

THE 2019 PHILIP C. JESSUP  
INTERNATIONAL MOOT COURT COMPETITION

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

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*Case Concerning the Kayleff Yak*

**THE STATE OF AUROK**

**APPLICANT**

**V.**

**THE REPUBLIC OF RAKKAB**

**RESPONDENT**

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**MEMORIAL FOR THE RESPONDENT**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... ii

INDEX OF AUTHORITIES..... vi

STATEMENT OF JURISDICTION..... xviii

QUESTIONS PRESENTED..... xix

STATEMENT OF FACTS ..... xx

SUMMARY OF PLEADINGS..... xxiv

PLEADINGS ..... 1

I. Rakkab is not responsible for DORTA’s actions because they are not attributable to Rakkab and Rakkab fulfilled its obligation to prevent DORTA from committing any wrongful acts. 1

A. DORTA’s actions are not attributable to the Republic of Rakkab. .... 1

1. DORTA M/S is a private company, and hence not an organ of the Rakkabi government. .... 2

a. There is no substantial and effective connection between DORTA and Rakkab. ... 3

b. Rakkab has a limited influence over DORTA. .... 3

2. DORTA is not exercising elements of governmental authority..... 4

3. Rakkab did not instruct, direct, control or aid and assist DORTA. .... 5

B. Rakkab fulfilled its obligation to prevent DORTA from committing any wrongful acts by exercising Due Diligence..... 6

1. Rakkab has an obligation to exercise due diligence. ....	6
2. Rakkab complied with its obligation to exercise due diligence.....	6
a. There is no transboundary harm due to Yak harvest in Rakkab. ....	7
b. Rakkab conducted a comprehensive Environmental Impact Assessment (‘EIA’). 7	
C. Rakkab did not breach international law. ....	8
D. In the alternative, any wrongfulness is precluded by the defence of Necessity. ....	9
II. The harvesting of the Yak does not violate Rakkab’s international obligations relating to the protection of endangered species and the environment, therefore Rakkab is not obligated to end Yak harvesting on its territory.....	10
A. Rakkab has complied with its treaty obligations. ....	11
1. Rakkab has acted in accordance with the Convention on Biological Diversity (‘CBD’). ....	11
a. Rakkab has complied with Article 3 of the CBD. ....	11
b. Rakkab has complied with Article 14 of the CBD. ....	11
2. Rakkab has acted in accordance with the Convention on International Trade in Endangered Species (‘CITES’). ....	12
3. Rakkab did not violate its obligations under Convention on Migratory Species (‘CMS’). ....	13
a. Rakkab has complied with Article II of the CMS.....	13
b. Rakkab’s actions are justified under the Article III exceptions. ....	13
B. Rakkab has not abused its right to use its natural resources. ....	14

III. Harvesting of The Yak in Rakkab does not violate the cultural and religious rights of Aurokan people.....	15
A. Rakkab is fulfilling its obligation towards the realization of highest attainable standard of health. ....	15
1. Rakkab is obligated to take measures towards the full realization of right to health under Art 12 of the ICESCR.....	15
2. Provision of Essential Medicines is a core obligation on States in ensuring access to right to health. ....	16
3. Rakkab is acting towards promotion of the right to health of children. ....	17
4. Right to life forms a prerequisite for enjoyment of all other human rights. ....	18
B. Yak Harvesting in Rakkab’s Territory does not violate the religious and cultural rights of the Aurokan People. ....	19
1. There is no substantial interference with the rights of Aurokans. ....	19
2. Rakkab is exercising its right to scientific progress under Art 15(1)(b) of the ICESCR.....	20
IV. Rakkab by manufacturing Gallvectra has not appropriated Aurok’s Traditional Knowledge. Hence, it is under no obligation to compensate the Aurokan people. ....	21
A. Rakkab has complied with international law.....	21
1. Rakkab has not violated any international obligation as the nascent international norm of Free, Prior and Informed Consent is of non-binding nature. ....	21
2. Rakkab nonetheless has involved relevant stakeholders of Aurok by way of the Comprehensive Environment Impact Assessment.....	22

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B. DORTA by securing patent rights over Gallvectra has not committed any acts of misappropriation of Aurokan Traditional Knowledge.....	23
1. The granting of patent for Gallvectra fulfils the essential requirements namely; novelty, inventive step and industrial application.....	23
a. The claim of Aurokan people over Gallvectra by way of their TK fails as it does not qualify as a prior art.....	23
b. The processes associated with the manufacture of Gallvectra are not obvious to a person skilled in the art.....	25
c. Dr. Bello has a legally tenable right to protection as the inventor of Gallvectra under International law.....	27
2. Gallvectra’s sale is not a threat to Aurokan tradition as it has no negative impact on the indigenous population.....	28
C. Consequently, Rakkab has no duty to make reparation.....	28
PRAYER FOR RELIEF .....	30

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**STATEMENT OF JURISDICTION**

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The State of Aurok (“Aurok”) and the Republic of Rakkab (“Rakkab”) have submitted by Special Agreement this present dispute concerning the differences between the parties concerning the Kayleff Yak and other matters to the International Court of Justice (“I.C.J.”), and have transmitted a copy thereof to the Registrar of the Court in accordance with Article 40(1) of the Statute of the I.C.J. (“Statute”). Therefore, both parties have accepted the jurisdiction of the Court pursuant to Article 36(1) of the Statute.

Rakkab undertakes to accept the judgment of the Court as final and binding and shall execute it in utmost good faith.

**QUESTIONS PRESENTED**

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**-I-**

Whether Rakkab is responsible for the internationally wrongful acts as 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;

**-II-**

Whether the harvesting of the Yak in Rakkab violates Rakkab's international obligations relating to the protection of endangered species and the environment and whether Rakkab is obligated to end Yak harvesting on its territory;

**-III-**

Whether the harvesting of the Yak in Rakkab violates the cultural and religious rights of the Aurokan people and whether Rakkab must prohibit such hunting forthwith; and

**-IV-**

Whether Rakkab must pay Aurok a portion of the profits realized from the sales of the drug Gallvectra and whether Rakkab appropriated Aurok's traditional knowledge in manufacturing Gallvectra.

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**STATEMENT OF FACTS**

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**THE GAUR HIGHLANDS**

Gaur Highlands have been the exclusive habitat of the Kayleff Yak [**“the Yak”**] for than 250,000 years. The Yak is a migratory species that travels thousands of kilometers seasonally in large herds. Over spring and summer in the Northern hemisphere, young Yak are born and the herd stays in the northern grazing lands of present-day State of Aurok [**“Aurok”**]. Mating season begins after the Yak migrate south to their autumn and winter range, that is, present-day Republic of Rakkab [**“Rakkab”**].

**STATE OF AUROK**

Aurok is a small, landlocked, least developed country with a population of around 1.2 million, composed almost entirely of the descendants of the Pivzao civilization. Nearly all Aurokans as well as Rakkabi adherents to Pivzao traditions, self-identify as indigenous. Their territory comprises the northern 70 percent of the Gaur Highlands.

**REPUBLIC OF RAKKAB**

Rakkab lies to the south of Aurok and encompasses 30 percent of the Gaur Highlands. Rakkab is a developed country with a population of 4.5 million out of which there are fewer than 200 adherents to the Pivzao traditions.

**PRIVATISATION OF THE DEPARTMENT OF RESEARCH, TECHNOLOGY & APPLICATION**

A major component of Rakkab’s economic success has been its investment in the area of research and development. The Department of Research, Technology & Application was privatized in 1996, thereby creating a newly private company, DORTA M/S [**“DORTA”**]. Presently, Rakkab holds approximately 12% of DORTA’s stocks.

DORTA is now the world’s 8<sup>th</sup> largest manufacturer of pharmaceuticals and has subsidiaries in over 50 countries (with no subsidiary in Aurok). The government of Rakkab subsidizes DORTA’s research and development activities both inside and outside of Rakkab.

**DORTA's PRIVATE CHARTER**

According to DORTA's private charter the government of Rakkab must always own no less than 9.9 percent and no more than 19.9 percent of the shares of DORTA. Rakkab presently holds approximately 12% of DORTA's stock. DORTA has a 15-member Board of Directors and its charter prohibits the employment or appointment to the Board of current Rakkabi government officials.

**GALLVECTRA: THE PRODUCT OF DR. BELLO'S LABOUR**

Dr. Isaac Bello is a Rakkabi citizen who works in a DORTA-operated private hospital. Through his investigation, fieldwork and laboratory studies he discovered a never-before identified enzyme called the "Lustuk Enzyme" in the gallbladder of the Yak. He published these findings in the British peer reviewed medical journal, *The Lancet* in 2002.

In 2003, Dr. Bello and his team successfully isolated the enzyme and used it to produce an experimental medication. After two years of clinical trials they determined that the drug was highly effective in the treatment of diabetes and related disorders and named it Gallvectra.

**PATENT OF GALLVECTRA**

On 11 November 2004, a patent application was filed by DORTA for Gallvectra. Thereby, DORTA proceeded to pursue intellectual property protection for Gallvectra as a human pharmaceutical in other countries. As of 2018, it has been approved for use and sale in more than 85 countries. By October 2014, worldwide sales of the drug topped €2 billion

**SUSTAINABLE YAK HARVESTING IN RAKKAB**

To meet supply requirements of DORTA, nearly 30,000 Yak were killed per year within the territory of Rakkab. Hundreds of private Rakkabi citizens applied for the grant of Yak hunting licenses. With raising concerns over Yaks sustainability, Rakkabi Prime Minister promised to monitor the issue and to cooperate with Aurok. In furtherance of this, the Rakkabi Ministry of Agriculture released YakTrakker, an application to provide real-time tracking of Yak herds in Rakkab to allow scientists and conservationists to make accurate estimates of the health and vitality of the Yak population.

### **WHO MODEL LIST OF ESSENTIAL MEDICINES**

Gallvectra's fundamental importance and enormous value was recognized by international community at the 20<sup>th</sup> Expert Committee on the Selection and Use of Essential Medicines in March 2017 when it was added to the WHO Model List of Essential Medicines. Gallvectra recorded worldwide sales of 3.2 billion euros from 2014 to 2017.

