[12] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America). Merits, Judgment. I.C.J. Reports 1986*, p. 41, para. 86.

[13] *Ibid.*, para. 110.

4.1.1.2 Entities exercising elements of governmental authority

Under Article 5 of ARSIWA, a State is responsible for the conduct of private actors that are "empowered by the law of that State to exercise elements of the governmental authority" when they are acting in that capacity. An entity is empowered to exercise elements of the governmental authority if it is "empowered . . . to exercise specified functions which are akin to those normally exercised by organs of the State."[14]

The crucial question is which functions are "normally" exercised by organs of the State. In its commentary, the ILC suggests that the analysis is context-specific and fact-intensive:

> Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.[15]

The standard has been most frequently applied in the context of investment arbitration. Some tribunals, following from the earlier award in *Maffezini v. Spain*,[16] have imported the distinction between commercial and sovereign acts applied in the context of State immunities. Respondent may therefore rely on cases regarding State immunities to support its case. However, some recent tribunals have been generous in applying the standard. For example, in *Flemingo DutyFree v. Poland*, a tribunal considered airport terminal renovation to be an element of governmental authority.[17]

- **Aurok:** DORTA is exercising an element of governmental authority when it hunts the Yak because this activity is an integral part of DORTA's healthcare/pharmaceutical activities. In the Rakkabi context, until 1996, pharmaceutical research, production, and distribution were State functions, and pharmaceutical distribution remains in DORTA's sole authority, and research remains State--subsidized. This accords with examples from other States where the State is involved in the provision of healthcare. Accordingly, the hunting of Yak can be attributed to Rakkab in these circumstances.

- **Rakkab:** DORTA does not exercise an element of governmental authority at all, and specifically not when it or its agents hunt Yak. Yak hunting is not normally a function exercised by the organs of State. Additionally, the other activities of DORTA are not impugned by Aurok's claims. Nevertheless, even those activities are not governmental authority as State organs are not often responsible for pharmaceutical distribution or research. Accordingly, DORTA's Yak hunting is not attributable to Rakkab.

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[14] Cf. especially the response of Germany, reproduced in **part** in the Commentary to draft art 7, para 15, Report of the ILC, 26th Session, *ILC Yearbook 1974*, Vol. II(1), p. 281.

[15] ARSIWA Commentary, *op. cit.*, p. 43.

[16] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award of 13 Nov. 2000.

[17] *Flemingo DutyFree Shop Private Limited v. Poland*, UNCITRAL, Award of 12 Aug. 2016.

Q:	Agent, how should the Court determine whether an entity is exercising elements of the governmental authority? • According to the ILC, the Court should look at the content of the powers, how they were conferred, the purposes for which they are exercised and accountability to the government.
Q:	Agent (Applicant), can you point the Court to other examples of States this heavily involved in pharmaceuticals? Agent (Respondent), can you point the Court to examples of States that are not involved in healthcare?

4.1.1.3 Organs of a State

Aurok may also argue that the acts of DORTA and its agents are attributable to Rakkab because DORTA is a State organ. Under Article 4(1) of ARSIWA, "The conduct of any State organ shall be considered an act of that State under international law." Article 4(2) specifies that "An organ includes any person or entity which has that status in accordance with the internal law of the State." However, the internal law of a State is only a starting point, and international law recognizes the possibility of *de facto* organs.[18] As the Court stated in the *Bosnian Genocide* case, a test of "complete dependence" can also be applied to determine when an entity is a *de facto* organ.[19]

- **Aurok:** DORTA is clearly a *de facto* organ of Rakkab. While it may no longer be a *de jure* organ, there is no evidence that its functions have changed since its privatization. Rakkab cannot avoid responsibility for it by changing its status in the internal legal order. Moreover, DORTA's government monopoly and subsidies reflect its dependence on Rakkab.

- **Rakkab:** DORTA is clearly not an organ of Rakkab. It is a private corporation under Rakkab's law and therefore is not a *de jure* organ. It is also not a *de facto* organ because pharmaceutical research and manufacturing is not a core state function. Further, it does not act in "complete dependence" on Rakkab, as is evidenced by its substantial revenues from commercial activities and by its independent governance.

Q:	Agent, what is the difference between a *de facto* organ and *de jure* organ of a State?
Q:	Agent, when is an entity a *de facto* organ of a State?
Q:	Agent (Applicant), can you point the Court to another State where pharmaceutical manufacture is considered the function of a State organ?

[18] Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Government Authority', in J Crawford et al (eds), *The Law of International Responsibility* (OUP 2010) p. 243.

[19] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, paras. 391-392.

4.1.1.4 Acknowledgment and Adoption of Conduct

Aurok may also argue that Rakkab is responsible for the conduct of DORTA because it acknowledged and adopted this conduct as its own. Generally, private actions are not attributable to the State. However, as reflected in Article 11 of ARSIWA, conduct may be attributed to a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own."[20] The ILC Commentary distinguishes such circumstances from cases where the State has simply indicated "support" or "endorsement" of the conduct in question.[21]

The most commonly cited example of this applied by the Court is the *United States Diplomatic and Consular Staff in Tehran* case (also commonly called *Tehran Hostages*). In that case, the Court considered that, by announcing a policy of continued occupation of the US Embassy and the continued detention of diplomatic and consular hostages, the Iranian authorities converted the previously private acts of a group of private individuals into acts attributable to the Iranian State.[22] In particular, Ayatollah Khomeini had issued a decree declaring that the situation would be maintained until the United States returned the deposed Shah to Iran for trial.[23] This distinguished the situation from one of support or endorsement. According to the ILC Commentary, what is essential is that "the State identifies the conduct in question and makes it its own."[24]

4.1.2 Substantive Obligations of States with respect to the Conduct of Nationals — Due Diligence.

A stronger argument that Rakkab is responsible is to show that it has some obligation under international law to regulate the activity of DORTA to avoid injury to the environment and/or human rights. Such obligations are so-called "due diligence" obligations.

NOTE:	The lines between Question 1 and the others can be fuzzy. In the minds of the authors, the existence of due diligence obligations is within the scope of Question 1 and whether the obligations were fulfilled are within the scope of the others (along with the lawfulness of the conduct which is clearly Rakkab's) That said, the authors encourage open-mindedness to teams' strategic decisions about where the line is; different does not mean wrong.

An obligation of due diligence is one of conduct to take certain steps to prevent an injury. By its nature, a due-diligence obligation is one of conduct, not result. The occurrence of an injury does not imply a failure of due diligence. Applicant will need to establish that due diligence obligations exist with respect to specific kinds of obligations. This can be done, for example,

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[20] ARSIWA Commentary, *op. cit.*, p. 52.

[21] ARSIWA Commentary, *op. cit.*, p. 53.

[22] *United States Diplomatic and Consular Staff in Tehran (U.S.* v. *Iran), Judgment,* I.C.J. Reports 1980, para. 74.

[23] para. 73

[24] ILC Commentary, *op. cit.*, p. 53.

with respect to Questions 3 and 4, through the interpretation of applicable treaties. It is also possible that a due diligence obligation exists in customary international law, as is likely to be argued under Question 2.

4.1.2.1 Environmental Due Diligence and Corporations

Aurok has a strong case for the existence of a due diligence obligation under customary international law with respect to transboundary environmental harm. As the Court held in *Corfu Channel*, it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[25] While *Corfu Channel* concerned Albania allowing naval mines to be laid in a strait under its control subject to other States' right of passage, the Court has more recently applied this standard to environmental harm.

For example, in *Pulp Mills on the River Uruguay*, the Court considered it "established" that due diligence is part of international environmental law.[26] It clarified that the obligation "is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party."[27] It is not anticipated that the existence of such an obligation will be highly controversial. Teams are rather anticipated to focus on its application, which is discussed below under Question 2.

4.1.2.2 Due Diligence and Human Rights – Horizontal Effect

The most controversial question on which Aurok will need to establish Rakkab had a due diligence obligation is Question 3. Nevertheless, Aurok has a strong argument that Rakkab has due diligence obligations in the field of human rights.[28] The concept that human rights law impacts the interaction between private actors is known as "horizontal effect."[29] In order to make good its claims under Question 3, Aurok will need to show under Question 1 that human rights law puts obligations on Rakkab to provide for horizontal effect, which it failed to discharge, in additional to showing that actions of DORTA amount to substantive violations of human rights under Question 1.

Q:	Agent, what is vertical and horizontal effect in human rights law? When it comes to the consequences of the actions of DORTA, which one should the Court focus on?

[25] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment,* I.C.J. Reports 1949, p. 22.

[26] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment,* I.C.J. Reports 2010, para. 109.

[27] *Ibid.*, para. 197.

[28] Timo Koivurova, *Due Diligence*, Max Planck Encylopedia of Public International Law, at MN 33 (2010).

[29] See generally, John H. Knox, *Horizontal Human Rights Law* (2008) 102 AJIL 1.

4.1.2.3 Sources of Horizontal Effect

Aurok will need to argue that a particular human right has horizontal effect to the particular source of the relevant obligation for Rakkab. Strong participants will prove a particular human rights instrument provides for horizontal effect.

4.1.2.3.1 The International Covenant on Civil and Political Rights ("ICCPR")

The horizontal effect of the ICCPR is derived from the general obligation of States contained in its Article 2(1). This is relevant in particular to the Aurokans' religious rights claimed under Question 3, which have their basis in the ICCPR. Article 2(1) provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Some commentators understand the obligation "to ensure" rights to include an obligation of at least due diligence to protect the human rights of individuals from violations by private entities.[30]

The UN Human Rights Committee ("HRC")[31] has interpreted Article 2(1) consistently with this. In General Comment 31, the HRC stated:

> "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities."[32]

4.1.2.3.2 The International Covenant on Economic, Social and Cultural Rights ("ICESCR")

The existence of a general due diligence obligation to allow for the horizontal effect of the ICESCR is less clear, and arguments in favor of it rely more on subsidiary sources. This is relevant to Aurok's arguments relating to the right to culture under Question 3, as this right is provided for by the ICESCR. The principal obligation of States parties to the ICESCR is set forth in Article 2(1), which is less direct than its equivalent in the ICCPR:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant

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[30] Knox, 102 AJIL at p. 22.; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, NP Engel 2005) pp. 39-40.

[31] See section 5.3 below.

[32] HRC, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

> by all appropriate means, including particularly the adoption of legislative measures.

However, both the UN Committee on Economic, Social and Cultural Rights ("CESCR")[33] and several academic commentators advance the view that the obligation to take steps toward progressive realization includes an obligation to avoid retrogression in the enjoyment of rights.[34]

In 2011, the CESCR adopted a Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights.[35] In that Statement, the CESCR expressed its view that "States parties have the primary obligation to respect, protect and fulfill the [ICESCR] rights of all persons under their jurisdiction in the context of corporate activities."[36] The Committee further stated that:

> "Protecting rights means that States Parties effectively safeguard rights holders against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations."[37]

This view is that Article 2(1) is broad enough to encompass a due-diligence obligation for States with respect to the activities of corporate actors that may otherwise impair the enjoyment of human rights.[38]

4.1.2.3.3 Applying Horizontal Effect - UN Guiding Principles on Business and Human Rights

Aurok is likely to argue that the Court's interpretation of Rakkab's due diligence obligation should be guided by the UN Guiding Principles on Business and Human Rights (also known as the "Ruggie Principles").[39] In its Resolution 17/4, the UN Human Rights Council "endorse[d]" the Ruggie Principles,[40] and these principles have been influential in guiding thought about business and human rights and corporate social responsibility. However, in addition to showing that Rakkab violated the principles, Aurok will have to show that the principles are enforceable.

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[33] See section 5.3 below.

[34] CESCR, General Comment No. 3, in UN Doc E/1991/23 (1990), para. 9; Ben Saul, David Kinely and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) p. 152.

[35] CESCR, Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, UN Doc E/C.12/2011/1 (2011).

[36] *Ibid.*, para. 3

[37] *Ibid.*, para. 5.

[38] See also Saul et al. at p. 142 and Knox, 102 AJIL at p. 22.

[39] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31, Annex (2011) [hereinafter "Ruggie Principles"]

[40] UN Human Rights Council res. 17/4 (2011) operative para. 1.

If Aurok can establish that the Ruggie Principles are in any sense binding, it can rely on them to establish that Rakkab has obligations to give human rights horizontal effect. The first foundational principle provides:

> States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[41]

The first operative principle provides that, as part of the duty to protect human rights, States "should enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights".[42] The second operational principle provides that States should "take additional steps" to protect against human rights abuses by State-owned or controlled enterprises or enterprises that "receive substantial support and services from State agencies."[43] However, as Ruggie's commentaries to the principles generally reflect, the line between things states "must" and "should" do is fuzzy. Strong teams should be able to provide examples of how States implement the horizontal effect of human rights in order to support their positions.

Participants may raise other human rights instruments with respect to human rights standards (e.g., regional human rights treaties and General Assembly resolutions) and with respect to business and human rights, in particular the *OECD Guidelines for Multinational Enterprises* and the *Maastricht Principles on Extraterritorial Obligations*. As with the Ruggie Principles, parties will need to show that the rules in such instruments have value either to interpret the ICCPR and/or ICESCR or that their rules reflect custom in order to rely on them as law.

- **Aurok:** There is no evidence that Rakkab has any legislation to require its corporate nationals to take human rights into account. Inconsistently with the first operational principle, Rakkab has no legislation requiring Rakkabi enterprises to respect human rights or to review their conduct against human rights standards. Furthermore, as will be demonstrated under Question 3, this has allowed DORTA to engage in conduct that actually violates human rights standards. Rather than suppressing such conduct, Rakkab is supporting it through an overly permissive regulatory regime and through YakTrakker.

- **Rakkab:** Rakkab has met any due diligence obligation it has with respect to the conduct of Rakkab. While it does not have general legislation regarding corporations and human rights, in the case of DORTA and the exploitation of the Yak, it took into account the views of all stakeholders before adopting regulations that limit DORTA's activities.