### **THE YAK PROTECTION ACT**

The Aurokan Parliament adopted the Yak Protection Act on 1 July 2007. It prohibited the export of Yak products, subjected hunting of the Yak to strict licensing requirements, and imposed travel and financial sanctions on Rakkab and Rakkabi companies and individuals present or doing business in Aurok. It further provided that a specified number of Yak could only be taken and that too by traditional means only.

### **INCLUSION OF YAK IN CITES AND CMS**

At the request of the Aurokan Ministry of Foreign Affairs, the Kayleff Yak was included in Appendix III of the Convention on International Trade in Endangered Species of Wild Flora and Fauna, effective from 29 September 2017, without any reservation or objection from Rakkab. Later, in October 2017, the Yak was included in Appendix I of the Convention on Migratory Species on the recommendation of the CMS Scientific Council.

### **ENVIRONMENTAL IMPACT ASSESSMENT**

Beginning in October 2017, Rakkab conducted a comprehensive environmental impact assessment [**"EIA"**], focused on the impact of continued hunting of the Yak. The assessment involved consultation with DORTA scientists, YLSA representatives, Rakkabi Pivzao adherants, government officials from Aurok, licensed Yak hunters and members of the general public. The assessment concluded that Regulation AG/2017-0300 would be adequate to protect the sustainability of the Yak population.

**RAKKAB'S PROMULGATION OF NEW REGULATION FOR HUNTING LICENSES**

The Rakkabi Ministry of Agriculture, in response to the CMS decision, and according to the applicable law promulgated a Regulation which terminated the licenses issued prior to the date of this Regulation and prohibited the killing of Yak in the territory of Rakkab by an individual not in possession of a valid license issued by the Ministry. In addition to this, additional limits and requirements were imposed on the number of Yak a license holder could take.

**ENACTMENT OF DOMESTIC LAW PURSUANT TO INTERNATIONAL OBLIGATIONS**

The Ministry also provided in the Regulation that a license shall be issued for any taking of Yak it considers consistent with Section 5 of Article III of the CMS and may impose limits on the number of Yak that any license holder may take. It also provided that it may require that license applicants demonstrate their familiarity with relevant safety and environmental rules, monitor compliance with the requirements of this Regulation and impose fines on violators accordingly.

**PERMISSION TO DORTA TO HARVEST YAK**

DORTA applied for a new license to the Rakkabi Ministry of Agriculture which was granted on 20 December 2017. It permitted DORTA, its employees and agents, to harvest 30,000 Yak annually, for a period of three years. The license was subject to review based on the impact upon the Yak population and its continuing scientific and medical benefits.

**SPECIAL AGREEMENT BETWEEN AUROK AND RAKKAB**

In November 2017, a civil suit by the Rakkabi Pivzao community leaders and Aurokans was dismissed on the ground that it lacked *locus standi*. The Executive Director of the United Nations Environment Programme in spring 2018, urged the parties to submit their disputes for resolution by the International Court of Justice. A Special Agreement has been negotiated and submitted to the Registry by them for the resolution of disputes between them concerning the Kayleff Yak.

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**SUMMARY OF PLEADINGS**

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**FIRST PLEADING**

DORTA M/S is a private company incorporated in Rakkab with 50 subsidiaries worldwide and is the world's largest manufacturer of pharmaceuticals. DORTA, in its purely commercial pursuit is manufacturing and selling the drug Gallvectra, whose inventor Dr. Isaac Bello works in a private DORTA-operated hospital. DORTA's acts cannot be attributed to Rakkab since government holds a minority shareholding of 12 percent in DORTA and its private charter prohibits a Rakkabi official to be a member of the Board.

Further, Rakkab is complying with all its international obligations flowing from international treaties and conventions and enacting laws pursuant to these to ensure that Yak harvesting in Rakkab is within permissible limits and not contravening the cultural and social rights of Aurokans.

Also discharging an obligation of facilitating right to health worldwide and addressing the grappling insulin-related diseases along with the fundamental importance of Gallvectra being recognized by the WHO, Rakkab is fulfilling its obligation to ensure that the harvest of Yak in Rakkab is sustainable and compliant with its international obligations.

**SECOND PLEADING**

Rakkab is not obligated to end Yak harvesting on its territory as Rakkab did not violate its obligations under Convention on International Trade in Endangered Species of Wild Flora and Fauna. By ensuring that there is no export of Yak at unsustainable levels, Rakkab is respecting its international obligations.

By actively coming up with the Regulation AG/2017-0300 that controlled hunting of the Yak, Rakkab is acting in furtherance of its obligations under Convention on Migratory Species. In furtherance of exercising Due Diligence, Rakkab has conducted a successful Environmental Impact Assessment. The consultation for the same involved all relevant stakeholders from Aurok, thereby fulfilling its international obligations.

### **THIRD PLEADING**

Harvesting of the Yak in Rakkab does not violate Aurok's cultural or religious rights as there is no substantial interference in the enjoyment of the same. Culling of the Yak in Rakkab's territory, to manufacture Gallvectra, is an exercise of its right to scientific progress by creating a life-saving drug that is highly effective in treating insulin related diseases in more than 85 countries.

Further, Rakkab is fulfilling its international obligation of guaranteeing the highest attainable standard of health to the international community at large. With addition of Gallvectra to the WHO Model List of Essential Medicines, Rakkab is meeting its core obligation to ensure availability of essential drugs.

### **FOURTH PLEADING**

Rakkab has not breached any international obligation as the nascent International norm of Free, Prior and Informed Consent is non-binding in nature. By involving relevant stakeholders of Aurok in good faith, Rakkab by way of the Comprehensive Environment Impact Assessment has fulfilled its duties under the Convention on Biological Resources.

Further, DORTA by securing patent rights over Gallvectra has not committed any acts of misappropriation as the patent for Gallvectra fulfils the essential requirements namely; novelty, inventive step and industrial application. This gives Dr. Bello a legally tenable right to protection as the inventor of Gallvectra under International law.

Gallvectra's sale is not threat to Aurokan tradition as the hunting of Yaks is limited to Rakkab's territory which is in exercise of its sovereign rights under The Convention on Biological Resources. Being a party to the International Covenant on Economic, Social and Cultural Rights, Rakkab is acting in furtherance of Right to health. Consequently, Rakkab is under no obligation to give reparation to Aurok.



**PLEADINGS**

**I. RAKKAB IS NOT RESPONSIBLE FOR DORTA'S ACTIONS BECAUSE THEY ARE NOT ATTRIBUTABLE TO RAKKAB AND RAKKAB FULFILLED ITS OBLIGATION TO PREVENT DORTA FROM COMMITTING ANY WRONGFUL ACTS.**

Rakkab is not responsible for the commission of an internationally wrongful act,<sup>1</sup> as the conduct in question is not attributable to the State under international law [A], nor has Rakkab failed in fulfilling its obligation to prevent the commission of any wrongful act [B]. Further, the conduct does not constitute a breach of an international legal obligation in force for the State, at the time<sup>2</sup> [C] without being precluded by a circumstance of wrongfulness<sup>3</sup> [D].

**A. DORTA'S ACTIONS ARE NOT ATTRIBUTABLE TO THE REPUBLIC OF RAKKAB.**

Conduct is attributable to a state if it is carried out either by an official state organ,<sup>4</sup> by some other entity that exercises elements of governmental authority,<sup>5</sup> or by entities within the state's direction or control.<sup>6</sup> DORTA's conduct does not fall within any of these categories, and cannot be attributed to Rakkab as a matter of international law.

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<sup>1</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, Fifty-Third Session, U.N. G.A.O.R., 56<sup>th</sup> Sess., Supp. No. 10, art. 2, at 34, U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA Commentary]; Phosphates in Morocco (Italy v. Fr.), 1938 P.C.I.J. (ser. A/B) No. 74, at 10.

<sup>2</sup> ARSIWA Commentary, art. 2, ¶1.

<sup>3</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, Fifty-Third Session, U.N. G.A.O.R., 56<sup>th</sup> Sess., Supp. No. 10, chap. V, U.N. Doc. A/56/10 (2001). [hereinafter ARSIWA]

<sup>4</sup> ARSIWA, art. 4.

<sup>5</sup> ARSIWA, art. 5.

<sup>6</sup> ARSIWA, art. 8.

**1. DORTA M/S is a private company, and hence not an organ of the Rakkabi government.**

It is a cardinal principle of the law of state responsibility that States are not responsible for acts done by private or non-state actors.<sup>7</sup> To hold otherwise would collapse the distinction between the public and private spheres requiring states to strictly police the behavior of their citizens (individuals or entities), in order to prevent the international responsibility of the state from being engaged.<sup>8</sup>

State organ is “any person or entity which has that status in accordance with the internal law of the state.”<sup>9</sup> No rule of international law governs what is to be considered a state organ; the question is essentially one of fact.<sup>10</sup> It is crucial to identify precisely the actor’s “association with the state.”<sup>11</sup> While corporations may be considered ‘organs of society’, they are specialized economic organs, not democratic public interest institutions.<sup>12</sup>

DORTA M/S incorporated in Rakkab on 6<sup>th</sup> April 2015<sup>13</sup> is a private entity<sup>14</sup> and world’s eighth-largest manufacturer of pharmaceuticals with subsidiaries in over 50 countries<sup>15</sup> and therefore, exists as a separate legal entity (doctrine of corporate separation<sup>16</sup>) distinct from Rakkab.

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<sup>7</sup> CEDRIC RYNGAERT ET AL., NON-STATE ACTORS IN INTERNATIONAL LAW, State Responsibility and Non-State Actors 163 (Hart Publishing 2015).

<sup>8</sup> JAMES CRAWFORD ET AL., THE LAW OF INTERNATIONAL RESPONSIBILITY 261 (Oxford University Press 2010).

<sup>9</sup> ARSIWA, art. 4(2).

<sup>10</sup> IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 136 (Oxford University Press 1983).

<sup>11</sup> Yeager v. Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 92, 101-102 (1987).

<sup>12</sup> Suerie Moon, *Respecting the Right to Access to Medicines: Implications of the U.N. Guiding Principles on Business and Human Rights for the Pharmaceutical Industry*, 15 Health and Human Rights 35 (June 2013).

<sup>13</sup> *Compromis*, ¶10.

<sup>14</sup> Emilio Augustin Maffezini v. Kingdom of Spain, Award on the Merits, I.C.S.I.D. Case No. ARB./97/7, (Nov. 13, 2000).

<sup>15</sup> *Compromis*, ¶11.