Q:	What is required by the due diligence standard under international human rights law?
Q:	[Applicant] What level of regulation would have been necessary to satisfy Rakkab's obligation of due diligence?

[41] *Ibid.*, p. 6.

[42] *Ibid.*, p. 8.

[43] *Ibid.*, p. 9.

4.1.2.4 Due Diligence and Traditional Knowledge

Teams are not anticipated to address this in great depth here, and most have been dealing with this topic entirely under Question 4. This is because the existence of an obligation for States to ensure that corporations engaged in access and benefits sharing is very clear in Article 5 of the Nagoya Protocol. Nevertheless, the strongest Applicants will be able to explain this under Question 1.

Q:	Does Rakkab have an international obligation to regulate the use of traditional knowledge by DORTA? What is the source of the obligation?

4.1.3 Other Arguments

4.1.3.1 Complicity

Aurok may argue that Rakkab is responsible because it is complicit in the wrongful acts of DORTA. Some scholars suggest than an emerging ground for attribution of conduct to a State may exist when the State materially assists a private actor with knowledge that the aid will be used to commit an internationally wrongful act.[44] Although Rakkab may be able to meet this standard, its challenge will be to demonstrate that complicity has risen to the level of customary international law.

4.1.3.2 Duty to Cooperate

Aurok may raise under Question 1 arguments relating to Rakkab's duty to cooperate with Aurok. These arguments certainly have a home under Question 1, but for the purposes of this bench memorandum are addressed in the substantive sections below, particularly 4.2.3.3 and 4.3.2.1.1.

4.1.3.3 Transboundary Environmental Harm

Another argument that Aurok may use under Question 1 is that Rakkab is responsible because it failed to take reasonable measures to prevent its territory from being used in a way that causes transboundary environmental harm. This argument certainly has a place under Question 1, but for the purposes of the Bench Memorandum, it is addressed under subsection 4.2.2.1.

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[44] *See* Vladyslav Lanovoy, *The Use of Force by Non-State Actors* (2017) 28 EJIL 563, at pp. 579-85.

4.2 QUESTION 2: BREACH OF OBLIGATIONS TO ENDANGERED SPECIES AND THE ENVIRONMENT

Aurok's Claim	*Rakkab's Claim*
Rakkab violated international law concerning the protection of endangered species and the environment through the manner in which it harvested the Yak in Rakkab.	Rakkab's harvesting of the Yak in its own territory was consistent with both its treaty and customary international law obligations concerning the protection of endangered species and the environment.
Aurok's Anticipated Argument	***Rakkab's Anticipated Argument***
Rakkab violated Article III(5) of the Convention on the Conservation of Migratory Species of Wild Animals ("CMS") because its granting of a license to harvest the Yak to DORTA pursuant to Regulation AG/2017-0300 constituted a prohibited "taking" to which no recognized exception applies. Further, Rakkab's Yak harvesting practices and oversight breached its identification, monitoring and *in situ* conservation obligations under the Convention on Biological Diversity ("CBD") as well as customary international law obligations of sustainability and to avoid transboundary harm.	Aurok must demonstrate a positive breach of international law by Rakkab in harvesting the Yak. Such a breach does not exist. Rakkab's harvesting of the Yak was either for scientific purposes, or alternatively was an "exceptional circumstance", so did not violate Article III(5) of CMS. Further, Rakkab took sufficient steps to ensure its harvesting remained sustainable and did not damage the surrounding environment. It did not breach customary international law principles related to transboundary harm, as it took sufficient precautionary measures to ensure this harm was minimized.

Question 2 concerns environmental-law aspects of this year's problem, and is written in such a way as to enable the Applicant to bring a broad range of sources and norms to bear. These include both treaty and customary law. Accordingly, Applicant may present several arguments that the exploitation of the Yak in Rakkab violates international environmental law.

The relevant treaties to which both States are party are the Convention on the Conservation of Migratory Species of Wild Animals ("CMS"), the Convention on Biological Diversity ("CBD"), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The CMS is most likely Aurok's strongest treaty argument, and the CITES is its weakest.

Under customary international law, Aurok may rely on several principles. These are likely to include the prohibition on transboundary harm, the principle of sustainable development, and the obligation of international cooperation.

4.2.1 Clean Hands Doctrine

Rakkab may attempt to rely on Aurok's own conduct to argue that Aurok's claims should not be accepted by the Court according to the Clean Hands (or Unclean Hands) doctrine. The leading

authority in the jurisprudence of the Court is the individual opinion of Judge Hudson in *Diversion of Water from the River Meuse*. There, he wrote:

> It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing nonperformance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.[45]

The Clean Hands Doctrine was not the rationale for the Court's judgment in *Meuse* and the Court has never acknowledged that the doctrine exists. The Court maintained this position as recently as its 2019 judgment in *Certain Iranian Assets*.[46] However, the Court has seemed to indicate that the doctrine would require the State relying on it to show that the Applicant State had breached the same obligation.[47]

In the present case, it will be difficult for Rakkab to establish that the Clean Hands Doctrine applies. First, it must convince the Court that the doctrine exists, even though the Court was not convinced less than two months ago in *Certain Iranian Assets*. Second, it must show that Aurok violated the same obligation that Rakkab is alleged to have violated. It will therefore have to convince the Court that Aurok is misapplying the traditional use exceptions to the CMS (see below) and that this amounts to nonperformance of the same obligation as misapplication of whichever CMS exceptions Rakkab invokes. Strong teams will not let themselves get bogged down here.

4.2.2 International Treaties on Environmental Protection

4.2.2.1 CMS – Convention on the Conservation of Migratory Species of Wild Animals

Background on the CMS

Aurok may first claim that Rakkab is in breach of its international obligations under Articles II and III(5) of CMS. The CMS is a framework convention that provides for default obligations that the Range States of a species have once the species is added to either one of two Appendices to the CMS. A Range State, under Article 1(f)-(h) of the CMS, is a State that exercises jurisdiction over any of the areas a particular species inhabits. In this case, the Range States of the Yak are only Aurok and Rakkab.

Under CMS Article III, Appendix I lists endangered migratory species, which Range States must take specific direct measures to protect (e.g., a hunting ban). Under CMS Articles IV and V, Appendix II can include species that are not yet endangered but nevertheless have an unfavorable conservation status. If a species is included in Appendix II, its Range States must conclude an agreement for its conservation. In the present case, the Yak has only ever (since October 2017) been on Appendix I. Articles IV and V and the obligation to conclude an agreement are therefore not implicated.

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[45] *Diversion of Water from the River Meuse (Netherlands* v. *Belgium)*, 1937 PCIJ (ser. A/B) No. 70 p. 77.

[46] *Certain Iranian Assets (Iran* v. *United States)*, Judgment of 13 February 2019, para. 122.

[47] *Ibid*, paras. 121-122.

Decisions regarding the species are made by the Conference of Parties to the CMS. The procedural aspects of this are not intended to be controversial in this case.

Aurok may try to argue that Rakkab has an obligation to cooperate with it regarding the conservation of the Yak under the CMS particularly. This argument is weak. As noted above, the Yak is not on Appendix II, so the obligation to conclude a specific agreement does not apply. Moreover, the CMS has no general provision on an obligation to co-operation.

Prohibition on Taking

Article III(5) of CMS provides, in brief, that "Range States" of a migratory species (which both the parties to this dispute are in relation to the Yak) must prohibit the taking of any animal species listed in Appendix I to the Convention (which includes the Yak since October 2017). This is subject to a number of recognized exceptions, which will likely be the focus of this section of the argument.

- **Aurok:** By granting a license to DORTA under Regulation AG/2017-0300, the government of Rakkab *prima facie* violated Article III(5) by failing to prohibit the taking of a species of animal listed in Appendix I. Aurok will have little trouble overcoming this hurdle. More controversially, Aurok must argue that none of the exceptions provided for in the Article apply in order to make out a breach of international law. The two exceptions that are most relevant to the present dispute are likely to be the exception where the taking "is for scientific purposes" and the exception where the taking occurs in "extraordinary circumstances."
- **Rakkab:** Rakkab's Agent should focus his or her argument on the exceptions to Article III(5). A skilled oralist may very likely concede that a taking has occurred and move straight to the argument that Rakkab's act of permitting Yak harvesting, in limited and controlled circumstances, was either for legitimate scientific purposes or occurred for the extraordinary reason of providing extreme health benefits to citizens of its own state and many others.

4.2.2.1.1 Scientific Purposes

Once Aurok has established that Rakkab has permitted the taking of the Yak in contravention of Article III(5) of CMS by granting licenses to DORTA, Rakkab must make out an exception in order to avoid breaching its international obligations under the Convention. Perhaps the strongest argument Rakkab can make is that harvesting the Yak for the purposes of better advancing treatments for diabetes fits squarely into the definition of a scientific purpose under Article III(5)(a), and is exactly what the subsection intended to capture.

This question, of course, will turn on the definition of "scientific purposes" in Art III(5)(a). There is no definition in the Convention, so oralists must look to other contexts in order to define the phrase. This is not unheard of, and oralists on both sides will likely cite the ICJ's decision in *Whaling in the Antarctic (Japan v. Australia, New Zealand Intervening)* as a starting point by which to analyze the present case.[48]

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[48] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

In *Whaling,* the Court considered, *inter alia,* the question of whether state-sponsored whaling activities by Japan in the Antarctic region constituted whaling "for the purposes of scientific research," language closely resembling the language of Art III(5)(a) and for which there was similarly no ready definition. The Court assessed this issue in a two-step process, asking: (1) whether the relevant program under which the activities occur involves scientific research, and (2) whether the taking is for purposes of scientific research by examining whether, in the use of lethal methods, the program's design and implementation are reasonable in relation to achieving its stated objectives.[49]

Q:	Agent, what is the definition of "scientific purposes" that we should apply to this Article of CMS?
Q:	Agent, are "scientific purposes" the same as "scientific research"? How do you justify your conclusion?

Australia's memorial in *Whaling* provides an alternative definition, formulated by an Australian expert, explaining "purposes of scientific research" as encompassing: (1) defined and achievable objectives (questions or hypotheses) that aim to contribute to knowledge important to the conservation and management of stocks; (2) "appropriate methods," including the use of lethal methods only where the objectives of the research cannot be achieved by any other means; (3) peer review; and (4) the avoidance of adverse effects on stock.[50] Either party may urge judges to accept this definition on the basis that the *Whaling* court self-consciously avoided concrete parameters for "scientific purposes [or research]," and also on the simple basis that the court is not bound by its previous judgments per Article 59 of the ICJ Statute.

More advanced oralists may argue that the Court is better placed in the present dispute to concretely define the concept of scientific taking of protected species than it was in *Whaling,* given the more obvious cultural and socio-economic interests at stake here, balanced against the significant and tangible scientific outcomes that have been observed by the effectiveness of the medicine created through the harvesting. They may further argue that the four-part approach suggested gives clarity to the concept of "scientific purposes" in this context.

A taking State must also implement an external and independent protective and monitoring framework in the taking procedure in order to ensure the magnitude required for the scientific purpose is not exceeded. For example, one scholar opined that, "where scientific research needs are significant, inclusion of local conservation organizations, NGOs, and international institutions can be one way to direct resources toward improved research and monitoring."[51] This reflects the third prong of the expert definition provided by Australia in *Whaling*, and conforms

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[49] *Whaling in the Antarctic*, para. 67.

[50] *Whaling in the Antarctic*, Memorial of Australia, Vol. 1, pp. 334-388.

[51] Elizabeth A. Baldwin, 'Twenty-Five Years Under the Convention on Migratory Species: Migration Conservation Lessons From Europe', (2011) 41 Env. L. 535, 565.

substantially to an obligation to ensure a taking of only what is necessary for scientific purposes that cannot be achieved any other way.

This part of the argument will require both teams to analyze the Rakkabi government's Regulation AG/2017-0300, its preceding practices, and its public statements regarding Yak harvesting in Rakkab.

- **Aurok:** Under any recognized definition of "scientific purposes," Rakkab's system of granting licenses cannot be said to fit within Art III(5). The Court should adopt a strict standard for "scientific purposes" as was submitted by Australia in *Whaling*. Nowhere in the *Compromis* does Rakkab identify the nature of the scientific research necessitating the mass harvesting of a protected migratory species. Although initial harvesting of the Yak's gallbladder may have come within the definition of scientific research for the legitimate medical purpose of understanding the gallbladder's medical properties, the continuation of the Yak harvest is not contributing to research as understood in *Whaling* or by any other definition. The benefits of the Yak's gallbladder are now well known and the overwhelming financial success of Gallvectra, and the public touting of this, is evidence that the prevailing purpose for the granting of licenses is a commercial one, pointing firmly away from a finding that a taking is for scientific purposes. The Rakkabi government's direct financial interest through its ownership stake in DORTA undercuts any suggestion that the motivation behind the regulatory regime is purely scientific.

  Moreover, Aurok should argue that Rakkab has failed to implement sufficient independent protection and as such has not discharged its obligation to adhere strictly to "scientific purposes." An advanced oralist may attempt to persuade the Court that, in any event, Rakkab's harvesting of the Yak is irrelevant for science given the drug is now a settled and profitable product, and that its medical benefits are more appropriately considered, if anywhere, under the "extraordinary circumstances" exception (at which point the oralist will of course argue that these circumstances are not properly extraordinary).

- **Rakkab:** Rakkab's strongest point is that the text "scientific purposes" is broader than the phrase "scientific research" relevant in *Whaling*, and therefore the CMS accommodates a wider range of scientific uses than the Whaling Convention does. The Rakkabi regulatory framework for the harvesting of the Yak on its territory falls squarely within the definition provided in *Whaling* and other sources.

  Rakkab may point to facts in the *Compromis* emphasizing the extraordinary prospects of the medical remedy derived from the Yak, the remedy's uniqueness and newness to the global scientific community, and the need to ensure the medicine's control, reliability, and continuing quality through constant development, which is in turn possible only with continuing harvesting at present rates. Collectively, Rakkab will argue that a legitimate scientific purpose is made out in a far more obvious way than in *Whaling*. Any incidental commercial success, Rakkab will argue, is not the *purpose* of the harvesting, and is merely a convenient side-effect.

  Rakkab's methods of ensuring that harvesting adheres to the limitations of "scientific purposes" are sufficient, especially given the limited nature of the license system under Regulation AG/2017-0300, the quantitative limits on harvesting under those licenses, and the continuing, tri-yearly review of Yak population and the purpose of the taking. A

further comparison with *Whaling* may assist Rakkab in this regard, as its oversight measures are arguably more substantive than the state practice demonstrated by Japan. Other examples of state practice involving internal governmental regulation being deemed sufficient would also be appropriate.

Finally, Rakkab may invoke cases from other contexts such as *LaGrande, Pulp Mills* and *Gabcikovo-Nagymaros* in asserting that it is owed a degree of latitude and deference by the Court in implementing its own domestic policies in good faith.[52] This argument applies both to whether the harvesting of the Yak is for a legitimate "scientific purpose" and for whether Rakkab has put sufficient mechanisms in place to ensure that the harvesting adheres to this purpose on a continuing basis.

Q:	Agent, what is the definition of "scientific purposes" that we should apply to this Article of CMS?
Q:	Agent, does it matter that Rakkab is benefiting financially from the granting of these licenses to DORTA?
Q:	Agent, are the measures that Rakkab put in place to ensure it carried out its scientific purpose responsibly sufficient in the circumstances?

4.2.2.1.2 Extraordinary Circumstances

Article III(5)(d) provides that a taking State may also authorize or carry out a taking of a designated migratory species if can demonstrate that "extraordinary circumstances so require." This part of the argument depends on whether the exceptional health benefits that flow from the taking of the Yak's gallbladder are sufficient to meet this relatively high threshold. As such, the foundation of the argument will be how "extraordinary circumstances" are construed. An orthodox international law analysis is to be expected here, and will invoke the Vienna Convention of the Law of Treaties ("VCLT").

One instance of State practice that may be relied upon is Australia's practice in 2014 of culling Great White Sharks (a species designated under CMS) for the purposes of protecting humans on Western Australian beaches in light of a sharp rise in shark attacks.[53] The Australian government claimed that its culling practice was an "exceptional circumstance" because of the clear and unexpected threat that had emerged of fatal shark attacks in a particular region, and because there was no easily discernible alternative way to counter this threat other than by culling sharks for a short period of time. The Minister responsible stated that the culling was in response to an "imminent threat to life, economic damage and public safety more generally."[54]

Aurok would advocate for a narrower definition for "extraordinary circumstances" while Rakkab would argue for a broader one.

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[52] *LaGrand (Germany* v. *United States), Judgment, I.C.J. Reports 2001*, p. 466.

[53] Tom Arup, "Greg Hunt Grants WA Exemption for Shark Cull Plan", *Sydney Morning Herald,* 21 January 2014.

[54] *Ibid.*

- **Aurok**: "Extraordinary circumstances" sets too high of a standard to include simple (or even great) health benefits such as those present here. Article 31(1) of VCLT, i.e. that the ordinary and textual meaning of "extraordinary circumstances," taken in light of the object and purpose of the section and of CMS as a whole, clearly suggests an intention that only the most pressing and grave circumstances would justify taking in reliance on Art III(5)(d). This is supported by the preamble of CMS, and its stated purpose to protect and sustain populations of designated migratory species as far as is possible.[55] Proof of a positive impact on medical science or public health is not a sufficient basis to say that the present case is an extraordinary circumstance.

- Subsequent state practice, such as the Australian one referenced above, suggests that the present situation falls well below the standard required.[56] By contrast, Rakkab is not addressing an immediate threat to human life, but rather seeking to find a cure for diseases that have existed and been controllable through other medication for a long time. Although the medication harvested from Yak gallbladders has a great tangible benefit to human health, it is far removed from an "immediate threat to life" such as a shark attack outbreak, and thus is not a similarly extraordinary circumstance justifying the current Yak taking. In any case, in the Australian example, the sharks were culled for a short period of time in a specified area. The harvesting of the Yak, on the other hand, may continue in a widespread and indefinite manner. Finally, the Australian example has received much criticism by publicists, many of whom are of the view that even those circumstances, which are more extraordinary than in the present case, do not rise to the level required under Art III(5)(d).

- **Rakkab**: Skilled oralists may argue that it is not only immediate threats to human life that justify a taking pursuant to CMS Art III(5)(d). Support for this may be drawn from publicists, but also from the fact that "extraordinary circumstances" is a phrase that appears in many environmental law treaties and instruments covering a range of subject matter and circumstances, meaning it is unduly restrictive and arbitrary to say that the phrase can only apply to circumstances involving a specified threat to human life.[57]

  "Extraordinary circumstances" contemplates a potentially vast range of situations, especially when read in the context of Article III as a whole (particularly "scientific purposes"), as VCLT Art. 31(1) dictates. The phrase should not be limited to circumstances where taking is needed to *prevent extraordinary harm,* but may also capture takings that are *extraordinarily beneficial.*

  The Yak harvest provides extraordinary medical benefits, and potentially could be a cure for diseases such as diabetes, which will almost certainly prolong the lives, and increase the quality of life, of people on an almost unprecedented scale. Rakkab may argue that the medical effects of the Yak gallbladder in fact create circumstances far more

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[55] CMS, Preamble.

[56] Arie Trouwbost, *Aussie Jaws and International Laws* (2014) 2 Cornell Int LJ Online 41 (2014).

[57] Ramsar Convention art. 4; Berne Convention on the Conversation of European Wildlife and Natural Habitats arts. 4, 9; Convention for the Protection of Migratory Bird between the United States and Great Britain art. VII.

extraordinary than a spike in shark attacks, especially when it is noted that the number of shark deaths in Western Australia during this spike and before the cull remained in the single digits, and that the harvesting of the Yak provides a permanent solution to a life-threatening illness, as opposed to the temporary solution that the culling of protected birds created in response to the avian flu crisis.

Q:	Agent, must there be a threat to human life present before a circumstance can be described as "extraordinary" for the purposes of CMS?
Q:	Agent, what is the ordinary meaning of "exceptional"?

4.2.2.2 CBD – Convention on Biological Diversity

Aurok may also rely on Articles 7 and 8 of the CBD (which should be read together) and address whether the oversight provisions of Regulation AG/2017-0300 sufficiently conserve, monitor and sustain the Yak and the environment around it such that Rakkab has complied with its obligations under the Convention.

Article 7 of the CBD provides:

> "Each Contracting Party shall, as far as possible and as appropriate, in particular for the purposes of Articles 8 to 10:
>
> (a) Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex I;
>
> (b) Monitor, through sampling and other techniques, the components of biological diversity identified pursuant to subparagraph (a) above, paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use;
>
> (c) Identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques; and
>
> (d) Maintain and organize, by any mechanism data, derived from identification and monitoring activities pursuant to subparagraphs (a), (b) and (c) above."

Article 8 provides:

> Each Contracting Party shall, as far as possible and as appropriate:
>
> (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
>
> (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;
>
> (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;

(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;

(e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies.

- **Aurok**: The harvesting's effect on the environment, ecosystem, and biological diversity is not being sufficiently monitored or counteracted by Rakkab, and no plan has been put in place to ensure sustainability or protection of the Yak and its habitat. A starting point for Aurok may be the commentary on the Convention by the Secretariat to the CBD, the authoritative body for the treaty, which states that "The Convention on Biological Diversity (CBD) is the key international treaty for the conservation and sustainable use of biodiversity and for the fair and equitable sharing of the benefits arising out of the use of genetic resources."[58] The commentary also says that Article 7 "requires Parties to the CBD to identify the status of and trends in biodiversity and threats to the conservation and sustainable use of biodiversity."[59]

  The mechanisms Rakkab has put in place to monitor the harvesting are insufficient to ensure its sustainability and conservation, promote equitable sharing of benefits, and/or prevent severe adverse impacts on the surrounding environment. A review every three years, a cap on takings (apparently without scientific basis), and a licensing system do not address the Convention's underlying purpose of equitable sharing, and are not coupled with any procedures to identify threats to Yak numbers or the sustainability of the species. Comparisons may be made to the efforts of other countries in response to threats to sustainability and biological diversity. Australia, for example, submitted a report to the Secretariat in 2014 outlining its response to outbreaks of aquatic plant-life and foreign wildlife, as well as increasing pollution, that threatened animal and human habitats in its coral reef and on-land rural areas.[60] The government's monitoring response consisted of a strategic assessment, plan for implementation through legislation of a protective area and monitoring program as well as the institution of public-private partnerships to plant native flora and breed native fauna to offset the environmental damage observed and anticipated.[61] Nothing like this continuing and positive action has been observed by Rakkab in the Regulation or elsewhere, and Aurok may argue that Rakkab is therefore not complying with its obligations.

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[58] Secretariat of the Convention on Biological Diversity, "General description of mandates and objective(s) of your organization / associated network with institutional structure". Available at <https://unfccc.int/files/adaptation/cancun_adaptation_framework/loss_and_damage/application/pdf/cbdpdf.pdf>

[59] *Ibid.*

[60] Australia's Fifth Report to the Convention on Biological Diversity (May 2014).

[61] Australia's Fifth Report to the Convention on Biological Diversity (May 2014).

- **Rakkab**: States are afforded considerable latitude in implementing sustainability and monitoring measures under CBD Articles 7 and 8, as they are aspirational, particularly the language "as far as possible and as appropriate." The obligation is of conduct only, not result. Rakkab is obliged to create a sustainability environment only as far as is possible in the circumstances. Additionally, Rakkab's monitoring of the Yak license, how Yak are killed, and in what numbers, as well as the periodic review of these practices, are sufficient to ensure that the Yak and its habitat are protected. It may further point to the statistics regarding the percentage of Yak killed each year, and submit that this ensures sustainability "as far as appropriate" in light of the extreme human health benefits that flow from the harvesting that the Regulation permits.

Q:	Agent, what must a state do in order to discharge its obligation to monitor an environment's "sustainability"?
Q:	Agent, do Articles 7 and 8 impose obligations of conduct or result?

4.2.2.3 CITES – Convention on International Trade in Endangered Species of Wild Fauna and Flora

While both Aurok and Rakkab are parties to the CITES, the CITES is intended to be a red herring in this case.[62] Teams should not dwell on it, but should be able to explain why Rakkab's actions are in compliance with it. CITES applies three different levels of control to trade in particular species according to the appendix of the CITES on which they are listed. Under Article III of the CITES, trade in Appendix I species requires both an import and an export permit, which both require reviews of the effect of the transaction on the survival of the species. Under Article IV, trade in Appendix II species, requires only an export certificate and non-detriment finding. Under Article V of the CITES, trade in Appendix III species is only limited for exports from the countries that have listed the species. Exports from the listing States require permits, and exports from other States are not limited.

Because the Yak is listed on Appendix III only by Aurok, Article V of CITES obligates Rakkab to issue certificates of origin for Yak exports from its territory. As Clarification 6 explains, Rakkab does this. Accordingly, Rakkab is complying with the CITES with respect to the Yak.

4.2.3 Customary International Law of Environmental Protection

There is additionally wide scope to argue that Rakkab has violated customary international law by allowing DORTA to exploit the Yak to the extent it does, and teams may come up with arguments other than those below. However, the most likely arguments based on custom are a breach of the obligation to prevent transboundary harm and the obligation to practice sustainable development. Some discussion of the precautionary principle may tie into this, or may form a basis for argument independently (if an oralist is able to convince the Court that the precautionary principle is an independent customary obligation, which is by no means clear).

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[62] As it turns out, no species of herring is an endangered species.

In discussing customary international environmental law, several soft law instruments are relevant. The 1992 Rio Declaration on Environment and Development, and the 1972 Stockholm Declaration on the Human Environment, both adopted by special UN Conference on the environment, have been particularly influential in this regard. However, as with the Ruggie Principles above, teams seeking to rely on them should be prepared with additional authority to support the conclusion that the principles contained in the Declarations are part of customary international law.

4.2.3.1 Transboundary Environmental Harm

One of the strongest arguments in favor of Aurok regards transboundary environmental harm. States may not exercise their rights on their own territory in a way that causes significant environmental harm to another State's territory.[63] This principle is also known as the "no harm principle." As early as the 1941 *Trail Smelter* arbitration, an arbitral tribunal held that Canada was obligated to compensate the United States for damage cause to American farmer by sulfur dioxide emission from Canadian industry.[64] "Significant" harm is appreciable harm that can be established by objective evidence; the harm that results must be foreseeable, and a State may be effectively excused from breach of the obligation if it has done sufficient due diligence.[65] The environmental impact assessment conducted by Rakkab detailed in Clarifications 7 may come into play, but should not be the focus of the argument.

- **Aurok**: The taking of the Yak in their winter grounds has an immensely detrimental effect on the cultural and economic wellbeing of large parts of Aurok, and threatens their way of life and future health. The vast majority of the country of Aurok lives according to traditional practices, which require large quantities of the Yak in order to survive. The taking on Rakkabi territory has upset the Yak population balance, with the effect of threatening Aurokans' way of life, such that irreparable harm is being and will continue to be done to the fabric of Aurok's society. In *Pulp Mills* and *Construction of a Road*, the ICJ never intended to limit transboundary harm to physical harm over territory, and it is perfectly consistent with these decisions that a threat of destruction to the very way of life of a large part of a society is sufficient evidence of harm.