<sup>16</sup> Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain), Judgement, 1964 I.C.J. Rep. 6, ¶56-58 [hereinafter *Barcelona Traction*]; Peter Muchlinski, Max Planck Encyclopaedia of Public International Law, Corporations in International Law, ¶49 (Oxford University Press 2015).

**a. There is no substantial and effective connection between DORTA and Rakkab.**

There is very little evidence in support of the view that Aurok may present a claim against Rakkab on the sole basis of DORTA's incorporation under its law.<sup>17</sup> In general, the evidence supports a doctrine that some "substantial and effective" connection between the legal entity and the state is required.<sup>18</sup>

In the present case, a sufficiently strong link<sup>19</sup> cannot be established between Rakkab and DORTA, since Rakkab holds only 12% shares of DORTA<sup>20</sup>, which does not constitute a majority or a substantial proportion<sup>21</sup> of the shares required to establish a genuine connection between them.

Separated from the company by numerous barriers, the shareholder cannot be identified with it<sup>22</sup>, since the concept and structure of the company are founded on and determined by a firm distinction between the separate entity<sup>23</sup> of the company and that of the shareholder, each with a distinct set of rights.<sup>24</sup>

**b. Rakkab has a limited influence over DORTA.**

It is well-established that the company alone, through its directors or management<sup>25</sup> acting in its name, independently and autonomously<sup>26</sup> can take action in respect of matters that are of a corporate character.<sup>27</sup>

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<sup>17</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 139 (Oxford University Press 2003).

<sup>18</sup> *Id.* at 464.

<sup>19</sup> Ryngaert, *supra* note 7, at 163.

<sup>20</sup> *Compromis*, ¶10.

<sup>21</sup> *Barcelona Traction*, ¶70.

<sup>22</sup> *Barcelona Traction*, ¶45.

<sup>23</sup> J. G. Ruggie, State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' Core Human Rights Treaties 22 (Feb. 2007).

<sup>24</sup> *Barcelona Traction*, ¶41.

<sup>25</sup> T. CLARKE, INTERNATIONAL CORPORATE GOVERNANCE, A COMPARATIVE APPROACH 4-6 (Routledge 2007).

<sup>26</sup> Organization for Economic Co-operation and Development, O.E.C.D. Guidelines on Corporate Governance of State-owned Enterprises 24-25 (2005).

<sup>27</sup> *Barcelona Traction*, ¶42.

With 12% common voting shares,<sup>28</sup> Rakkab is not a controlling owner<sup>29</sup> and therefore is not in a position to nominate and elect the board or influence the decision making without the consent of other shareholders.<sup>30</sup> Also, the prohibition of the employment or appointment to the Board of current Rakkabi officials<sup>31</sup> does not *prima facie*, render its acts attributable to the State.

## **2. DORTA is not exercising elements of governmental authority.**

The conduct of DORTA can be attributed to Rakkab only where it was shown that DORTA was exercising governmental authority<sup>32</sup> in carrying out the conduct.<sup>33</sup> In order to determine whether an act is governmental, the assessment should be made from an objective point of view as to whether the act is normally regarded as governmental in a contemporary setting.<sup>34</sup>

In the present case, the requirements are not met, since DORTA is engaged in commercial activities such as manufacture of pharmaceutical medicines.<sup>35</sup> Therefore, DORTA cannot be said to be a *de facto* organ of Rakkab because it does not exercise public authority<sup>36</sup> and is not acting on behalf of the Government.<sup>37</sup>

Assuming *arguendo* that DORTA is an entity empowered to exercise elements of governmental authority, its conduct did not relate to that authority. Even though pharmaceutical research and development is a public function<sup>38</sup>, the manufacture and sale of the medicine is not.

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<sup>28</sup> *Clarifications*, ¶4.

<sup>29</sup> Ruggie, *supra* note 7, at 22.

<sup>30</sup> OECD, *supra* note 26, at 25.

<sup>31</sup> *Compromis*, ¶11.

<sup>32</sup> ARSIWA Commentary, art. 4(3), ¶2.

<sup>33</sup> A.M.T.O. L.L.C. v. Ukraine, Decision, Arbitration No. 080/2005, ¶ 101-02 (Mar. 26, 2008).

<sup>34</sup> Michael Feit, Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity, 28 Berkeley J. Int'l Law 148 (2010).

<sup>35</sup> *Compromis*, ¶10.

<sup>36</sup> ARSIWA Commentary, art.4, ¶12.

<sup>37</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 391 (Feb. 27). [hereinafter *Genocide Judgement*]

<sup>38</sup> Suerie Moon, *supra* note 12.

### **3. Rakkab did not instruct, direct, control or aid and assist DORTA.**

Even if DORTA, having a separate legal status<sup>39</sup> is assumed to be empowered to exercise elements of governmental authority, the existence of these general powers and the mere recognition of a link<sup>40</sup> are not sufficient to attribute DORTA's conduct to Rakkab. To impart responsibility, Rakkab must have either expressly directed the acts or possessed effective control<sup>41</sup> over DORTA's acts. Customary law of state responsibility<sup>42</sup> makes states responsible under Article 8 for the specific conduct that it instructed, directed or controlled.

In the instant case, no State officials or agents are involved<sup>43</sup>, for which reason this conduct cannot be attributed to Rakkab. Dr. Isaac Bello, the inventor of Gallvectra works in a DORTA-operated *private* hospital.<sup>44</sup> Hence, DORTA, acting on its own account<sup>45</sup> has some qualified but real, margin of independence and autonomy.<sup>46</sup>

Even though the government subsidised DORTA's research and development activities, the target of government was the maximisation of social interests, that is, their utility to the public for the general regulation of the affairs of the community.<sup>47</sup> Although DORTA's work furthers the public interest, Rakkab was neither legally nor practically responsible for the actions of DORTA in manufacturing or selling Gallvectra.<sup>48</sup>

Moreover, in *Nicaragua*, where the United States' planning, directing, and supporting of the Contras were held inadequate to meet the high threshold for effective control.<sup>49</sup> Similarly,

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<sup>39</sup> Bayindir Insaat Turizm Ticaret V.E. Sanay A.S. v. Islamic Republic of Pakistan, Award, I.C.S.I.D. Case No. ARB./03/29, ¶117-30 (Aug. 26, 2009)

<sup>40</sup> ARSIWA Commentary, chap. II, ¶ 4.

<sup>41</sup> Military and Paramilitary Activities in and against Nicaragua (Nic. v. U.S.), 1986 I.C.J. 14., at 51.

<sup>42</sup> James Crawford, Max Planck Encyclopaedia of Public International Law, State Responsibility, ¶18 (Oxford University Press 2016).

<sup>43</sup> ELIZA MORGERA, CORPORATE ACCOUNTABILITY IN INTERNATIONAL ENVIRONMENTAL LAW, 36 (Oxford University Press 2009).

<sup>44</sup> *Compromis*, ¶13.

<sup>45</sup> JAMES CRAWFORD ET AL., THE LAW OF INTERNATIONAL RESPONSIBILITY, 261 (Oxford University Press 2010).

<sup>46</sup> *Genocide Judgment*, ¶94.

<sup>47</sup> ARSIWA Commentary, art. 5, ¶7.

<sup>48</sup> *Compromis*, ¶42.

<sup>49</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986 I.C.J. Rep. 14, ¶109 & 115 (June 27).

Rakkab's mere monopolisation and subsidisation of DORTA's activities establishes no clear nexus for attribution of actions<sup>50</sup> and effective control over DORTA.<sup>51</sup>

**B. RAKKAB FULFILLED ITS OBLIGATION TO PREVENT DORTA FROM COMMITTING ANY WRONGFUL ACTS BY EXERCISING DUE DILIGENCE.**

**1. Rakkab has an obligation to exercise due diligence.**

The wrongful conduct of a State consists either of an action or of the failure to take a prescribed action<sup>52</sup> by virtue of its capacity to prevent wrongful non-state actor conduct,<sup>53</sup> thus justifying holding the state directly responsible for its failure to utilize this influence (due diligence failure<sup>54</sup>). It is necessary to prove a 'double due diligence standard', namely it has to be determined that the company failed to exercise due diligence in carrying out its activities and that the State omitted to exercise due diligence in overseeing the activities of the company.<sup>55</sup>

**2. Rakkab complied with its obligation to exercise due diligence.**

Due diligence requires taking appropriate steps to prevent, investigate, punish and redress abuse through effective policies, legislation, regulations and adjudication.<sup>56</sup> In the instant case, DORTA assured that it was researching for a synthetic alternative to the Lustuk Enzyme and complied with all applicable laws and regulations<sup>57</sup> enacted pursuant to Rakkab's international obligations.

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<sup>50</sup> U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. No. A/CONF.48/14/Rev.1, principle 17 (June 16, 1972); ARSIWA, art.5, ¶(5) & (7).

<sup>51</sup> ARSIWA, art. 8.

<sup>52</sup> ARSIWA Commentary, art. 2, at 38.

<sup>53</sup> ARSIWA Commentary, art. 2, at 31.

<sup>54</sup> Ryngaert, *supra* note 7.

<sup>55</sup> T. Scovazzi, *State Responsibility for Environmental Harm* (2001) 12 Yearbook of International Environmental Law 43, 56.

<sup>56</sup> John Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, U.N. Doc. A/H.R.C./17/31, principle 1 (2011).

<sup>57</sup> *Compromis*, ¶33.

**a. There is no transboundary harm due to Yak harvest in Rakkab.**

According to customary international law<sup>58</sup>, States by virtue of the ‘no-harm’ rule, have a responsibility to ensure that activities within their jurisdiction or control do not cause damage to other States beyond<sup>59</sup> the limits of national jurisdiction.<sup>60</sup> A state does not breach its obligations merely by causing damage; a potentially affected State has to show a lack of diligent efforts on the part of the origin state.<sup>61</sup>

Rakkab, as ‘a guarantor of private conduct’<sup>62</sup> took necessary measures to prevent the effects<sup>63</sup> of the same. Rakkabi Prime Minister promised to monitor the issue and to cooperate with Aurok.<sup>64</sup> In furtherance of this, it launched YakTrakker to allow scientists and conservationists to make accurate estimates of the health and vitality of the Yak population.<sup>65</sup> Rakkab’s Yak harvest, therefore, does not cause ‘reasonably foreseeable’ and ‘significant damage’ to the Aurokans’ way of life.

**b. Rakkab conducted a comprehensive Environmental Impact Assessment (‘EIA’).**

In order for states to meet their due diligence obligations, they have to establish various domestic and transboundary procedures to prevent significant transboundary damage which

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<sup>58</sup> Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Merits, 2015 I.C.J. 665, ¶104 (Dec. 16).

<sup>59</sup> Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, in Report of the International Law Commission, Fifty-Third Session, U.N. G.A.O.R., 53<sup>rd</sup> Sess., Supp. No. 10, art. 3, at 154, U.N. Doc. A/56/10 (2001).

<sup>60</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 27 (July 8) [hereinafter *Nuclear Weapons Case*]; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Rep. 14, ¶193 (April 20) [hereinafter *Pulp Mills Judgement*]; Trail Smelter Arbitration (United States v. Canada), 3 R.I.A.A. 1905; Corfu Channel case, Judgment, 1949 I.C.J. Rep. 4 (April 9).

<sup>61</sup> Timo Koivurova, *The Max Planck Encyclopaedia of Public International Law, Due Diligence* 237 (Oxford University Press 2009).

<sup>62</sup> P. BIRNIE AND A. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 182 (Oxford University Press 2002).

<sup>63</sup> Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶56 (May 24); Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. Rep. 7, ¶78 (Sep. 25) [hereinafter *Gabčíkovo-Nagymaros Case*].

<sup>64</sup> *Compromis*, ¶31.

<sup>65</sup> *Compromis*, ¶34.

includes conducting EIA. It is a distinct and freestanding obligation in international law<sup>66</sup> which plays a pivotal role in relation to notification.<sup>67</sup>

After determining its specific contents,<sup>68</sup> States are obligated to conduct a comprehensive EIA<sup>69</sup> wherein government agencies, members of the public, experts in relevant disciplines and interested groups should be allowed appropriate opportunity to comment.<sup>70</sup> Rakkab in order to ensure Yaks' sustainability conducted a comprehensive EIA, involving consultations with DORTA scientists, YLSA representatives, Rakkabi Pivzao adherents, Aurokan government officials, licensed Yak hunters, and general public.<sup>71</sup> This concluded the Yak hunt to be sustainable in accordance with Ministry's Regulation AG/2017-300.

### **C. RAKKAB DID NOT BREACH INTERNATIONAL LAW.**

The characterization of an act as internationally wrongful is made on the basis of its inconformity with what is required of it by that international obligation<sup>72</sup> in international law. There is no *a priori* limit on the content or scope<sup>73</sup> of an international juridical standard.<sup>74</sup> The emphasis is on causal connection and the 'conduct appropriate' to the given situation.<sup>75</sup>

A breach involves an act contrary to the treaty rights<sup>76</sup> of another State with the intention or knowledge<sup>77</sup> of relevant State organs or agents causing "damage" to another State<sup>78</sup> or

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<sup>66</sup> U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc No. A/CONF.151/26, principle 17 (June 14, 1992).

<sup>67</sup> Jutta Brunnee, *Procedure and Substance in International Environmental Law: Confused at a Higher Level?*, 5 E.S.I.L.J. 1-7 (2016).

<sup>68</sup> *Pulp Mills Judgement*, ¶205.

<sup>69</sup> UNEP Goals and Principles of Environmental Impact Assessment, Decision 14/25 of the U.N.E.P. Governing Council, Doc. No. U.N.E.P./G.C. 14/26, Annex. 1, principle 1 (June 17, 1987).

<sup>70</sup> *Id.* principle 7.

<sup>71</sup> *Clarifications*, ¶7.

<sup>72</sup> ARSIWA, art. 12.

<sup>73</sup> James Crawford, *supra* note 46.

<sup>74</sup> ARSIWA Commentary, art. 2, ¶2.

<sup>75</sup> Ian Brownlie, *supra* note 17, at 431.

<sup>76</sup> LORD MCNAIR, *THE LAW OF TREATIES* 547-550 (Oxford University Press 1961).

<sup>77</sup> ARSIWA Commentary, art. 2, at 34.

<sup>78</sup> *Id.* at 36.

inaction of authorities which failed to take appropriate steps<sup>79</sup> in circumstances where such steps were evidently called for.<sup>80</sup> After Yak's inclusion in Appendix I of CMS<sup>81</sup>, Rakkab promulgated stricter licensing requirements and terminated previous licenses.<sup>82</sup>

**D. IN THE ALTERNATIVE, ANY WRONGFULNESS IS PRECLUDED BY THE DEFENCE OF NECESSITY.**

As stated in *Gabčíkovo*, the principle of necessity is part of customary international law under the condition that it can be invoked only “on an exceptional basis.”<sup>83</sup> In order for a State to invoke necessity on a valid legal basis, certain conditions should be met. First, it should be the only way for the State to safeguard its essential interest against a grave and imminent peril which should not be “merely apprehended or contingent”.<sup>84</sup> Second, the act should not seriously impair an essential interest of another State towards which the obligation exists.<sup>85</sup> The first condition extends to particular interests of the State and its people, as well as of the international community as a whole. The peril has to be objectively established and proximately imminent.

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations.<sup>86</sup> Harvesting of the Yak in Rakkab allows the manufacture of a medicine vital and necessary for the promotion of the right to health worldwide.<sup>87</sup>

The provision of essential medicines has been identified as one of eight key components of primary health care.<sup>88</sup> It is in essence the right of countries to take measures to protect public

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<sup>79</sup> *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H. R. (ser. C) No. 4, ¶ 170 (July 29, 1988).

<sup>80</sup> *German Settlers in Poland*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 11, at 22.

<sup>81</sup> *Compromis*, ¶43.

<sup>82</sup> *Compromis*, ¶44.

<sup>83</sup> *Gabcikovo-Nagymaros Case*, ¶51.

<sup>84</sup> ARSIWA Commentary, art. 25, ¶¶15-17.

<sup>85</sup> ARSIWA Commentary, art. 25, ¶1 (b).

<sup>86</sup> ARSIWA Commentary, art. 1, ¶2.

<sup>87</sup> *Compromis*, ¶43.

<sup>88</sup> World Health Organization & U.N.I.C.E.F., Report of the International Conference on Primary Health Care, *Declaration of Alma-Ata* of Sep. 12 1978; Richard Laing et al., 25 years of the WHO Essential Medicines Lists: Progress and Challenges, *The Lancet*, 361 (May 17, 2003).

health, and in particular, to promote access to medicines for all.<sup>89</sup> Having witnessed a significant increase in the rates of obesity and diabetes,<sup>90</sup> DORTA scientists invented Gallvectra for the treatment of diabetes and related disorders<sup>91</sup> which has been approved for use and sale in more than 85 countries<sup>92</sup> and has from 2014 to 2017 had a worldwide sale of more than €3.2 billion,<sup>93</sup> in addition to being included in the WHO Model List of Essential Medicines ('EML').<sup>94</sup> This, therefore reflects the essential interest of the international community as a whole.

Secondly, Yak harvesting in Rakkab does not seriously impair an essential interest of Aurok. The interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests.<sup>95</sup> The foregoing medical interests of the international community are in no way outweighed by the interest of the traditional practitioners from Aurok. Overall, the wrongfulness Rakkab's action of harvesting Yak within its territory is precluded by necessity.

**II. THE HARVESTING OF THE YAK DOES NOT VIOLATE RAKKAB'S INTERNATIONAL OBLIGATIONS RELATING TO THE PROTECTION OF ENDANGERED SPECIES AND THE ENVIRONMENT, THEREFORE RAKKAB IS NOT OBLIGATED TO END YAK HARVESTING ON ITS TERRITORY.**

Rakkab is not obligated to end Yak harvesting on its territory as: Rakkab complied with its obligations under Convention on Biological Diversity ('CBD') 1992, Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES') 1973 and Convention on Migratory Species ('CMS') 1983[A]; Rakkab has not abused its rights[B]; Rakkab fulfilled its obligation to exercise Due Diligence[C].

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<sup>89</sup> World Trade Organization, Doha ministerial declaration on the TRIPS agreement and public health of 20 November 2001, W.T.O. Doc. W.T./MIN.(01)/DEC./2, ¶ 4 (2001)

<sup>90</sup> *Compromis*, ¶12.

<sup>91</sup> *Compromis*, ¶14.

<sup>92</sup> *Compromis*, ¶20.

<sup>93</sup> *Compromis*, ¶¶ 21 & 38.

<sup>94</sup> *Compromis*, ¶37.

<sup>95</sup> ARSIWA, art. 25.

**A. RAKKAB HAS COMPLIED WITH ITS TREATY OBLIGATIONS.**

**1. Rakkab has acted in accordance with the Convention on Biological Diversity ('CBD').**

**a. Rakkab has complied with Article 3 of the CBD.**

Article 3 of the CBD, provides that states have a sovereign right to exploit their resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states. Notwithstanding the resources available to Rakkab as a regional power and its acknowledgement of the “fragility of the situation,” diabetes is a global public health concern.

The GATT panel in the *Dolphin Tuna*, rejected the attempt by the US to force the extrajudicial application of its environmental standards on Mexico.<sup>96</sup> Although Aurok may disagree with Rakkab’s chosen course of action, its response was necessitated by the life-saving properties of the drug.

**b. Rakkab has complied with Article 14 of the CBD.**

Parties to the CBD are obliged to introduce EIA during the preliminary stages of activities to prevent or to minimize adverse effects on biodiversity in general and to facilitate public participation. Only after the EIA and based on its result should the decision on the realization of planned measures be taken.<sup>97</sup> Once the Yak was included in Appendix III of CITES, Rakkab in furtherance of its international obligation conducted a comprehensive EIA concluding the Yak harvesting to be sustainable.<sup>98</sup>

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<sup>96</sup> U.S.-Restrictions on the Imports of Tuna (Mexico v. U.S.),30 I.L.M. 1594 (1991); PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 193 (Cambridge University Press 2014).

<sup>97</sup> H. Schneider, Convention on Biological Diversity: Impact Assessment and Minimizing Adverse Impacts: Implementation of Article 14, U.N. Doc. No. U.N.E.P./C.B.D./C.O.P./4/20.

<sup>98</sup> *Clarifications*, ¶7.