  Additionally, Rakkab's environmental impact assessment was insufficient to take into consideration the effect of Yak exploitation in Aurok. It actually proceeded with its harvesting procedures in spite of protest by Aurok concerning that very subject.

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[63] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, para. 101; *Trail Smelter Arbitration (United States* v. *Canada)*, 3 RIAA 1905 (1941); *Corfu Channel case, Judgment, I.C.J. Reports 1949*, p. 22; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, para. 140; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, paras. 101, 104.

[64] *Trail Smelter Arbitration (United States* v. *Canada)*, 3 RIAA 1905 (1941).

[65] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, paras. 112-113; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, para. 197; Rio Declaration, principle 3.

- **Rakkab**: There has been no harm within the meaning of "transboundary harm" at international law sufficient for a finding of breach. Decisions of the ICJ involving transboundary harm primarily focus on pollution across borders or physical degradation of a state by the actions of another, which is not the case here. The potential lessening of a cultural group's ability to undertake traditional practices is simply not within the scope of the international community's understanding of transboundary harm. An effective oralist will not seek to diminish the potential for Aurok's cultural traditions involving the Yak to suffer as a result of Rakkab's actions, but will rather argue the effective (albeit not attractive) point that it is not the kind of harm that the international community has recognized, so the court cannot do so either.

  Alternatively, Rakkab undertook sufficient due diligence performing the environmental impact assessment. The Rio Declaration and other decisions of this court stress the importance of procedural mechanisms such as the impact assessment as key to discharging due diligence obligations.[66] This is borne out in the fact that the Yak continue to return to Aurok and the Aurok people's cultural practices continue to subsist, despite the harvesting taking place by Rakkab under the Regulation's guidance and pursuant to the EIA.

4.2.3.2 Sustainable Development

In *Gabcikovo-Nagymaros Project,* the Court said that there exists at international law "a need to reconcile economic development with protection of the environment", which is "aptly expressed in the concept of sustainable development."[67] It continued on to say that "this means that [nation states] should look afresh at the effects on the environment" when considering projects for economic gain. This principle may come up as between the parties to the present dispute.

- **Aurok**: This principle reflects customary international law, and Rakkab has breached the principle through the harvesting of the Yak. Aurok will obviously cite the language of *Gabcikovo-Nagymaros,* as well as the similar outcome in *Pulp Mills,* in support of the proposition that Rakkab had an obligation to consider the environment of both Rakkab and Aurok in addition to the economic (and medical) advantage of harvesting Yak gallbladders, yet, as described above, Rakkab did not, and as such has breached the principle.
- **Rakkab:** The comment in *Gabcikovo-Nagymaros* does not reflect customary international law. Of course, decisions of the ICJ are still only supplementary sources of law under Article 38(1)(d) of the Court's Statute, and as such are only authoritative if they can be shown to reflect state practice and *opinio juris.* A paucity of authority exists for the principle, and publicists on the topic have affirmatively stated that the principle has not crystallized into custom.

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[66] Rio Declaration, Principle 3, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, paras. 203-209.

[67] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, para. 140.

Q:	Agent, what must a state do in order to discharge its obligation to monitor an environment's "sustainability"?
Q:	Agent [for Respondent], how is Rakkab's exploitation of the Yak sustainable when the Yak population seems to be in decline?

4.2.3.3 International Cooperation

Aurok may also argue that Rakkab has violated its obligation to cooperate to conserve, protect and restore the environment.[68]

- **Aurok**: Rakkab is not complying with its obligation to cooperate in good faith. All of its efforts to protect the Yak have been illusory and it has made no effort seriously to join a joint conservation effort.
- **Rakkab:** Rakkab is fulfilling its obligation to cooperate. The obligation to cooperate is one of conduct but not one of result. Rakkab is a party to all the relevant multilateral treaties, specifically the CMS, CBD and CITES and is complying with its obligations under these.

4.2.3.4 Permanent Sovereignty over Natural Resources

In support of its position, Rakkab may also invoke the principle of permanent sovereignty over natural resources (PSNR),[69] which "embodies the right of States and people to dispose freely of their natural resources."[70] PSNR has its roots in the principle of sovereign equality, as enshrined in Article 2(1) of the UN Charter, and was reaffirmed by the General Assembly in its Declaration on Permanent Sovereignty over Natural Resources in resolution 1803 (XVII) of 14 December 1962. Rakkab may argue that PSNR gives it the sovereign prerogative to exploit the Yak on its territory as it sees fit. Aurok may counter that the principle was historically applied in the context of renationalizing mineral concessions and, in any event, cannot amount to an unqualified right to exploit migratory species in light of the CMS.

4.2.3.5 Abuse of Right

A response Aurok might make to an argument that Rakkab has permanent sovereignty over its natural resources is that Rakkab is abusing that right. In general, the doctrine of abuse of right – well known in several domestic jurisdictions – is often invoked before the Court but has never clearly been upheld. This is a weaker argument for Aurok compared with arguments based on more concrete obligations.

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[68] See, for example, Rio Declaration, Principle 7.

[69] For more on PSNR, see Section 4.3.4.

[70] Nico Schrijver, *Permanent Sovereignty over Natural Resources*, Max Planck Encyclopedia of Public International Law, para. 2.

4.3 QUESTION 3: CULTURAL AND RELIGIOUS RIGHTS

Aurok's Claim	*Rakkab's Claim*
The harvesting of the Yak in Rakkab violates the cultural and religious rights of the people of Aurok, and Rakkab must prohibit such hunting forthwith.	The harvesting of the Yak in Rakkab does not violate the cultural and religious rights of the people of Aurok.
Aurok's Anticipated Argument	***Rakkab's Anticipated Argument***
Rakkab has obligations to indigenous peoples outside of its territory and violated the Aurokan people's (1) right to consultation and consent; (2) right to access natural resources connected to their culture; (3) right to take part in their cultural life; and (4) right to manifest their religion. Therefore Rakkab must cease the harvesting of the Yak.	Rakkab has no extraterritorial human rights obligations and has met any obligations of international cooperation. In any case, any applicable obligations lack specificity and were not violated because the harvesting of Yak is necessary and proportional to the legitimate aim of producing the diabetes medication, Gallvectra.

Question 3 examines whether a State has obligations to respect the cultural and religious rights of indigenous peoples outside of its territory and the confines of those obligations. The right to culture and religion, as well as the specific rights of indigenous groups to consultation and to natural resources to which they have a strong connection, are enshrined in a variety of international, regional, and domestic legal instruments. Competitors will have to address both whether a State has an extraterritorial duty to protect those rights, and what substantive standard is applied when determining whether those rights have been violated.

4.3.1 Indigenous Rights

In recent years, international law in the area of indigenous rights has changed rapidly and substantially, and the trend has been towards a stronger recognition of the rights of indigenous groups. Although both States are parties to the ILO Tribal Peoples Convention of 1989 ("Indigenous People's Convention"), it is unclear that the obligations contained therein apply extraterritorially. Thus, Aurok will be of the position that many of the rights with respect to indigenous peoples outside of the State's territory have crystalized into custom, while Rakkab will argue the opposite.

4.3.1.1 Definition of Indigenous

The definition of indigenous is contested, but most definitions require, first and foremost, that the peoples self-identify as indigenous, with secondary features including continuity from pre-colonial or pre-invasion populations, distinctive culture, and a strong link to territory and natural

resources of the region they have historically inhabited.[71] Some other definitions also include being non-dominant in society.[72]

As Clarification #1 stated, all Aurokans self-identify as indigenous, thus, fulfilling the most important criterion. The Pivzao, from whom the Aurokans descend, have inhabited the Gaur Highlands for over 3000 years, with a distinctive culture connected to the Yak, an animal unique to that area.

The only argument against the Aurokans' indigenous status is that they are the dominant, and arguably, only, group in Aurokan society. However, this criterion is controversial as it would preclude the possibility that any indigenous group could establish its own nation. Given the primacy of self-identification as a prong in the test, the dominance of Pivzao in Aurok should not prevent them from being considered indigenous.

Q:	Are the Aurokans indigenous even if they are the dominant group in Aurokan society?

4.3.1.2 Customary Law regarding Indigenous Rights

Much of the jurisprudence relied upon by Aurok in this Question originates from regional tribunals from the Americas and Africa, which have been at the forefront of the development of indigenous rights. Thus, Rakkab can always assert that those interpretations and practices have not risen to the level of custom due to the lack of consistent global practice. On the other hand, these regional bodies have robust experience in the area of indigenous rights, in no small part due to those two continents' history of colonization and the hundreds of groups of indigenous peoples living there. Aurok can advance strong arguments that consistent practice across these bodies, as representative of the specially affected States in those regions, demonstrates formation of custom.

4.3.2 Territorial Scope of human rights obligations

While States generally do not have human rights obligations to those outside of their territory, there are some notable exceptions, including with regards to genocide.[73]

Students may argue that the ICESCR, ICCPR and/or customary international law impose duties with regards to the human rights of people outside of a State's territory. The argument that ICESCR imposes extraterritorial obligations is stronger than the argument that ICCPR imposes extraterritorial obligations based on the contrast in the Conventions' articles and the differing approach by the CESCR and HRC, but in practice, this is unclear.

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[71] See ILO Convention No. 169 art. 1; American Declaration on the Rights of Indigenous Peoples art. I.2.

[72] Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, ECOSOC, Study of the Problem of Discrimination Against Indigenous Populations (Final Report): Conclusions, Proposals and Recommendations, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (1983), pp. 21-22, 379.

[73] Convention on the Prevention and Punishment of the Crime of Genocide; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Q:	Agent, do States have extraterritorial human rights obligations? Do you have any examples?
Q:	Agent, are the territorial scope of application for the ICESCR and ICCPR identical? Why or why not?

4.3.2.1 ICESCR

Aurok and Rakkab are both parties to the ICESCR and the ICCPR, two treaties often discussed in concert. However, the language of each Covenant's respective Article 2(1) are different, and consequently, students may also argue that the territorial scope of obligations are also different.

Article 2(1) of the ICESCR provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The ICESCR does not rely on territory and jurisdiction as delimiting criteria for its application, and explicitly references international cooperation in Articles 2(1), 11, and 15, suggesting that economic, social, and cultural rights ("ESC rights") have an international dimension.

The treatment of ESC rights as obligations of an international character is supported both by the drafters' understanding[74] as well as the approach taken by the CESCR. The CESCR has recognized that State parties must consider the extraterritorial effects impacting ESC rights of their policies on other States' populations, including when imposing sanctions on another State.[75] The committee has also warned State parties to monitor the activities of its transnational corporations and their effects on the local (extraterritorial) population in accordance with its obligations under the Convention.[76]

On the other hand, the reference to "international cooperation" in the ICESCR suggests that a State's extraterritorial obligation may be different from its domestic one. International cooperation is discussed in the following subsection.

- **Aurok**: The ICESCR is not limited in its application by the territory of a State.

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[74] See Matthew Craven, The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development (Clarendon 1995), p. 144. Craven quotes Cassin, who, at the time of drafting the ICESCR, argued that "by providing for recourse to international cooperation instead of allowing the enjoyment of rights to be put off, [the reference to international cooperation] filled the gap between what States could in fact do and the steps they would have to take to meet their obligations under the Covenant", See UN Doc E/CN.4/SR.216 (1951) at p. 6.

[75] E.g., CESCR, General Comment No. 8, in UN Doc E/C.12/1997/8 (1997) on "The relationship between economic sanctions and respect for economic, social and cultural rights".

[76] E.g., CESCR, General Comment No. 24, in UN Doc E/C.12/GC/24 (2017) on "State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities".

- **Rakkab**: Even if the human rights treaties impose international obligations, it is only with respect to actions directly targeted at another State, as in the case of sanctions.

4.3.2.1.1 Cooperation

The basic obligation of cooperation with respect to human rights is found in Arts. 1, 55, and 56 of the UN Charter, in which members "pledge themselves to take joint and separate action in co-operation with the Organization"[77] for the achievement of the purposes of the UN which includes "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[78] In addition to the ICESCR, this obligation is also referenced in many other human rights instruments.[79]

Countries that have lower capacities to implement their human rights obligations have often expressed that international cooperation and assistance was a legal obligation enshrined in the Covenant.[80] ICESCR Article 2(1)'s reference to "economic and technical" assistance suggests that the duty to cooperate is not merely verbal, or limited to considering the views of the other State, but also requires substantive help. On the other hand, countries with higher resources available domestically tended to consider cooperation as a moral duty, but not a legal one.[81] The CESCR has not identified any breaches of the duty to cooperate under the Covenant thus far.

In the context of protecting human rights, the practice of the Committee on the Rights of the Child has suggested that the principle of cooperation in that treaty is not a standalone obligation a failure of which would allow direct recourse by one State party against another.

- **Aurok**: Under the ICESCR, States have an obligation to engage in international cooperation to protect the ESC rights of peoples outside of a State's territory. Rakkab's failure to provide Aurok with any financial or technical support, along with its refusal to reconsider its own position, demonstrates a breach of this duty.
- **Rakkab**: Any obligation to cooperate under the ICESCR is not one of result, and by negotiating with Aurok and considering Aurok's position in good faith, Rakkab has complied with the ICESCR.

4.3.2.2 ICCPR

Article 2(1) of the ICCPR detailing its applicability provides that:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the

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[77] UN Charter art. 56.

[78] UN Charter art 55(c).

[79] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention relating to the Status of Refugees; 1967 Protocol relating to the Status of Refugees.

[80] Commission on Human Rights, Report of the Open-ended Working Group to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its third session, 14 March 2006, UN Doc E/CN.4/2006/47 (2006) para. 78 [hereinafter ICESCR Optional Protocol Working Group Report].