**2. Rakkab has acted in accordance with the Convention on International Trade in Endangered Species ('CITES').**

Appendix III of CITES is intended to provide international assistance to individual Parties in regulating the control of trade, if any, of species *within their jurisdiction*.<sup>99</sup> There is no need for a *non-detriment finding*<sup>100</sup> to meet export requirements for specimens of species in Appendix III unlike those in Appendices I and II.

The only obligation on the State is to ensure that the species concerned are not exported at unsustainable levels.<sup>101</sup> Only 4% of total population of Yak was being harvested by DORTA,<sup>102</sup> further capped by the Rakkabi Ministry of Agriculture at a maximum of 30,000 Yaks annually<sup>103</sup> after being determined as sustainable. Moreover, DORTA was committed to researching for a synthetic alternative to the Lustuk Enzyme<sup>104</sup> as well from a time even before the obligation under CITES had arisen.

Rakkab is not obligated to prevent manufacture and export of Gallvectra by DORTA because it met all the procedural requirements under the CITES. The Ministry of Agriculture of Rakkab was the designated as the Management Authority under Article IX of the CITES<sup>105</sup> and it also issued certificates of origin<sup>106</sup> for the Lustuk Enzyme in all batches of Gallvectra exported from Rakkab, maintaining appropriate record<sup>107</sup> of the same.

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<sup>99</sup> WILLEM WIJNSTEKERS, THE EVOLUTION OF CITES: A REFERENCE TO THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FLORA AND FAUNA 161 (C.I.C. Wildlife 2018).

<sup>100</sup> Peter H. Sand, The Max Planck Encyclopaedia of Public International Law, Endangered Species' 423-429(Oxford University Press 2012).

<sup>101</sup> Convention on International Trade in Endangered Species of Wild Flora and Fauna, art. II, 993 U.N.T.S. 243 (entered into force Mar. 3, 1973). [hereinafter CITES]

<sup>102</sup> *Compromis*, ¶24.

<sup>103</sup> *Compromis*, ¶45.

<sup>104</sup> *Id.* ¶33.

<sup>105</sup> CITES, art. IX.

<sup>106</sup> *Id.* art. V(3).

<sup>107</sup> *Id.* art. VIII(6).

**3. Rakkab did not violate its obligations under Convention on Migratory Species ('CMS').**

**a. Rakkab has complied with Article II of the CMS.**

Article II CMS requires Rakkab to conserve migratory species, whenever possible. The use of terms like *shall endeavour*<sup>108</sup> and *where feasible and appropriate*<sup>109</sup> suggests that it lacks the binding force<sup>110</sup> to prohibit takings of endangered species<sup>111</sup> and the states are under an obligation to only reduce or control factors that are endangering the species.<sup>112</sup>

In the instant case Rakkab, in furtherance of its obligation under CMS, actively responded once *Kayleff Yak* was included<sup>113</sup> in the Appendix I of the CMS and enacted Regulation AG/2017-0300<sup>114</sup> to control the activity of hunting of the Yak within its territory whereby possession of valid license was made mandatory for hunting the Yak.

**b. Rakkab's actions are justified under the Article III exceptions.**

Article III lists certain exceptions to the prohibition of taking animals belonging to endangered migratory species. Rakkab has issued licenses under these exceptions: for scientific purposes to academic institutions<sup>115</sup>, to accommodate the needs of traditional subsistence users and under extraordinary circumstances<sup>116</sup> to DORTA. The text of Article III (5) permits the taking of migratory species if 'extraordinary circumstances so require.' It grants States a considerable degree of discretion in determining when it should be invoked.<sup>117</sup>

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<sup>108</sup> Convention on the Conservation of Migratory Species of Wild Animals, art. II(3)(b) & art. III(4), 1651 U.N.T.S. 333 (entered into force Nov. 1, 1983). [hereinafter CMS]

<sup>109</sup> *Id.* art III(4)(c).

<sup>110</sup> Alexander Proelss, *The Max Planck Encyclopedia of Public International Law, Migratory Species, International Protection*, 160 (Oxford University Press 2012).

<sup>111</sup> Richard Caddell, *International Law and the Protection of Migratory Wildlife An Appraisal of Twenty Five Years of the Bonn Convention* 16, *C.O.L.O. J. Intl. Evt. L. Poly.*, 113 (2015).

<sup>112</sup> Proelss, *supra* note 115.

<sup>113</sup> *Compromis*, ¶43.

<sup>114</sup> *Id.* ¶44.

<sup>115</sup> *Clarifications*, ¶9.

<sup>116</sup> CMS, art. III.

<sup>117</sup> Arie Trouwborst, *Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species*, 2 *Cornell Intl. L. Jour. Online*, 42 (2014).

The word “require” in the phrase “if extraordinary circumstances so require,” indicates a complete absence of reasonable alternatives, in the sense that the taking of Appendix I species is the only existing option available to respond to the extraordinary circumstances.<sup>118</sup> The exception cannot be invoked unless no other course of action that would be less harmful to the species concerned is available.<sup>119</sup>

Rakkab is one of the most scientifically developed countries equipped with the world’s best universities and scientific research facilities and two Nobel Laurates in Chemistry were Rakkabi citizens. Its scientists are researching for a synthetic alternative to the Lustuk Enzyme<sup>120</sup> as there exists no other alternative to it, presently.

The exceptions, however, must be “precise as to content,” “limited in space and time,” and “should not operate to the disadvantage of the species.”<sup>121</sup> The provision of imposing limits on the number of Yak that any license holder may take<sup>122</sup> within the territory of Rakkab satisfies the preconditions<sup>123</sup> for the exception to be applicable.

**B. RAKKAB HAS NOT ABUSED ITS RIGHT TO USE ITS NATURAL RESOURCES.**

Rakkab has not abused its right to use its natural resources.<sup>124</sup> The Yak harvesting was ‘genuinely in pursuit’ of its legitimate interest in providing lifesaving medicines to the world.<sup>125</sup> Rakkab demonstrated the ‘highest possible standards of care’ towards the Yak in the entire duration of Yak hunting and therefore did not exercise its rights in a way ‘calculated to cause any unfair prejudice’<sup>126</sup> to population of Yak.

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<sup>118</sup> *Id.* at 44.

<sup>119</sup> *Id.* at 44.

<sup>120</sup> *Compromis*, ¶33.

<sup>121</sup> CMS, art. III (5) & art. III(7); Aleisha Orr, *More Claims of Breaches in Great White Shark Baiting*, W.A. Today, Feb. 12, 2014.

<sup>122</sup> *Compromis*, ¶44.

<sup>123</sup> CMS, proviso to art. III(5).

<sup>124</sup> G.A. Res. 1720, Permanent Sovereignty over Natural Resources, Doc. No. A/RES/1720.

<sup>125</sup> *Compromis*, ¶33.

<sup>126</sup> BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 131-132 (Stevens & Sons 1953).

**III. HARVESTING OF THE YAK IN RAKKAB DOES NOT VIOLATE THE CULTURAL AND RELIGIOUS RIGHTS OF AUROKAN PEOPLE.**

**A. RAKKAB IS FULFILLING ITS OBLIGATION TOWARDS THE REALIZATION OF HIGHEST ATTAINABLE STANDARD OF HEALTH.**

**1. Rakkab is obligated to take measures towards the full realization of right to health under Art 12 of the ICESCR.**

Right to health is a fundamental human right, indispensable for the exercise of other human rights<sup>127</sup> and has acquired the status of being customary international law.<sup>128</sup> Article 12(2) provides baseline standards of the health care obligations borne by States<sup>129</sup> that include a duty to control epidemic diseases<sup>130</sup> by making available relevant technologies<sup>131</sup> and creation of conditions to assure medical service to all.<sup>132</sup> One of the four essential elements of right to health for guiding action of a State party is to ensure availability of essential medicines.<sup>133</sup>

Rakkab has witnessed a significant increase in its rates of adult obesity and diabetes,<sup>134</sup> a non-communicable disease regarded as an epidemic.<sup>135</sup> Being a State party to the ICESCR,<sup>136</sup> Rakkab has a core obligation to ensure satisfaction of minimum essential levels<sup>137</sup> of the right to health, which includes providing essential medicines as defined by the World Health

<sup>127</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec.10, 1948) art. 25(1) [hereinafter UDHR]; Constitution of the World Health Organization art. 1, adopted on July 22, 1946, 14 U.N.T.S. 185; Convention on the Rights of the Child art. 24, 1577 U.N.T.S. 3 (entered into force Sep. 2, 1990) [hereinafter CRC].

<sup>128</sup> Andrew Clapham and Mariano Garcia Rubio, *The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health* (Health and Human Rights, Working Paper Series No. 3).

<sup>129</sup> BEN SAUL ET AL., INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 1030 (Oxford Univ. Press 2014) [hereinafter Ben Saul].

<sup>130</sup> International Covenant on Economic Social and Cultural Rights art. 12(2)(c), Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>131</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Aug. 11, 2017) ¶16 [hereinafter General Comment 14].

<sup>132</sup> ICESCR art. 12(2)(d).

<sup>133</sup> General Comment 14, ¶12.

<sup>134</sup> *Compromis*, ¶12.

<sup>135</sup> International Diabetes Federation, I.D.F. Diabetes Atlas 9 (6<sup>th</sup> ed., International Diabetes Federation 2017).

<sup>136</sup> *Compromis*, ¶48.

<sup>137</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Dec. 14, 1990) ¶10 [hereinafter General Comment 3].

Organization ('WHO') Action Programme on Essential Drugs.<sup>138</sup> Gallvectra is a life-saving drug,<sup>139</sup> added to the WHO EML in March 2017.<sup>140</sup> Harvesting the Yak in Rakkabi territory is therefore in pursuance of meeting its international obligation as compliance with the core obligations is non-derogable.<sup>141</sup>

Article 12 imposes a positive obligation on States to adopt all appropriate positive measures, to the maximum of the resources allocated to this purpose and to promote access to such preventive or curative pharmaceutical products.<sup>142</sup> In view of the credentials possessed by Rakkab, it has been committed to providing the best scientific research facilities<sup>143</sup> and has previously granted numerous patents to DORTA, especially in the health-care sector.<sup>144</sup>

Moreover, there exists an international obligation on Aurok in relation to Article 12, to cooperate with Rakkab<sup>145</sup> and respect its right to enjoyment of health<sup>146</sup> and of 85 other countries where Gallvectra is sold.<sup>147</sup>

## **2. Provision of Essential Medicines is a core obligation on States in ensuring access to right to health.**

WHO defines essential medicines as “those that satisfy the priority health care needs of the population” selected with due regard to public health relevance<sup>148</sup> based on the disease burden.<sup>149</sup> Essential medicines are intended to be available within the context of functioning

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<sup>138</sup> General Comment 14, ¶43; World Health Organization Policy Perspectives on Medicines, Equitable Access to Essential Medicines: A Framework for Collective Action (2004), <http://apps.who.int/medicinedocs/pdf/s4962e/s4962e.pdf>.

<sup>139</sup> *Compromis*, ¶24.

<sup>140</sup> *Compromis*, ¶37.

<sup>141</sup> General Comment 14, ¶47.

<sup>142</sup> Commission on Human Rights Res 2004/26, *Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, U.N. Doc. No. E./C.N.4/RES./2004/26 (April 23, 2004).

<sup>143</sup> *Id.*

<sup>144</sup> *Compromis*, ¶10.

<sup>145</sup> U.N. Charter art. 56.

<sup>146</sup> General Comment 14, ¶39.

<sup>147</sup> *Compromis*, ¶20.

<sup>148</sup> WHO Equitable Access, *supra* note 143, at 1.

<sup>149</sup> World Health Organization, W.H.O. Medicines Strategy, Revised Procedure for Updating W.H.O. Model List of Essential Drugs, Report by Secretariat, Doc. No. E.B.109/8, 109<sup>th</sup> Sess., at 3 (Dec. 7, 2001).

health systems at all times in adequate amounts,<sup>150</sup> as they satisfy health care needs of the majority of the population.<sup>151</sup>

About 422 million adults suffer from diabetes<sup>152</sup> and 1.6 million deaths a year are directly attributable to diabetes.<sup>153</sup> The gross sales of Gallvectra of more than €3.2 billion worldwide<sup>154</sup> reflect its global, indispensable demand, as the Model List is a guide for the development of national and institutional essential medicines list.

The obligation to make essential medicines available is immediate and not subject to progressive realization.<sup>155</sup> Being a member of the WHO,<sup>156</sup> Rakkab is obligated to provide access to essential medicines for all,<sup>157</sup> since all Gallvectra is only manufactured in Rakkab,<sup>158</sup> with lack of an effective alternative<sup>159</sup> to its vitalefficacy.<sup>160</sup>

### **3. Rakkab is acting towards promotion of the right to health of children.**

The Universal Declaration on Human Rights entitles children to special care and assistance in sickness.<sup>161</sup> The rights contained in ICESCR apply to both adults and children, and

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<sup>150</sup> WHO Equitable Access, *supra* note 143, at 1.

<sup>151</sup> WHO, *supra* note 154.

<sup>152</sup> World Health Organization, Global Report on Diabetes 25 (2016), <https://www.who.int/diabetes/global-report/en/>.

<sup>153</sup> World Health Organization, Diabetes Factsheet (Oct. 30, 2018), <https://www.who.int/en/news-room/factsheets/detail/diabetes>.

<sup>154</sup> *Compromis*, ¶38.

<sup>155</sup> Paul Hunt (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), U.N. Doc. No. A/H.R.C./7/11/Add.2 (March 5, 2008).

<sup>156</sup> *Compromis*, ¶48.

<sup>157</sup> World Health Organisation, Fifty-Fifth World Health Assembly: Ensuring accessibility of essential medicines (May 18, 2002), [http://apps.who.int/gb/archive/pdf\\_files/WHA55/ewha5514.pdf](http://apps.who.int/gb/archive/pdf_files/WHA55/ewha5514.pdf).

<sup>158</sup> *Clarifications*, ¶5.

<sup>159</sup> LEND CHRISTIAN, ETHICS AND LAW OF INTELLECTUAL PROPERTY CURRENT PROBLEMS IN POLITICS, SCIENCE AND TECHNOLOGY 55 (Ashgate Publishing Company 2007).

<sup>160</sup> WHO Equitable Access, *supra* note 143, at 1.

<sup>161</sup> UDHR art. 25(2).

include some child-focused elements,<sup>162</sup> such as equitable access to health care including prevention, promotion, and protection.<sup>163</sup>

The WHO notes that childhood obesity is one of the most serious public health concerns, with approximately 42 million children with obesity in 2016.<sup>164</sup> Obesity contributes to insulin resistance and is a strong risk factor for diabetes.<sup>165</sup> There are increased rates of diabetes amongst children and adolescents.<sup>166</sup> Rakkab has also witnessed a significant increase in rates of childhood obesity and diabetes, since the middle 20<sup>th</sup> Century.<sup>167</sup>

To successfully manage diabetes, WHO has international guidelines which include adding insulin and blood-glucose lowering drugs on its EML.<sup>168</sup> Gallvectra contains the Lustuk Enzyme, the ingestion of which has been found to provide remarkable protection against diabetes and obesity.<sup>169</sup> The drug on being tested was determined as being highly effective in the treatment of diabetes and insulin resistance-related diseases,<sup>170</sup> which led to its addition in the WHO EML.<sup>171</sup>

#### **4. Right to life forms a prerequisite for enjoyment of all other human rights.**

The right to health is interdependent on the right to life.<sup>172</sup> The right to life has been confirmed to have a socio-economic aspect<sup>173</sup> and a number of health rights<sup>174</sup> have been read into the protection of right to life.<sup>175</sup>

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<sup>162</sup> ICESCR art. 10(3), 11 & 12.

<sup>163</sup> CRC art. 24; OHCHR & WHO, Right to Health, Factsheet No. 31, <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

<sup>164</sup> WHO, Global Strategy on Diet, Physical Activity and Health, *Childhood overweight and Obesity* (2016), <https://www.who.int/dietphysicalactivity/childhood/en/>.

<sup>165</sup> WHO Commission on Ending Childhood Obesity, Facts and Figures on Childhood Obesity (Oct. 13, 2017), <https://www.who.int/end-childhood-obesity/facts/en/>.

<sup>166</sup> Dr. Margaret Chan, Obesity and diabetes: The Slow-Motion Disaster Keynote Address at the 47th Meeting of the National Academy of Medicine (Oct. 17, 2016), <https://www.who.int/dg/speeches/2016/obesity-diabetes-disaster/en/>.

<sup>167</sup> *Compromis*, ¶12.

<sup>168</sup> Margaret Chan, *supra* note 171.

<sup>169</sup> *Compromis*, ¶13.

<sup>170</sup> *Compromis*, ¶14 & 15.

<sup>171</sup> *Compromis*, ¶37.

<sup>172</sup> Ben Saul, at 1070.

The responsibility of States to provide adequate health care for patients has been upheld under the right to life and found to be directly and immediately linked to human health care.<sup>176</sup> The recognition of the right to health as a component of the right to life further obligates Rakkab to take steps for its realization by harvesting the gallbladders of the Yak, to save human lives.<sup>177</sup>

**B. YAK HARVESTING IN RAKKAB'S TERRITORY DOES NOT VIOLATE THE RELIGIOUS AND CULTURAL RIGHTS OF THE AUROKAN PEOPLE.**

**1. There is no substantial interference with the rights of Aurokans.**

While determining violation of rights of indigenous peoples under Article 27,<sup>178</sup> including right to culture,<sup>179</sup> the test of substantial interference has been relied on.<sup>180</sup> Not every interference, which in some limited way alters previous conditions can be regarded as a denial of Article 27 rights<sup>181</sup> and requires serious and significant interference with indigenous interests before justiciable issues arise.<sup>182</sup>

On the advice of experts, DORTA sustained harvesting at levels of only a quarter of the number killed each year by the Aurokans themselves, for more than ten years<sup>183</sup> determined to be sustainable by a comprehensive EIA.<sup>184</sup>

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<sup>173</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 6: The Right to Life (Apr. 30, 1982) [hereinafter General Comment 6]

<sup>174</sup> Nitecki v. Poland, App. No. 65653/01, Eur. Ct. H.R. (2002); Cyprus v. Turkey, App. No. 25781/94, (Euro. Ct. H.R. (2001); Powell v. United Kingdom, App. No. 45305/99, Euro. Ct. H.R. (2000).

<sup>175</sup> European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 & 14, art. 2, 1950 E.T.S. 5 (entered into force Sep. 3, 1953); American Convention on Human Rights, "Pact of San Jose", Costa Rica, art. 4 & 5, 1969 O.A.S. Treaty Series No. 36 (entered into force July 18, 1978).

<sup>176</sup> Alban Cornejo et al. v. Ecuador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 171, ¶117 (Nov. 22, 2007).

<sup>177</sup> *Compromis*, ¶24.

<sup>178</sup> ICCPR, art. 27.

<sup>179</sup> Mahuika v. New Zealand, U.N. Doc. No. C.C.P.R./C/55/D/547/1993, ¶9.4 (Oct. 13, 1995).

<sup>180</sup> Sandra Lovelace v. Canada, Communication No. R6/24, U.N. Doc. No. A/36/40 Supp. No. 40 (Dec. 29, 1977).

<sup>181</sup> Aarela and Nakkalajarvi v. Finland, Communication No. 779/1997, U.N. Doc. No. C.C.P.R./C/73/D/779/1997 (Nov. 4, 1997).

<sup>182</sup> *Id.*

<sup>183</sup> *Compromis*, ¶33.

<sup>184</sup> *Clarifications*, ¶7.

**2. Rakkab is exercising its right to scientific progress under Art 15(1)(b) of the ICESCR.**

The harvesting of the Yak takes place in the 30% territory of Gaur Highlands<sup>185</sup> which is located in Rakkab<sup>186</sup> and causes no direct injury<sup>187</sup> to Aurok. There exists no breach of Covenant obligations as Rakkab is protecting the exercise of Convention rights under Article 15(1)(b) and 15(1)(c)<sup>188</sup> which entitles individuals to pursue and enjoy benefits of, scientific progress and its applications.<sup>189</sup>

The rights to science and culture are interlinked<sup>190</sup> as both relate to the pursuit of knowledge and understanding and to human creativity in a constantly changing world.<sup>191</sup> There also exists a link between the right to enjoy the benefits of scientific progress and the right to health,<sup>192</sup> as the right to highest attainable standard of health must be advanced by progress in science and technology.<sup>193</sup> Health technologies include drugs.<sup>194</sup>

‘Benefits’ of science may take the form of access to quality health care.<sup>195</sup> The failure to ensure a regular and consistent supply of the drugs was recognized by the European Court of Human Rights to constitute a violation of the right to enjoy the benefits of scientific progress. Dr. Isaac Bello and a team of scientists at DORTA isolated the Lustuk Enzyme from the gallbladder

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<sup>185</sup> *Compromis*, ¶8.