[81] ICESCR Optional Protocol Working Group Report, paras. 80-82.

present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The argument that the ICCPR imposes obligations on States for the protection of individuals outside their territory is very difficult due to the identification of a State's territory and jurisdiction as the boundaries to which protection extends. Countries like the U.S. and Russia have relied on Article 2(1) to argue that there are no ICCPR obligations to anyone outside of its territory or not subject to its jurisdiction. However, both the ICJ[82] and the HRC[83] have suggested that extraterritorial obligations may exist under the ICCPR, although only in circumstances where a State has "effective control" over people outside of its territory, such as in cases of military occupation.

The American Convention on Human Rights ("ACHR") similarly requires states to ensure the protection of the rights recognized therein "to all persons subject to their jurisdiction." In the context of transboundary harm, the Inter-American Court of Human Rights ("IA Court") considered that jurisdiction was broader than "effective control," ruling that a person is subject to the "jurisdiction" of the state of origin if there is a *causal connection* between the incident that took place on the state's territory and the violation of the human rights of persons outside its territory.[84]

- **Aurok**: The ICCPR imposes extraterritorial obligations, as suggested by the HRC. In any case, Aurokans can be considered under Rakkab's jurisdiction as Rakkab's Yak hunting licensing scheme, the Yaktrakker application, and its actions with regards to DORTA clearly caused the decrease in the Yak population that violated the Aurokan people's religious and cultural rights.
- **Rakkab**: The ICCPR imposes no external obligations as is clear from the ordinary meaning in the words of its Article 2(1). At most the ICCPR may apply to areas where Rakkab has effective control such as in cases of consular premises or military occupation. A mere causal connection is simply too attenuated as many actions by a State have extraterritorial effects.

4.3.3 Obligation to Consult Indigenous Peoples

Aurok may argue that there is a customary international obligation for Rakkab to consult with indigenous groups before taking action that substantially affects the group's indigenous rights. This argument relies on the numerous international, regional, and domestic instruments that specifically address the rights of indigenous peoples, and not on general human rights.

This position is premised on the policy preference for cultural diversity, as was articulated in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") and in the Indigenous People's Convention, as well as other instruments.[85] Aurok may argue that in

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[82] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* para. 112.

[83] HRC, General Comment No. 3, UN Doc E/1991/23.

[84] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 November 2017.

[85] UNESCO Universal Declaration on Cultural Diversity.

furtherance of cultural diversity, there is a customary obligation to consult with an indigenous group regarding any decisions affecting the group's rights.[86] The duty "arises from, and helps to safeguard, the substantive rights of indigenous peoples, especially their rights to self-determination, lands, territories and natural resources."[87]

Substantively, there are "deep divergences on the nature and contents of the rights to consultation and consent."[88] The majority of cases suggest that consultation is necessary but consent is not. At the very least, consultation with indigenous groups prior to taking an action weighs in favor of the argument that the indigenous group's rights were not violated.[89] In *Länsman et al v Finland*, the HRC noted that consultation with the indigenous group was required but did not rule that consent was required as well.[90] Many States similarly take the position that while the duty to consult may be customary, consent is not necessary, because other legitimate aims may override the preference of the indigenous group.

- **Aurok**: Rakkab's obligation to consult with indigenous groups is a customary norm. The discussions that occurred in preparation for the environmental impact assessment was insufficient because of its limits in time and scope.
- **Rakkab**: There are no obligations customary obligations towards indigenous groups who reside outside the territory of a State. In any case, Rakkab fulfilled its obligation to consult by speaking with Aurokan officials in preparation for the environmental impact assessment as detailed in the Clarifications.

4.3.4 Indigenous Right to Natural Resources

The principle of permanent sovereignty over natural resources ("PSNR") was developed to protect colonized or non-self-governing peoples and newly independent states from the misuse and exploitation of their natural resources from colonial powers and foreign extractive companies.[91] Since the period of decolonization, the principle has developed to apply to all States.[92]

At the same time, as an extension of the original intention for the principle of PSNR, various international instruments specifically recognize that, as part of their right to self-determination and culture, indigenous peoples have a property right in the "natural resources pertaining to their

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[86] ILO Convention 169, Article 6; UNDRIP, Article 19; *See also* James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, (2005) 22 Arizona J Int'l & Comp L 7 (2005).

[87] Report to the General Assembly of the Special Rapporteur on the rights of indigenous peoples, UN Doc A/73/176 (2018), para.10.

[88] Anaya, *op. cit.*

[89] See *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000).

[90] *Länsman et al v. Finland*, Communication No. 511/1992, UN Doc CCPR/C/52D/511/1992 (1994).

[91] Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge 1997), p. 36.

[92] *Permanent sovereignty over natural resources*, UN General Assembly res. 1803 (XVII) (1962); see also *Charter of Economic Rights and Duties of States*, UN General Assembly res. 3281 (XXIX) (1974); CBD art. 3.

lands."[93] In accordance with these documents, this right is not limited to natural resources which indigenous peoples "occupy" or "own" in the sense that colonizers interpreted but also to resources that have historically "used" or "accessed." The *travaux* for the American Declaration on the Rights of Indigenous Peoples indicates that indigenous groups may have historically "used" resources that currently exist in multiple states, thus requiring all of them to respect the indigenous group's right to such resources.

In the *Dann* case, the Inter-American Commission on Human Rights ("IA Commission") recognized that "property and ownership rights with respect to lands, territories and resources [indigenous peoples] have historically occupied" is part of the "general international legal principles applicable in the context of indigenous human rights"[94] Moreover, where the property interest of the indigenous group predates a State's creation, the group's "title" to the property can be "changed only by mutual consent between the State and respective indigenous peoples."[95]

Indigenous rights to natural resources have also been found as stemming from the economic right to property incorporated in human rights instruments.[96] In the *Awas Tingni* case, the IA Court determined that the right to property in Article 21 of the ACHR "includes, among others, the rights of members of the indigenous communities within the framework of communal property."[97]

In practice, states have been slow to recognize the property rights of indigenous peoples over natural resources they have traditionally used. In the United States, where many indigenous tribes have historically hunted whales, the only tribe granted an exception to the Marine Mammal Protection Act, which prohibits whale hunting, was the Makah tribe, on the basis of a treaty between the federal government and the Makah signed in the 1800s.

- **Aurok**: Under customary international law, the indigenous descendants of the Pivzao culture have a collective property right to the Yak because the Yak has a long and significant connection to Aurokan culture. Only the adherents of the Pivzao traditions in Rakkab have the right to hunt the Yak in Rakkab.
- **Rakkab**: This approach to natural resources has not crystallized into custom, as can be seen in the practice of States which have not recognized the property rights of indigenous peoples.

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[93] ILO Convention 169 art. 15; UNDRIP art. 26; American Declaration on the Rights of Indigenous Peoples art. XXV.2 ("Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.").

[94] Mary and Carrie Dann, United States, Case 11.140, Inter-Am. C.H.R. Report No. 75/02, OEA/Ser.L/V/I1.1 17, doc. 1, rev. 1 (2002) at para. 130 [hereinafter *Dann*].

[95] *Dann,* at para. 130.

[96] *See* African Charter on Human and Peoples' Rights art. 21; American Convention on Human Rights art. 21; American Declaration on the Rights and Duties of Man.

[97] *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C.) No. 79 (Judgment on merits and reparations of Aug. 31, 2001, para.148).

4.3.5 Right to Cultural Life

Under ICESCR Article 15(1)(a), a State must recognize people's right to participate in "cultural life." This concept is widely recognized, and is also codified in CERD article 5(e)(vi), CEDAW article 13(c), CRC article 31 and other human rights instruments.[98]

International tribunals have often examined the right to culture in the context of indigenous peoples, and Aurok will rely on that jurisprudence in its arguments, while Rakkab will attempt to distinguish them.

4.3.5.1 Cultural Distinctiveness

One of the requirements for cultural protection is cultural distinctiveness. The CESCR takes a "broad [and] inclusive" approach to culture, viewing it as "a living process, historical, dynamic and evolving, with a past, a present and a future" and should not be seen as isolated manifestation.[99] According to CESCR, culture encompasses "*inter alia*, ways of life," "religion or belief systems, rites and ceremonies," "natural . . . environments, food," "customs and traditions" through which individuals and communities express their humanity, existence, and world view.[100]

Aurok can rely on the jurisprudence of the African Court on Human and People's Rights to argue that the change must be so large as to "entirely eliminate their cultural distinctiveness."[101] and that threshold had not been reached.

The African Court found: "A static way of life is not a defining element of culture or cultural distinctiveness. … It is natural that some aspects of indigenous population's culture, such as certain ways of dressing or group symbols, could change over time. Yet the values, mostly the invisible tradition of values embedded in the self-identification [of the group] often remain unchanged."[102]

4.3.6 Right to Religion

The right to religion is often analyzed as part of the right to culture under human rights instruments. As a concept separate from cultural rights, the right to religion is the subject of Article 18 of the ICCPR, Article 8 of the African Charter on Human and Peoples' Rights, Article 12 of the American Convention on Human Rights, as well as other human rights instruments.[103]

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[98] See e.g., International convention on the Protection of the Rights of All Migrant Workers and Members of Their Family art. 31; Convention on the Rights of Persons with Disabilities art. 30; African Charter on Huamn and People's Rights art. 17.

[99] CESCR, General Comment No. 21, in UN Doc E/C.12/GC/21 (2009), para. 10 [hereinafter "CESCR GC 21"]; see also UNESCO Universal Declaration on Cultural Diversity, preamble; Fribourg Declaration on Cultural Rights art. 2.

[100] CESCR GC 21, para. 13.

[101] Ogiek Case, Judgment, African Ct. on Human and Peoples' Rights, App. No. 006/2012, para. 185.

[102] *Ibid.*

[103] International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(vii); Convention on the Rights of the Child art. 14; African Charter on the Rights and Welfare of the Child art. 9; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women art. 4(i).

Tribunals that have considered this right tend to find that it is violated when the religious group "can no longer undertake their religious practices."[104]

- **Aurok**: Rakkab violated the Aurokans' right to religion because the decrease in Yak population has rendered many villages unable to perform and conduct their religious rites.
- **Rakkab**: While there has been a decrease in Yak population, the vast majority of Aurokans are still able to perform their religious practices and continue to have access to Yak. Therefore, any purported interference with this has not risen to the level of a violation of the right to practice or manifest religion.

4.3.6.1 Necessary and Proportional Limitations and Legitimate Aim

Under Article 18(3) of the ICCPR, freedom to manifest one's religion "may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Restrictions on the rights protected by ICCPR are allowed if there is a "legitimate aim," as measure by necessity and proportionality, and cannot be such that "the essence" of the right is impaired.[105]

- **Aurok**: The harvesting is not a legitimate aim because it is not necessary and proportional. It is not necessary because there is no emergency, nor is it the least intrusive way to produce diabetes medication. The harvesting is not proportional because the rate is unsustainable and will lead to the extinction of the Yak, which is an irreversible effect.
- **Rakkab**: The purpose of the harvesting is legitimate because people worldwide depend on Gallvectra to treat insulin-resisted diseases and save their lives. The harvesting rate is both necessary and proportional as there are no reports of Gallvectra waste, and the amount killed by DORTA's hunters is far less than those killed by Aurokans. At the same time, Rakkab is researching alternative means to producing the Lustuk Enzyme so that Yak no longer have to be harvested for the drug.

4.3.7 Remedy

In accordance with Article 30 to the ILC Articles on State responsibility, a State is required to cease a wrongful act if it is continuing. The IA Commission stated that the violation of the right to natural resources requires the remedy of fair compensation, but premised the remedy on the fact that the property and user rights were irrevocably lost.[106]

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[104] *Ogiek*, para. 166.

[105] HRC, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.6.

[106] *Dann* at para. 130 (property interest "also implies the right to fair compensation in the event that such property and user rights are irrevocably lost").

4.4 QUESTION 4: PROFIT SHARING FROM THE SALE OF GALLVECTRA

Aurok's Claim	*Rakkab's Claim*
Rakkab must pay Aurok a portion (to be determined in subsequent proceedings) of the profits realized from sales of the drug Gallvectra because the appropriation and exploitation of traditional knowledge belonging to the Aurokan people without compensation is inconsistent with international law.	Rakkab is under no obligation under international law to pay Aurok any portion of the profits realized from sales of the drug Gallvectra.
Aurok's Anticipated Argument	***Rakkab's Anticipated Argument***
Aurok will mainly be expected to build its arguments on the basis of the Convention on Biological Diversity ("**CBD**") as well as the 2010 Nagoya Protocol ("**Nagoya Protocol**"),[107] claiming that Rakkab should share the benefits of the utilization of the Lustuk Enzyme with Aurok, either as an obligation under those conventions or as a compensation for breaching its treaty undertakings. Aurok might also try to demonstrate the existence of a custom for States to compensate indigenous people when utilizing their traditional knowledge.	Rakkab may contest many of the points, likely to be raised by Applicant, *i.e.* that it did not utilize Aurokan people's traditional knowledge and also that sharing profits realized from the sale of the Gallvectra drug by a private enterprise is not envisioned by the CBD or Nagoya Protocol as a form of equitable sharing of benefits. Even if that were the case, the treaty provisions in question are not enforceable and merely recommendatory in nature, thus Respondent did not breach them. Additionally, there is no rule of customary international law requiring Rakkab to pay Aurok for using traditional knowledge of its citizens.

4.4.1 Convention on Biological Diversity and Nagoya Protocol

The main argument of Aurok should be based on the application of the CBD and the Nagoya Protocol, to which both Aurok and Rakkab are parties.