<sup>186</sup> *Id.* ¶23.

<sup>187</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, at 139-142 (July 9).

<sup>188</sup> ICESCR art. 15(1)(b).

<sup>189</sup> *Id.*; G.A. Res. 61/295 United Nations Declaration on Rights of Indigenous Peoples (Sept. 13, 2007), U.N.G.A. Res A/RES./61/295; UDHR art. 27(1).

<sup>190</sup> Fareeda Shaheed (Special Rapporteur in the field of Cultural Rights), *The Right to enjoy the Benefits of scientific Progress and its Application*, U.N. Doc. No. A/H.R.C./20/26, ¶16 (May 14, 2012).

<sup>191</sup> *Id.* ¶7.

<sup>192</sup> General Comment 6, ¶42; United Nations Educational, Scientific and Cultural Organization, Report of the International Bioethics Committee of UNESCO (International Bioethics Committee) on Social Responsibility and Health, Doc. S.H.S./E.S.T./C.I.B.10-11/1 (2010).

<sup>193</sup> UNESCO G.C., 19<sup>th</sup> Sess., Universal Declaration on Bioethics and Human Rights (Nov. 11, 1997) art. 14(2). [hereinafter UDBHR]

<sup>194</sup> Suerie Moon, *Respecting the Right to Access to Medicines: Implications of the U.N. Guiding Principles on Business and Human Rights for the Pharmaceutical Industry*, 15 *Health and Human Rights* 32, 32-43 (2013).

<sup>195</sup> United Nations Human Rights Office of the High Commissioner, Seminar on the Right to Enjoy Benefits of Scientific Progress and its Applications, Room XXIV, Palais de Nations, Geneva (Oct. 3-4, 2013).

and used its discovery as a medical treatment of insulin-resistant diseases as a reliable, consistent prescription drug.<sup>196</sup> Taking cognizance of the importance of research contributing to the alleviation of urgent global health problems,<sup>197</sup> Rakkab's grant of the patent for Gallvectra<sup>198</sup> and its consequent sale worldwide<sup>199</sup> was a justified exercise of its right to freedom to pursue scientific research and enjoyment of the benefits of scientific progress.<sup>200</sup>

**IV. RAKKAB BY MANUFACTURING GALLVECTRA HAS NOT APPROPRIATED AUROK'S TRADITIONAL KNOWLEDGE. HENCE, IT IS UNDER NO OBLIGATION TO COMPENSATE THE AUROKAN PEOPLE.**

**A. RAKKAB HAS COMPLIED WITH INTERNATIONAL LAW.**

**1. Rakkab has not violated any international obligation as the nascent international norm of Free, Prior and Informed Consent is of non-binding nature.**

By way of interpretation of the existing conventions, the still evolving concept of Free, Prior, Informed Consent ('FPIC')<sup>201</sup> has been brought forth. The right of indigenous population to FPIC finds mention in the UN Declaration on the Rights of Indigenous People<sup>202</sup> which is an example of soft law and not a legally binding instrument.<sup>203</sup>

Additionally, the concluding observations to State Parties and general comments or recommendations as above made by a UN Treaty Supervisory bodies are not legally binding decisions.<sup>204</sup> However, before recognising right to FPIC of Indigenous people as a customary

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<sup>196</sup> *Compromis*, ¶18.

<sup>197</sup> UDBHR, art. 21(3).

<sup>198</sup> *Compromis*, ¶19.

<sup>199</sup> *Compromis*, ¶20.

<sup>200</sup> Ben Saul, at 1215; Shaheed, *supra* note 75, ¶24; *Compromis*, ¶18.

<sup>201</sup> Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, 1650 U.N.T.S. 383.

<sup>202</sup> G.A. Res. 61/295, United Nations Declaration on Rights of Indigenous Peoples, Dec. 13, 2007, 1520 U.N.T.S. 363.

<sup>203</sup> Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. J. INT'L L. 439, 458-59 (2008).

<sup>204</sup> Michael O'Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27 (2006).

international legal norm, an examination of State practice beyond the ratification or endorsement of international agreements is necessary.<sup>205</sup> After being put to such a test, right to FPIC of the indigenous population is a nascent notion of Human Rights law, falling short of a binding nature as customary international law.

The right to FPIC as derived from property rights of indigenous people are not absolute and the State has the right to subordinate the rights in the interest of the society in cases of a previously established law; when it is necessary and proportional to aim of achieving a legitimate objective in a democratic society.<sup>206</sup>

Therefore, there lies no obligation upon Rakkab to take a free, prior, informed consent from Aurokan people.

## **2. Rakkab nonetheless has involved relevant stakeholders of Aurok by way of the Comprehensive Environment Impact Assessment.**

While empowering States to limit property rights of indigenous people, a limit can be placed on the State's power, in cases where the right to survival of indigenous people is being affected and preventing the same by way of environmental and social impact assessments.<sup>207</sup>

Rakkab while fulfilling its obligations in good faith,<sup>208</sup> conducted a comprehensive EIA which included consultation with Rakkabi Pivzao adherents and government officials from Aurok amongst others.<sup>209</sup> Thus, Rakkab has fulfilled its obligations with regard to impact assessment as mandated by the Convention on Biodiversity (CBD)<sup>210</sup> and supplemented by the Akwe: Kon Guidelines.<sup>211</sup> The obligations of FPIC as covered by the Nagoya Protocol<sup>212</sup> have also been fulfilled.

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<sup>205</sup> International Law Association, Final Report of the Committee Statement of Principles Applicable to the Formation of General Customary International Law 8 (2000).

<sup>206</sup> *Saramaka People v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶131,136 (Nov. 28, 2007).

<sup>207</sup> *Id.* ¶133.

<sup>208</sup> UNDRIPS, art. 32.

<sup>209</sup> *Clarifications*, ¶7.

<sup>210</sup> CBD, art. 8(j).

<sup>211</sup> Secretariat of Convention on Biological Diversity, *Akwe: Kon Guidelines* (2004).

**B. DORTA BY SECURING PATENT RIGHTS OVER GALLVECTRA HAS NOT COMMITTED ANY ACTS OF MISAPPROPRIATION OF AUROKAN TRADITIONAL KNOWLEDGE.**

**1. The granting of patent for Gallvectra fulfils the essential requirements namely; novelty, inventive step and industrial application.**

The internationally accepted pre-requisites, largely governed by multi-lateral treaties<sup>213</sup> for a patent include the triple test of (a) novelty, (b) inventiveness and (c) industrial utility which have been fulfilled by the patentee in our case i.e., DORTA.

**a. The claim of Aurokan people over Gallvectra by way of their TK fails as it does not qualify as a prior art.**

As per the cross-jurisdictionally accepted definition of prior art, as manifested by multilateral treaties,<sup>214</sup> an invention becomes a part of the prior art namely by a (i) description of the invention in a published writing or publication in other form; (ii) description of the invention in spoken words uttered in public, called an oral disclosure; and (iii) use of the invention in public, or by putting the public in a position that enables any member of the public to use it.<sup>215</sup>

In the present case it can be ascertained that the Aurokan people by challenging the patent granted are claiming a defensive protection<sup>216</sup> of their Traditional Knowledge (TK). Foundations for the claim of protection of TK are laid by the establishment of a thought-through

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<sup>212</sup> 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 art. 6-7, Oct. 29, 2010 U.N.E.P./C.B.D./C.O.P./DEC./X/1.

<sup>213</sup> Agreement on Trade-Related Aspects on Intellectual Property Rights art. 27.1, Apr. 15, 1994 1869 U.N.T.S. 299; Patent Cooperation Treaty art. 33(1)-(4), June 19, 1970, 1160 U.N.T.S. 231.

<sup>214</sup> Report of the Standing Committee on the Law of Patents, *Draft Substantive Patent Law Treaty*, Doc./S.C.P./05/2 art. 8.

<sup>215</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 19 (2d ed. 2004).

<sup>216</sup> World Intellectual Property Organization Secretariat, Glossary of Key Terms Related to I.P., G.R., T.K. and T.C.E., W.I.P.O./G.R.T.K.F./I.C./37/I.N.F./7.

process of documentation,<sup>217</sup> as an isolated note or photograph of TK are not documentation *per se*.<sup>218</sup> Aurok fails to establish the presence of a documented or an orally transmitted account of the healing properties of *Tirhinga Nos Lustuk* specific to the ailments/insulin related diseases, subject matter of the patent and they never produced a reliable, consistent prescription drug for human use.

In *Pharmaceutical Appetite Suppressant*<sup>219</sup> certain plants, used as ‘bush food’ by the original inhabitants<sup>220</sup> were subsequently made available in concentrated form as medicaments. Such a medicament was held to be new as it has a new utility. The patent in contention was not discovered by merely living in rural Aurok and observing their practices,<sup>221</sup> rather, Dr. Bello discovered the Enzyme after fieldwork and subsequent laboratory studies.<sup>222</sup>

The decision to pursue the particular goal of investigating the cause for discrepancy in rate of obesity and insulin-related diseases amongst Rakkabis and Aurokans, by observing dietary and cultural practices of Aurokans, is insufficient to recognise Aurok as the owners.<sup>223</sup> It is at best a hint, which is not part of the invention of Gallvectra as such.

Further, the novelty requirement with respect to genetic resources is only to show that the substance was not available in its pure form i.e., thus if indigenous communities use the active substance in a dilute form then a pure form of the substance fulfils the “novelty” requirement.<sup>224</sup>

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<sup>217</sup> World Intellectual Property Organization, (2016) *Developing a National Strategy on Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources* (Background Brief No. 3), [www.wipo.int/publications/en/details.jsp?id=3864&plang=EN](http://www.wipo.int/publications/en/details.jsp?id=3864&plang=EN).

<sup>218</sup> Begona Venero Aguirre, *Documenting Traditional Knowledge: A Toolkit*, WIPO, [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1049.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1049.pdf).