It is possible for Applicant to claim that Rakkab breached several of its obligations under the Nagoya protocol, namely:

[107] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

- To ensure that the benefits from utilizing the genetic resource, *i.e.* the Lustuk Enzyme, are shared "in a fair and equitable way with the communities concerned, based on mutually agreed terms."[108]
- That "traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established"[109] or prior informed consent of the Contracting Party providing such resources.[110]
- To cooperate with Aurok with the involvement, as appropriate, of the indigenous and local communities concerned when implementing the Protocol.[111]

With respect to the second alleged breach, if Applicant chooses to allege failure to obtain prior informed consent or approval and involvement of the indigenous communities under the Protocol, Aurok may not rely on the instance where Dr. Bello studied local Aurokan dietary practices, since it occurred prior to the entry into force of the Nagoya Protocol. Aurok may still rely on the continuous failure to obtain such consent or approval by DORTA/Rakkab while developing and selling Gallvectra however, if it manages to prove that once the Nagoya Protocol became binding for both states, Rakkab should have sought such consent or approval. Similarly, Aurok may try to argue a violation of Article 15(5) of the CBD; however then it shall have the completely different task of demonstrating that it was Aurok as a State that provided the traditional knowledge regarding the genetic resource in question, which would not be a strong argument and could be easily refuted on the facts.

The first and third alleged breaches shall be explored in detail below, and the structure of Aurok's arguments to prove either will be the same. To that end, agents for Applicant will need to demonstrate cumulatively that: 1) Aurok is *parens patriae* for the Aurokan people; 2) the Lustuk enzyme is a "genetic resource" within the meaning set under Article 2 of the CBD and the Nagoya Protocol; 3) Aurok is the "country of origin" of this genetic resource; and 4) the Gallvectra drug was designed as a result of appropriating and exploiting traditional knowledge belonging to Aurokan people. Throughout the analysis, Applicant is expected to tie its arguments to the object and purpose of the CBD and the Nagoya Protocol.

Thereafter, Aurok will need to show either that:

- sharing the profits of the sales of the Gallvectra drug is fair and equitable benefit-sharing under Article 5 of the Nagoya Protocol and therefore Rakkab is under an obligation to do so; or

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[108] Nagoya Protocol art. 5(2).

[109] Nagoya Protocol art. 7.

[110] CBD art. 15(5).

[111] Nagoya Protocol art. 11.

- as a result of Rakkab's internationally wrongful act of appropriating and exploiting the traditional knowledge belonging to the Aurokan people, compensation is owed as the most appropriate remedy.

4.4.1.1 Standing for Aurok to Present the Claim

4.4.1.1.1 Aurok may submit this claim to assert its own direct right as most of the population is composed of Pivzao adherents

Applicants might argue that they have standing to submit this claim to the ICJ on the basis of the infringement by Rakkab of direct rights of the state of Aurok. This is so, as even though the traditional knowledge pertains to the Aurokan people and not the State of Aurok, the population is almost entirely made up of Pivzao adherents and thus the Applicant has a good basis to assert this claim.

4.4.1.1.2 Diplomatic Protection

Applicants might also rely on diplomatic protection to protect its citizens' rights. It should generally be acceptable to use this ground to claim *locus standi* as no issues arise as to the nationality of the Aurokan citizens whose traditional knowledge was appropriated. Further, it is clear from the Clarifications to the *Compromis* that local remedies in Rakkab were exhausted, since "No further review is available under the laws of Rakkab."

4.4.1.1.3 *Parens patriae* of the Aurokan people

Some applicants may choose to rely on the theory of *parens patriae* to argue that they have standing to assert their claim, even though it would be less advisable compared to the previously mentioned two grounds that are much less likely to cause unnecessary debate and take up valuable pleading time.

This doctrine, initially developed under English common law,[112] provides States with standing to submit claims, *e.g.*, before the ICJ, on behalf of an individual or more commonly a group of people, who lack the legal capacity to bring a claim before the World Court, with respect to a right, recognized and existing under international law. Aurok may thus invoke its position of *parens patriae* with respect to the Aurokan people as a general principle under Article 38(1)(c) of the ICJ Statute, granting it the required standing to pursue its compensation claim.[113] This has already been done on several occasions before the ICJ.[114]

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[112] "The doctrine developed in England from the common law concept of the royal prerogative. The Sovereign was "the general guardian of all infants, idiots, and lunatics" and represented their interest as *parens patriae*. English law required the following four elements before granting the sovereign *parens patriae* representation: 1) the party is legally incapable of securing his rights; 2) the sovereign or his representative is the only alternative; 3) the sovereign has a duty to protect the subject's welfare; and 4) the sovereign has no personal interest and acts on someone else's behalf." - Lisa Moscati Hawkes, *Parens Patriae and the Union Carbide Case: The Disaster at Bhopal Continues*, (1998) 21 Cornell ILJ p. 186.

[113] David Sloss, *Using International Court of Justice Advisory Opinions to Adjudicate Secessionist Claims,* (2001) 42 Santa Clara LR 357, p. at 375.

[114] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952 : I.C.J. Reports 1952*, p. 176; *The Minquiers and Ecrehos case, Judgment of November 17th, 1953 : I.C.J. Reports*

Aurok should ordinarily not have a hard time establishing its *parens patriae* status with respect to the Aurokan people.

Agent for the Respondent might point out to the fact that there are around "200 adherents to the Pivzao traditions among the population of Rakkab." However, it should be noted that Aurok is claiming to represent the interests of its own Aurokan citizens and not all adherents to the Pivzao traditions. Further, even if Respondent claims that Aurok may only a bring such claim on behalf of all the adherents, such argument is attenuated at best, with the addition that Rakkab is in a much better position to offer an equitable share of the benefits achieved through harvesting the Yak to its own citizens.

Q:	Agent, are you exercising diplomatic protection with respect to your citizens? Are there any differences between diplomatic protection and *parens patriae* and if so, why are you not relying simply on diplomatic protection to demonstrate your standing?
Q:	Agent, does *parens patriae* give you standing for this claim? If not, are you precluded from maintaining this submission?
Q:	Agent, why are you only claiming compensation on behalf of the Aurokan adherents to the Pivzao traditions?

4.4.1.2 Genetic Resource

Since Article 2 of the CBD limits the definition of "genetic resources," to "any material of plant, animal, microbial or other origin **containing functional units of heredity**" some Respondents might argue that Rakkab is merely using Lustuk Enzyme to produce Gallvectra. As enzymes do not possess DNA, it would therefore not qualify as a genetic resource. However, agents for the Applicant should be prepared to discuss whether they rely on the Lustuk Enzyme as being the genetic resource, or, more likely, the gallbladder of the majestic yak.

Agents for Aurok should demonstrate that the abovementioned definition has evolved, namely through the adoption of the Nagoya Protocol, which, although recalling the definition of "genetic resources" under the CBD, also goes on to add a definition of "Utilization of genetic resources", which refers to conducting "research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology". Biotechnology itself is defined as including, among others, derivatives, which shall have the following meaning:

> A naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.

After making this point, agents for Aurok may claim with sufficient authority and persuasiveness that the Access and Benefit Sharing ("ABS") rules, relevant to proving their case, apply to the

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1953, p. 47; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* p. 38.

Lustuk Enzyme as well,[115] since DORTA is conducting such research and development as mentioned above, while making the Gallvectra medications.

Q:	Agent, even if some medicinal properties of the Yak gallbladder were known to Pivzao adherents in Aurok before the invention of Gallvectra, DORTA engaged in a lengthy research and development process (arguably around 5 years), along with associated expenses, which yielded a highly efficient and globally recognized medicine. Does that not entitle DORTA to their patent over the drug and thus all of the profits?

4.4.1.3 Country of Origin

Under the CBD and Nagoya Protocol definitions, it may be argued that both Aurok and Rakkab should be considered as "countries of origin" of the Yak, as the Majestic Yak herds spend an even amount of time in their natural habitats in both countries, respectively. This possibility is expressly envisaged by Article 11 of the Nagoya Protocol, which requires States that share transboundary genetic resources to cooperate, as appropriate, with the involvement of indigenous and local communities concerned, where applicable, with a view to implementing this Protocol. Thus Aurok will easily be able to show that this requirement has been met.

4.4.1.4 Traditional Knowledge

Traditional knowledge has been defined by some authors to refer to "knowledge, innovations and practices of indigenous peoples and local communities ("ILC"), curated and developed through intergenerational experience with the environment, and shared—often orally—with each generation." [116] Another definition that agents might rely on is contained in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Draft Articles on Traditional Knowledge:

> Knowhow, skills, innovations, practices, teachings [of ILCs relating to] fields such as agriculture, the environment, healthcare and indigenous and *traditional medical knowledge*, biodiversity, traditional lifestyles and natural resources and genetic resources.[117]

- **Aurok:** Agents for Applicant might claim that Aurokans have long known of the health benefits associated with consuming yak and, in particular, *Tirhinga Nos Lustuk*, further

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[115] Evanson Chege Kamau et al., *The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and what are the Implications for Provider and User Countries and the Scientific Community?* (2010) 6 Law, Environment & Development J 248.

[116] Evanson Kamau, 'Protecting TK Amid Disseminated Knowledge: A New Task for ABS Regimes? A Kenyan Legal View' in Evanson Kamau and Gerd Winter (eds), *Genetic Resources, Traditional Knowledge & the Law: Solutions for Access and Benefit Sharing* (Earthscan 2009), pp. 160–161; Jonathan Curci, *The Protection of Biodiversity and Traditional Knowledge in International Law of Intellectual Property* (Cambridge 2010), pp. 14-16; CBD Secretariat, 'Factsheet: Traditional Knowledge' (2011).

[117] WIPO IGC on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (31st Session), 'Protection of Traditional Knowledge Draft Articles' (Geneva, 19–23 September 2016) WIPO/GRTKF/IC/31/4, 5.

supported by Dr. Bello's own observations. It might further be claimed that particular sophistication and detailed knowledge as to which diseases are cured or treated by the traditional Yak dish should not be considered as prerequisites to qualify Aurokans' rites and practices as traditional knowledge, pursuant to the above-mentioned definitions.

- **Rakkab:** Respondent might retort that simply by virtue of a comparatively random event, *i.e.* inhabiting a territory that happens to be the natural habitat of the Yak and consuming its gallbladder as part of their religious rites does not entail any particular knowledge. Additionally, the Lustuk Enzyme was "never-before-identified" until Dr. Bello's research during his hospital practice in Aurok. In addition, agents for Respondent might point to examples of indigenous peoples' traditional knowledge, where it was specifically related to treatment of diseases, such as the Ochoi tribe in India,[118] unlike the not-so-specific traditions of the Pivzao, where consumption of *Tirhinga Nos Lustuk* not only symbolized gratitude to Kayleff for nature's bounty, but also conferred health benefits and longevity on all who partook in it.

Q:	Agent, what is the applicable threshold to consider a ritual/tradition/rite as forming traditional knowledge? Is any particular and detailed awareness of certain positive effects associated with said ritual necessary?

4.4.1.4.1 Appropriation and exploitation

Some teams that represent the State of Aurok might claim that the appropriation and exploitation of the traditional knowledge constituted a violation of Rakkab's intellectual property obligations. While such claim might have merit, it must be noted from the outset that the CBD and Nagoya Protocol have different policy goals than the international IP law regime and thus, the following analysis shall focus mainly on the treaty obligations under the CBD and Nagoya Protocol.

Another preliminary note with respect to the case that Applicants must build pertains to how crucial the traditional knowledge of Aurokans was for the modern use of the yak gallbladder and whether Dr. Bello truly appropriated such traditional knowledge or whether the practices and tendencies observed merely inspired him to make a revolutionary scientific medicinal discovery.

While it should be relatively easy for Aurok to demonstrate that its people possess traditional knowledge of the health benefits of consuming Yak gallbladders, showing that Rakkab unlawfully appropriated and exploited such traditional knowledge, thus owing compensation, is going to be very difficult for Applicant. Despite the fact that one of the main goals of the Nagoya Protocol, as declared in its very title and reiterated in the preamble and numerous provisions thereafter, is to ensure the fair and equitable sharing of benefits arising from the utilization of

[118] R. Bussmann, Traditional Knowledge of Medicinal Plants in Tribes of Tripura in Northeast India, 14(4) AFR. J. TRADIT. COMPLEMENT ALTERN. MED. 221 (2017).

genetic resources, the protection and enforcement mechanisms enshrined therein, as commented by some authors, are relatively "weak".[119]

Rakkab may point to the vague wording of some of the provisions Applicant is likely to cite, such as "take legislative, administrative or policy measures, as appropriate," "in accordance with domestic law, each Party shall take measures, as appropriate," "shall endeavour to cooperate, as appropriate," *etc.* All of these expressions suggest a somewhat high degree of discretion, employing recommendatory language rather than imposing strict obligations to be followed by States parties to the Protocol.

This should not discourage agents for Aurok, however, as they should stress the importance of traditional knowledge in preserving indigenous peoples and boosting the economy of remote and less developed parts of the world,[120] Aurok itself being one. Most importantly, Applicants should note that while these provisions are vague to some degree, they nonetheless are clearly imposing obligations on Rakkab to cooperate and take into account the interests of the indigenous peoples, particularly when utilizing genetic resources under Article 12. As long as they manage to show with sufficient persuasiveness the existence of such a treaty obligation, it would then become extremely hard for agents for Rakkab to show that their State was willing to do anything to comply, based on the facts of the *Compromis*.

Ultimately, Applicants should also be able to claim that even if the use of Aurokan traditional knowledge to produce Gallvectra is not a breach by Rakkab, it still nonetheless entails sharing the benefits with the indigenous adherents to the Pivzao traditions in Aurok. Various monetary (as well as non-monetary) benefits are listed in Annex to the Nagoya Protocol, such as up-front payments, royalties, and license fees, all of which could form the basis of Aurok's compensation claim against Rakkab.

Q:	Agent, do the benefits referred to in Article 5(4) of the Nagoya Protocol include the profits that DORTA made by selling Gallvectra?

4.4.1.4.2 Retroactivity of the obligations for benefit sharing under Nagoya Protocol

The Aurokans' traditional knowledge was allegedly appropriated by Dr. Bello in 2001, which is after the entry into force of the Convention on Biological Diversity (29 December 1993), but prior to the entry into force of the Nagoya Protocol (12 October 2014). It should be stressed that the Nagoya Protocol itself does not address specifically the issue of whether or not it applies retroactively, despite the existence of ample debate during the drafting process, as evident from the *travaux preparatoire* and as expanded upon in the following paragraph.

There was a proposal for the inclusion of a specific provision under Article 3 of the Nagoya Protocol, stipulating that it applies to "benefits arising from the continuing uses of genetic

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[119] Krystyna Swiderska, *Equitable benefit-sharing or self-interest?* (IIED 2010), available online at: <www.iied.org/pubs/display.php?o=17084IIED>; See also: https://biocultural.iied.org/nagoya-protocol-access-genetic-resources-and-benefit-sharing

[120] Krystyna Swiderska, *Banishing The Biopirates:A New Approach To Protecting Traditional Knowledge*, Gatekeeper Series 129 (2006), p. 3.

resources and associated traditional knowledge acquired before the entry into force of the Convention."[121] Primarily propounded by the African Group, the provision was met with heavy resistance from developed countries and was ultimately dropped from the final text of the Nagoya Protocol.[122]

In view of the above, agents for Aurok must either attempt to claim that:

1. Regardless of the removal of the retroactivity clause in Article 3, it should nonetheless be interpreted to encompass continuing use of Aurokan's traditional knowledge, appropriated after the entry into force of the CBD, by relying on State practice in this regard; or that
2. The international obligations to share benefits and obtain prior informed consent already existed under the CBD[123] and thus the Nagoya Protocol may be merely seen as reiterating the already existing obligation, with respect to "genetic resources and traditional knowledge associated with genetic resources acquired prior to the entry into force of the Protocol."[124]

Wherein the second option is arguably more persuasive, given the *travaux preparatoires* of the Nagoya Protocol.

4.4.2 Customary International Law

Aurok might claim, in addition to the argument based on the CBD and the Nagoya Protocol, or as a standalone argument, that there is a rule under customary international law requiring Respondent to compensate Aurok for utilizing traditional knowledge of the latter's citizens. This might prove to be a particularly weak argument considering that access and benefit sharing agreements even under the regime of the CBD and Nagoya Protocol are limited in number.[125] Agents for Applicant may however rely on some limited support for this argument found in a proposition to amend the TRIPS Agreement so that "WTO Members require that an applicant for a patent relating to biological materials or traditional knowledge provide, as a condition to acquiring patent rights:

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[121] Report of the second part of the Ninth Meeting of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing, Tenth meeting Nagoya, Japan, 18–29 October 2010 Item 3 of the provisional agenda, UNEP/CBD/COP/10/5/Add.4, at 20

[122] Elisa Morgera et al., Unraveling the Nagoya Protocol: A Commentary On The Nagoya Protocol On Access And Benefit-Sharing To The Convention On Biological Diversity (2014), at 78.

[123] Submissions by Namibia on behalf of the African Group to the CBD Working Group on ABS, "Collation of operative text submitted by Parties, governments, international organisations, indigenous and local communities and relevant stakeholders in respect of the main components of the international regime on access and benefit-sharing listed in Decision IX/12, Annex I" (28 January 2009) UN Doc UNEP/CBD/WG-ABS/7/4, paragraphs 11–12, as cited in Elisa Morgera, at 77.

[124] CBD Working Group on ABS, "Report of the second part of the ninth meeting," UNEP/CBD/COP/10/5/ADD.4, paragraph 133; and Montreal I Draft, draft article 3.

[125] Nicolas Pauchard, *Access and Benefit Sharing under the Convention on Biological Diversity and Its Protocol: What Can Some Numbers Tell Us about the Effectiveness of the Regulatory Regime?* (2017), p. 6.

i. disclosure of the source and country of origin of the biological resource and of the traditional knowledge used in the invention;

ii. evidence of prior informed consent through approval of authorities under the relevant national regimes;

iii. evidence of fair and equitable benefit-sharing under the relevant national regimes."

Additionally and on a separate basis, agents for Aurok might claim unjust enrichment and/or equitable compensation for the use of indigenous peoples' traditional knowledge, as seen in the practice of various states, such as Canada,[126] Ecuador, India and Costa Rica,[127] as well as on a regional level, as seen in the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore Within the Framework of the African Regional Intellectual Property Organization.[128]

Rakkab will argue that there is insufficient practice to establish a customary rule that States owe compensation when utilizing indigenous people's traditional knowledge. In fact, many developed States have routinely taken advantage of the traditional knowledge of various indigenous peoples without sharing the benefits thereafter. Although the law may be on Rakkab's side in this respect, Aurok may refer to policy justifications, particularly in light of Aurok being a least developed country and Yak still forming an essential part of its citizenry's life.

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[126] Submission by Canada, The Relevance of Traditional Knowledge to Intellectual Property Law, Answer to Question 11, available online at: <http://aippi.org/wp-content/uploads/committees/232/GR232canada.pdf>.

[127] G. Aguilar, Access to Genetic Resources and Protection of Traditional Knowledge in the Territories of Indigenous Peoples, 4 ENVIRON. SCI. POLICY 244 (2001), at 254.

[128] Available online at: <https://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt_ap010.pdf>.

5 APPENDIX A: INTRODUCTION TO INTERNATIONAL LAW

This Appendix is a primer on public international law for judges who may not have substantial background in the field.

5.1 SOURCES OF INTERNATIONAL LAW

The sources of international law are listed in Article 38(1) of the Statute of the International Court of Justice ("ICJ"). The first three subparagraphs are the three sources of international law: (a) treaties (*i.e.*, conventions); (b) custom; and (c) general principles of law. The fourth subparagraph is not a source of international law; rather, it is a "subsidiary means" for the determination of rules of law: (d) judicial decisions and teachings (e.g., treatises, commentaries, monographs, articles, and other scholarly works). In other words, one can use judicial decisions and teachings to help identify and determine the rules of treaties, custom, and general principles of law.

ICJ Statute, Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is no hierarchy between the three sources of international law. Some commentators argue that unilateral acts—of both States and international organizations—are a fourth source of international law.

5.1.1 Treaties

The first source of international law is treaties (*i.e.*, conventions). Treaties are international agreements between States. The rules governing treaties are set forth in the Vienna Convention on the Law of Treaties ("VCLT"), to which both Aurok and Rakkab are party. Many, but not all, provisions of the VCLT are considered to reflect customary international law.

Article 26 of the VCLT sets out the fundamental principle relating to treaties: *pacta sunt servanda*. Article 26 provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Ordinarily, the provisions of a treaty bind only the States party to the treaty. Nevertheless, the provisions of a treaty may reflect customary international law, in which case they bind all States. It is not uncommon for certain provisions of a treaty to reflect customary international law while other provisions of the same treaty do not reflect customary international law.

Article 31 of the VCLT sets out the general rule of interpretation. Article 31(1) provides: "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." In short, three elements must be examined in interpreting a treaty: (1) the text; (2) the context; and (3) the object and purpose. Article 31(2) provides that the "context" of a treaty includes the text, the preamble, the annexes, and other agreements and instruments specified in subparagraphs (a) and (b). Article 31(3) further provides that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the parties.

5.1.2 Custom

The second source of international law is custom. Custom is established if there is sufficient (1) State practice; and (2) *opinio juris*. State practice refers to the conduct of States. *Opinio juris* refers to the belief on the part of the State engaging in the practice that "this practice is rendered obligatory by the existence of a rule of law requiring it."[129] Evidence of State practice and *opinio juris* may be found in, *inter alia*, a State's military acts, executive acts, administrative acts, legislative acts, judicial decisions, policy decisions, policy statements, conclusion of treaties, diplomatic correspondence, opinions of national legal advisers, comments at conferences, and voting in U.N. General Assembly resolutions, as well as in the conduct of international organizations.

The degree of State practice and/or *opinio juris* necessary to qualify a rule as customary is not clear. Nevertheless, the ICJ has given some vague guidance on this issue. In the *North Sea Continental Shelf* cases, the ICJ held that "State practice, including that of States whose interests are specially affected, [must be] both extensive and virtually uniform."[130] And in the 1974 *Fisheries Jurisdiction* cases, the ICJ considered a "generally accepted" rule to be customary.[131] Nevertheless, in *Military and Paramilitary Activities*, the ICJ held that "the corresponding practice [does not have to] be in absolutely rigorous conformity with the rule."[132]

5.1.3 General Principles of Law

The third source of international law is general principles of law. There is no consensus over the definition of general principles of law. The majority of such general principles of law are procedural in nature, such as good faith, estoppel, *res judicata*, and clean hands.

5.1.4 Judicial Decisions and Teachings

As noted above, judicial decisions and teachings, though listed in Article 38(1), are not a source of international law. Rather, they are a "subsidiary means for the determination of rules of law."

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[129] *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, *Merits, Judgment, 1969 I.C.J. Rep.* para. 77.

[130] *Ibid.*, para. 74.

[131] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, 1974 I.C.J. Reports,* para. 52; *Fisheries Jurisdiction (Germany* v. *Iceland), Merits, Judgment 1974 I.C.J. Rep.* para. 44.

[132] *Military and Paramilitary Activities in und against Nicaragua (Nicaragua* v. *United States of America). Merits, Judgment. I.C.J. Reports 1986*, para. 186.

In other words, the ICJ may use them to identify and determine the rules of treaties, custom, and general principles of law.

Judicial decisions include international and domestic decisions of both permanent courts and arbitral tribunals. As a matter of practice, however, the ICJ most often cites to its own precedent and the precedent of its predecessor, the Permanent Court of International Justice ("PCIJ"). Because judicial decisions are not a source of international law (but only a subsidiary means for the determination of rules of law), the ICJ is not bound by its own precedent. This is reinforced by Article 59 of the ICJ Statute, which provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Teachings refer primarily to scholarly writings. Notably, they include only the teachings of "the most highly qualified publicists," such as Grotius, Lauterpacht, Oppenheim, McNair, Brownlie, current and former ICJ judges (including their declarations, separate opinions, and dissenting opinions), as well as the documents produced by the International Law Commission ("ILC"). Many students cite the scholarly writings of individuals who are not among "the most highly qualified publicists." As a result, you may question oralists about the identity of the author of any scholarly source they cite.

Among highly qualified publicists, the ILC has had the most visible impact on the jurisprudence of the Court. The ILC is a permanent commission of experts established by the UN General Assembly with the dual mandate to codify and progressively to develop international law. Outcomes of its work take various forms, including treaties (The Vienna Convention on the Law of Treaties being a good example), articles and less formal texts. The ILC is well regarded and among the rare sources that the Court will openly cite. The work of the ILC is additionally useful because its studies and discussions are publicly documented, and there is often evidence of the reasons why its outcomes are phrased in the way that they are and of the sources that support its decisions. Be on the lookout for oralists who can cite to the reports of the ILC, its rapporteurs and the records of its meetings.

5.2 INTERNATIONAL DISPUTE SETTLEMENT

5.2.1 Terminology

The terminology used before the ICJ (and in international dispute settlement more generally) differs in various ways from the terminology used in domestic dispute resolution. The following differences should be noted.

- The words "settle" and "settlement" are for the most part synonymous with "resolve" and "resolution." The ICJ tends to use the words "settle" and "settlement."
- The party that filed the case is called the "Applicant" (not the "plaintiff").
- The party against whom the case is filed is called the "Respondent" (not the "defendant").
- The written pleadings filed by the parties are called "memorials" (not "briefs" or "cases").

- The individuals representing States are called "agents" (if they are direct representatives) or "counsel" (if they are external legal advisers).[133] In the Jessup Competition, oralists are referred to as "agents."
- The judges on the ICJ may be referred to as "Your Excellency" (not "Your Honor"), though in practice this is not common. In Jessup, the oralists should refer to the judges as "Your Excellency" and/or the President of the bench as "Mr./Mme President."

5.2.2 Jurisdiction

The fundamental principle in international dispute settlement is the principle of consent: a court or tribunal has jurisdiction to settle a dispute only if the parties consented to the court or tribunal doing so. This consent may be given before or after the dispute arises. There are four bases for the ICJ's jurisdiction:

- optional clause declarations (under Article 36(2) of the ICJ Statute) – Both States make a declaration stating that they will accept the jurisdiction of the Court over any dispute (or certain disputes) filed against it by another State that has also made such a declaration.
- compromis (*i.e.*, special agreement) – Both States conclude a treaty to submit the dispute to the Court after the dispute has arisen.
- compromissory clause (*i.e.*, dispute resolution clause, dispute settlement clause) – Both States concluded a treaty (often before the dispute arose), which provides for submission of any dispute (or certain disputes) to the Court.
- *forum prorogatum* – One State institutes proceedings against a second State over which the Court does not have jurisdiction, but the second State consents to the Court's jurisdiction for the case.

5.2.3 Admissibility

The distinction between jurisdiction (of the court or tribunal) and admissibility (of the claim) is often unclear. Indeed, international courts and tribunals have diverged on the exact differences between jurisdiction and admissibility. In general, the ICJ considers issues of jurisdiction to be those relating to the jurisdictional provisions of the ICJ Statute (Articles 34-37), such as whether the parties consented to the Court's jurisdiction, whereas issues of admissibility include a range of other issues that could prevent the Court from adjudicating the merits of the dispute. Commentators generally agree that the *Monetary Gold* principle, mootness, and standing are issues of admissibility.

5.2.4 Burden of Proof

The burden of proof is about which party has the burden of proving a matter of fact or law.

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[133] More specifically, there are "agents," "co-agents," "deputy agents," "assistant agents," "advocates," "counsel," and others.