<sup>219</sup> *Pharmaceutical compositions having appetite suppressant activity*/C.S.I.R., Case No. T 0543/04 (Jan. 27, 2005), <https://www.epo.org/law-practice/case-law-appeals/recent/t040543eu1.html>.

<sup>220</sup> *Id.*

<sup>221</sup> *Compromis*, ¶13.

<sup>222</sup> *Compromis*, ¶14.

<sup>223</sup> S. VON LEWINKSKI, *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* 61 (2<sup>nd</sup> ed., Kluwer Law International 2003).

<sup>224</sup> Lester I. Yano, *Protection of the Ethnobiological Knowledge of Indigenous Peoples*, 41 U.C.L.A. L. Rev. 443, 460 (1993).

Hence, health benefits in particular to the gallbladder were attributed to the Aurokan population,<sup>225</sup> however discovering a medical treatment of insulin resistant diseases was not part of the state of the art.

### *Undisclosed Traditional Knowledge*

Disclosed traditional knowledge refers to “traditional knowledge which is accessible to persons beyond the indigenous or local community which is regarded as the ‘holder’ of the traditional knowledge.”<sup>226</sup> Traditional knowledge claimed by Aurokans was undisclosed and did not exist in public domain, as no one outside the community was aware of its existence at the time that the patent application was filed. The knowledge of traditional use of gallbladder of the Yak in *Tirhinga Nos Lustuk* was only subsequently brought into the public domain in January 2005.

The said invention is neither obvious nor obviously derived from the state of the art.<sup>227</sup> Gallvectra’s novelty makes it the most successful pharmaceutical product in the history of DORTA.<sup>228</sup> This is so because it serves the utilitarian purpose of treating insulin resistant diseases in more than 85 countries. The isolation of the Lustuk enzyme, the subsequent production of the medication to arrive at a consistent, reliable prescription drug for human use, shows that it was not already part of prior art.

### **b. The processes associated with the manufacture of Gallvectra are not obvious to a person skilled in the art.**

In *Hoodia*,<sup>229</sup> the effect of prior art was discussed. The prior art stated the stomach filling properties of a genus of a plant.<sup>230</sup> The Board concluded that on the basis of this prior art, PHOSITA would not be prompted to use an extract from the plant of the genus Hoodia to

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<sup>225</sup> *Compromis*, ¶16.

<sup>226</sup> UNCTAD, ‘Report of the UNCTAD- Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices of options for an International Framework’, 4-6 February 2004.

<sup>227</sup> Cartagena Protocol on Bio-safety to the Convention on Biological Diversity, art. 18, 2226 U.N.T.S. 208.

<sup>228</sup> *Compromis*, ¶21.

<sup>229</sup> World Intellectual Property Organisation, *Case Study: Hoodia Plant* (Jan. 2008), [http://www.wipo.int/export/sites/www/academy/en/about/global\\_network/educational\\_materials/cs1\\_hoodia.pdf](http://www.wipo.int/export/sites/www/academy/en/about/global_network/educational_materials/cs1_hoodia.pdf).

<sup>230</sup> *Id.*

manufacture a medicament having appetite suppressant activity, administrable to a human as foodstuff (comprising said extract), to reduce the calorific intake.<sup>231</sup>

Such an invention has to involve an inventive step. It is common knowledge that a skilled person would know that consumption of a certain part of a genus confers a benefit, but that person “*could not obviously derive from this disclosure that an extract could be used for manufacture of an appetite suppressant, anti-obesity medicament.*”

Hence, a medicament reducing calorie intake is sophistication over simply knowing that the source of such a medicament is that it only “efficiently removes hunger pangs.” Such an invention is not obvious to a person skilled in the art. Further, the isolation process involving efficiency and safety measures, a lengthy process which took two years for a before identified enzyme in itself is an inventive step.<sup>232</sup>

Hence, Dr. Bello’s patent providing a lifesaving medicine to the world at large is an invention that involves an inventive step.<sup>233</sup> The Aurokan population knew of the health benefits and longevity attained from the Yak’s gallbladder but only thought of it as a promoter of well-being and aid in recovery from illness.

They were not aware of the Lustuk enzyme’s consumption being responsible for low rates of obesity and diabetes.<sup>234</sup> Nor had they discovered the Lustuk Enzyme as a medical treatment of insulin resistant diseases, creating a reliable consistent drug for human use. The isolation of the enzyme and manufacture of Gallvectra, involves an inventive step which is not obvious to a person skilled in the art. Aurok’s TK is not being utilized as is, since it doesn’t form part of the actual invention, Gallvectra and is at best, a hint.<sup>235</sup>

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<sup>231</sup> *Id.*

<sup>232</sup> Bourdy Genevieve et. al., *Quassia “Biopiracy” Case and the Nagoya Protocol: A Researcher’s Perspective*, 206 *Journal of Ethnopharmacology*, 290 &297 (2017).

<sup>233</sup> *Compromis*, ¶33.

<sup>234</sup> *Compromis*, ¶¶13-14.

<sup>235</sup> SILKE VON LEWINSKI, *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* 115 (2<sup>nd</sup>ed. Kluwer Law International 2008).

**c. Dr. Bello has a legally tenable right to protection as the inventor of Gallvectra under International law.**

The moral interests protected by Article 15(1)(c)<sup>236</sup> include the right of authors to be recognized as the creators of their scientific productions and to object to any modification, distortion or derogatory action, prejudicial to their honour and reputation.<sup>237</sup> Articles 17<sup>238</sup> and 27<sup>239</sup> provide this exclusive and monopolistic protection for a standard term of twenty years.<sup>240</sup> The second part of Article 27 (to share scientific advancements and its benefits)<sup>241</sup> is satisfied as Rakkab is sharing the benefits of Gallvectra by marketing it to more than 85 countries.<sup>242</sup> Dr. Bello as the inventor of the patent also satisfies the ‘*reward theory*’<sup>243</sup> which states that labour expended in cultivating a tract previously held in common gives the labourer a natural right over it.<sup>244</sup>

Aurok was under an international obligation to respect the human right to benefit from the moral and material interests of Dr. Isaac Bello as author,<sup>245</sup> by not infringing his right to be recognized as the creator of his scientific production<sup>246</sup>, Gallvectra. Dr. Bello’s discovery of the never-before-identified Lustuk Enzyme is based on his fieldwork and subsequent laboratory studies in Rakkab by isolating it and producing an experimental medication. Only after two years

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<sup>236</sup> ICESCR art. 15.

<sup>237</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Materials Interests Resulting from any Scientific, Literary or Artistic Production of Which he or she is the Author (Jan. 12, 2006).

<sup>238</sup> UDHR art. 17.

<sup>239</sup> UDHR art. 27.

<sup>240</sup> Lewinski, *supra* note 237, at 101.

<sup>241</sup> *Id.*

<sup>242</sup> *Compromis*, ¶20.

<sup>243</sup> William Fisher, *Theories of Intellectual Property Rights*, in *New Essays in the Legal Theory and Property* (S. Munzer ed., Cambridge Univ. Press, 2001).

<sup>244</sup> Herman T. TavaniLocke, *Intellectual Property Rights, and the Information Commons*, 7 H.T. INF. TECHNOL. 87 (2005).

<sup>245</sup> *Compromis*, ¶13.

<sup>246</sup> CESCR, General Comment No. 17.

of testing could a reliable, consistent prescription drug for medical treatment of insulin-related diseases<sup>247</sup> be invented.

**2. Gallvectra's sale is not a threat to Aurokan tradition as it has no negative impact on the indigenous population.**

The CBD reversed a previously well-accepted norm of international law that considered all biological resources to be the “common heritage of mankind,” under which theory biological resources could be transferred freely over international borders without any restrictions.<sup>248</sup> The CBD recognizes the sovereign right of the States to exploit their own resources pursuant to their own environmental policies.<sup>249</sup>

Rakkab, in manufacturing and selling Gallvectra, is thus exercising its rights under the CBD. Moreover, it is also fulfilling its obligation of protection of the right to health.<sup>250</sup> The harvesting of Yak for the manufacture of Gallvectra is limited to the territory of Rakkab. Moreover, the number of Yak harvested by Rakkab is a ‘drop in the ocean’ compared to that harvested by Aurok.<sup>251</sup>

The hunting being carried out by Rakkab is sustainable at the current levels.<sup>252</sup> It implies that the population of the Yak herd at present is enough to sustain harvesting for the manufacture of Gallvectra as well as for hunting by the Aurokans, thus causing no harm to the indigenous population.

**C. CONSEQUENTLY, RAKKAB HAS NO DUTY TO MAKE REPARATION.**

Having complied with international law, Rakkab is not obligated to compensate Aurok<sup>253</sup> as it has not breached its international obligations. On the contrary, by carrying out a

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<sup>247</sup> *Compromis*, ¶18.

<sup>248</sup> Prashant Reddy and Malathi Lakshmi Kumaran, *Protecting Traditional Knowledge Related to Biological Resources: Is Scientific Research Going to Become More Bureaucratized?* 5 COLD SPRING HARB. PERSPECT. MED. (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4588132/>.

<sup>249</sup> CBD, art. 3.

<sup>250</sup> ICESCR, art. 12.

<sup>251</sup> *Compromis*, ¶24.

<sup>252</sup> *Compromis*, ¶33.

<sup>253</sup> ARSIWA, art.34 &36(2).

comprehensive environment impact assessment Rakkab fulfilled its duties under the Convention on Biological Diversity and the Nagoya Protocol on Benefit Sharing.

**PRAYER FOR RELIEF**

Aurok respectfully requests the Court to adjudge and declare that:

1. Rakkab is not responsible for the internationally wrongful because DORTA's actions are not attributable to Rakkab and Rakkab has exercised due diligence over DORTA's acts;
2. The harvesting of the Yak in Rakkab does not violate Rakkab's international obligations relating to the protection of endangered species and the environment, and Rakkab is under no obligation to end Yak harvesting on its territory;
3. The harvesting of the Yak in Rakkab does not violate the cultural and religious rights of the people of Aurok, and Rakkab is under no obligation to prohibit such hunting forthwith; and
4. Rakkab is under no obligation to pay Aurok the profits realized from sales of the drug Gallvectra, because Rakkab did not appropriate or exploit the traditional knowledge belonging to the Aurokan people.

Respectfully submitted,

AGENTS OF THE RESPONDENT