With respect to matters of general international law (e.g., jurisdiction, admissibility, the law of treaties, the law of State responsibility), the Court adopts the principle of *jura novit curia* ("the court knows the law"), according to which the Court is the one that is supposed to know the law.[134] As a result, neither party has the burden of proof. As the Court held in the 1974 *Fisheries Jurisdiction* cases, "the burden of establishing or proving rules of international law cannot be imposed on any of the parties, for the law lies within the judicial knowledge of the Court."[135]

With respect to matters of specific international law (e.g., bilateral treaties, local customs) and national law (if relevant), the Court treats the existence of such rules of law as matters of fact, such that the party asserting it has the burden of proof.[136] For example, the Court held in *Asylum* that "[t]he Party which relies on a [local custom] must prove that this custom is established in such a manner that it has become binding on the other Party."[137]

With respect to matters of fact, the Court adopts the principle of *onus probandi incumbit actori* ("the burden of proof is on the claimant"). As the Court has held on multiple occasions, the party alleging the fact bears the burden of proving it.[138] However, the Court clarified in *Croatian Genocide* and *Diallo* that this principle "is not an absolute one."[139] For example, the Court has held that neither party has the burden of proof with respect to facts that are "notorious" or "undisputed,"[140] and that sometimes a party cannot be required to prove a "negative fact."[141]

5.2.5 Standard of Proof

The standard of proof is about the degree of certainty that must be proven by the party that bears the burden of proof.

The ICJ has not articulated consistent standards of proof, employing a variety of terminology, such as "(in)sufficient," "satisfying," "convincing," "conclusive," and "decisive." The Court has, however, recognized that "claims against a State involving charges of exceptional gravity [e.g., use of force, genocide] must be proved by evidence that is fully conclusive [*i.e.*, a higher

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[134] Robert Kolb, *International Court of Justice* (Hart 2013) pp. 934-935.

[135] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, 1974 I.C.J. Reports,* para. 17; *Fisheries Jurisdiction (Germany* v. *Iceland), Merits, Judgment 1974 I.C.J. Rep.* para. 18.

[136] Robert Kolb, *International Court of Justice* (Hart 2013) p. 935.

[137] *Asylum (Colombia/Peru), Judgment, 1950 I.C.J. Reports,*. p. 276.

[138] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Merits, Judgment* (18 November 2015), para. 172; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Reports*, para. 101; ICJ, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, para. 162.

[139] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Merits, Judgment* (18 November 2015), para. 172; *Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, para. 54.

[140] Robert Kolb, *International Court of Justice* (Hart 2013) p. 935.

[141] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Merits, Judgment* (18 November 2015), para. 172; *Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, para. 54

standard]."[142] Furthermore, a finding of bad faith had been held to require "clear and convincing evidence which compels such a conclusion."[143] In addition, the Court held in *Corfu Channel* that if evidence is in the "exclusive territorial control" of the respondent, then the claimant "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence."[144]

5.3 INTERNATIONAL HUMAN RIGHTS LAW SOURCES AND INSTITUTIONS

Much of this year's *Compromis* concerns international human rights law and institutions. Human rights law is well established as a field of international law.

At the core of the international treaty framework for human rights is the UN Charter. Article 1(3) of the Charter states that "promoting and encouraging respect for human rights" are among the purposes of the UN, and Article 55(c) of the Charter gives the UN a mandate to "promote . . . universal respect for, and observance of human rights." To this end, the UN General Assembly adopted on 10 December 1948 the *Universal Declaration of Human Rights* ("UDHR"). Although the UDHR is an Assembly resolution and, therefore, not formally binding, it is highly influential. It formed the basis for negotiations of subsequent human rights treaties. It is also often considered to reflect customary international law.[145] However, teams using the UDHR to support the proposition that a particular human rights norm is part of c

5.3.1 Core International Human Rights Treaties

Building on the UDHR, the UN has negotiated nine core international human rights treaties. For the purposes of this year's *Compromis*, the most relevant are the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Social, Economic and Cultural Rights ("ICESCR"), as both Aurok and Rakkab are parties to each of these treaties.[146]

5.3.2 Treaty Bodies

For each core human rights treaty is a monitoring body. For example, under part IV of the ICCPR, a Human Rights Committee ("HRC") is established with the mandate to receive national reports on implementation of the ICCPR, make General Comments on those reports, and to

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[142] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Merits, Judgment* (18 November 2015), para. 178 (quoting *Bosnian Genocide*); ICJ, *Corfu Channel case, Judgment, I.C.J. Reports 1949*, p. 17.

[143] *Application of the Interim Accord of 13 September 1995* (the Former Yugoslav Republic of Macedonia v. Greece), 2011 ICJ Rep 644, para 132.

[144] *Corfu Channel case, Judgment, I.C.J. Reports 1949*, p. 17.

[145] Hilary Charlesworth, *Universal Declaration of Human Rights*, Max Planck Encyclopedia of International Law (2008) para. 16.

[146] The other core human rights treaties are, in order of conclusion, the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Convention on the Rights of the Child ("CRC"), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("ICMW"), International Convention for the Protection of All Persons from Enforced Disappearance ("CPED"), and the Convention on the Rights of Persons with Disabilities ("CPRD"). Teams may rely on provisions of these instruments as well, but, like the UDHR, they only serve as potential evidence of customary law and do not bind Aurok or Rakkab directly.

express views on State-to-State and individual-State complaints for those States which have consented to its jurisdiction. Similarly, under resolution 1985/17 of the UN Economic and Social Council ("ECOSOC"), a Committee on Social, Economic and Social Rights exists to perform similar function with respect to the ICESCR. Both the General Comments of these bodies and their views on individual cases are widely seen as persuasive authority for the interpretation of the respective conventions.

In the *Diallo* case, the Court considered the weight it should give to the views of these treaty bodies. It stated that "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty."[147]

5.3.3 Regional Human Rights Instruments and Institutions

The universal framework for human rights is complemented in many geographical regions by regional conventions and institutions, which often are more prominent than their UN counterparts.

Because neither Aurok nor Rakkab is a party to any regional human rights conventions, these conventions and the views of experts and courts applying them can be applied in the present case only as persuasive authority to guide the Court in its interpretation and application of the ICCPR, ICESCR and customary international law.

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[147] *Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo)*, *Merits, Judgment, I.C.J. Reports 2010*, p. 664, para. 66.

6 APPENDIX B: TIMELINE OF EVENTS

250,000 years ago: Date of the earliest fossil records of the Kayleff Yak.

1000 BCE: The Pivzao civilization arises in the Gaur Highlands.

1400s: First outside account of the Yak by Zheng He.

1730: Jeramia colonizes Guar Highland and the surrounding region.

1950s: Motor vehicles and firearms begin to be used in Yak hunting.

1961: Aurok and Rakkab achieve independence from Jeramia.

1965: Rakkab establishes the Department of Research, Technology & Application.

1970s: Rakkab emerges as a regional power with a diversified economy.

1994: YLSA begins surveying Yak migration along the Aurok-Rakkab border.

February 1996: Rakkab privatizes the Department of Research, Technology & Application as DORTA.

1997: Dr. Isaac Bello begins working for DORTA in its pharmaceutical development division and in a DORTA-operated private hospital in Rakkab near the border with Aurok.

1990s – Early 2000s: Yak population consistently estimated to be 750,000 by scientists.

2001: Dr. Bello spends the year in rural Aurok investigating their dietary and cultural practices.

2002: Dr. Bello publishes an article summarizing his findings regarding what he referred to as "the Lustuk Enzyme."

2003: Dr. Bello and Dorta biologists isolate the Lustuk Enzyme and begin to test its efficacy.

11 November 2004: DORTA files patent application with the Rakkabi Intellectual Property Ministry for Gallvectra.

January 2005: Professor Cressida Cauty publishes article "The Lustuk Enzyme in the Aurokan Diet."

March 2005: Aurokan Minister of Intellectual Property writes to his Rakkabi counterpart, noting that Bello's discovery of the Lustuk Enzyme can be attributed to his study of the Aurokan people and their usage of Yak gallbladders, and enclosing a copy of Cauty's article.

April 2005: Patent attorneys for DORTA respond to Aurok's letter that Bello's work led to the discovery and isolation of the enzyme as a medical treatment of insulin-resistant diseases.

11 November 2005: DORTA pursues intellectual property protection for Gallvectra as a human pharmaceutical in all of the countries in which it has subsidiaries.

21 May 2006: Rakkab grants the patent to DORTA.

May 2011: DORTA begins marketing Gallvectra in Rakkab and other countries that had approved it for prescription use.

October 2015: Carla Alexander, the Chief Executive Officer of DORTA reports at a shareholder meeting that 2014 worldwide sales of Gallvectra topped €2 billion. During a press conference

days later, Aurokan Prime Minister Sumun expressed "grave concerns" that the demand for Gallvectra would "negatively impact our indigenous culture."

13 January 2016: The unsigned editorial "What Will Happen When the Yak Do Not Return?" is published in Aurok.

February 2016: Brisbane-based *Courier-Mail* published a lengthy investigative report entitled, "Gallvectra Saves Lives: But Where Are All the Yak Gallbladders Coming From?" noting that Rakkab granted between 20 and 30 Yak hunting licenses per year from 1950 to 2010, but in 2011, the number of Yak hunting license applications increased to more than 300, nearly all of which were granted, and the number of licenses has increased every year since then. The article estimated that hunters killed nearly 30,000 Yak in Rakkab from October 2015 to February 2016 and delivered their gallbladders to DORTA. A DORTA spokesperson quoted in the article said that only 4% of the Yak population is killed yearly for Gallvectra, which was less than the number, killed by Aurokans for traditional purposes.

February 2016: Aurok enacts a law to fund Yak research, with emphasis on captive breeding, and a five-year moratorium on hunting females of breeding age.

March 2016: After consultation with Aurokan parliamentarians, DORTA begins its own captive breeding program.

Spring 2016: Aurokan villagers begin to describe a significant decline in the size of Yak herds.

June 2016: YLSA publishes its first report expressing grave concern regarding the effects of Yak hunting.

10 September 2016: 8,000 Aurokan villagers demonstrate in Transcentral.

16 November 2016: Rakkab releases YakTrakker.

March 2017: The WHO adds Gallvectra to the list of essential medicines.

1 July 2017: Aurok's Yak Protection Act enters into force, prohibiting the export of Yak protects, enhancing Yak hunting licensing requirements and imposing sanctions on Rakkabi individuals and companies involved in the Yak trade.

29 September 2017: The Yak is included in Appendix III of the CITES at the request of Aurok.

5 October 2017: Aurok's Prime Minister presents a demarche to Rakkab's Prime Minister, demanding that the DORTA's Yak hunting cease and that Aurok and its people be paid "their rightful share" of Gallvectra profits.

October 2017: The Yak is included in Appendix I of the CMS. Rakkab begins a rule-making process in response, including an environmental impact assessment.

November 2017: Aurokan and Pivzao leaders file a civil suit against DORTA and the Rakkabi Ministry of Agriculture in Rakkabi court. The Supreme Court of Rakkab ultimately affirmed the dismissal of the suit on the merits.

15 November 2017: Rakkab promulgates Regulation AG/2017-0300, limiting the hunting of the Yak.

20 November 2017: DORTA applies for a Yak hunting license in Rakkab.

20 December 2017: DORTA is granted a Yak hunting license by Rakkab.

2 January 2018: DORTA begins offering payment for Yak gallbladders to its registered agents only.

Spring 2018: The Parties agree to negotiate the *Compromis* to submit their dispute to the Court.

7 APPENDIX C: INDEX OF PROPER NAMES

Aurok -- A small, landlocked, least-developed country in the Gaur Highlands and Applicant in the present case.

Aurok Truth – the only daily newspaper of Aurok.

Bos mumuensis – Linnaean name for the Kayleff Yak

Carla Alexander - CEO of DORTA (and Rakkabi Minister of Intellectual Property from 1981 to 1989).

Cressida Cauty – World-renowned expert on rural Aurok and its cultural practices.

Derlap Frangie – Prime Minister of Rakkab.

DORTA M/S -- A Rakkabi pharmaceutical company, privatized from the former Department of Research, Technology & Application in 1996.

Dvorah Zhivago – Minister of Foreign Affairs of Rakkab

Gallvectra – Pharmaceutical developed by DORTA containing the Lustuk Enzyme, indicated for insulin-resistance related diseases.

Gaur Highlands – Geographical region comprising all of Aurok and most of Rakkab.

Handog – Ambassador of Aurok to the Netherlands

Isaac Bello – Rakkabi medical doctor employed by DORTA and first isolator of the Lustuk Enzyme.

Jelles Kelf – Ambassador of Rakkab to the Netherlands

Jeramia – Colonial power of both Aurok and Rakkab from 1730 to 1961.

Kayleff – The Yak god of the Pivzao religion.

Lustuk Enzyme – Enzyme present only in the gallbladder of the Kayleff Yak and active ingredient in Gallvectra.

Pivzao Civilization – Ancient civilization in the Gaur Highlands and ancestors to current members of the Pivzao culture.

Rakkab - An emerging economy in Gaur Highlands and neighbouring plains and Respondent in the present case.

Redtaili – Minister of Foreign Affairs of Aurok

Regulation AG/2017-0300 -- Rakkabi regulation promulgated after the addition of the Yak to CMS Appendix I to restrict Yak hunting.

Sumun – Prime Minister of Aurok.

Tirhinga Nos Lustuk – Soup of the nasty bits of the Yak with great cultural and religious significance to the Pivzao people.

Tom Wynet – Aurokan Minister of Intellectual Property

Wim Curriz – Professor and noted expert on the prehistory of the Gaur Highlands

Yak Protection Act – 2017 Aurokan statute prohibiting Yak exports, imposing sanctions on Rakkab and prohibiting all but traditional Yak hunting

YakTrakker – App published by the Rakkabi Ministry of Agriculture in November 2016 that displays real-time location information of Yak herds.

YLSA – Yak Life Sciences Academy, an NGO focused on yak science and preservation.

Zheng He – 15th c. Chinese explorer whose scribe provides the earliest outside account of the Yak.