



IN THE
INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE

NETHERLANDS

THE 60TH PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION, 2019

CASE CONCERNING THE KAYLEFF YAK

THE STATE OF AUROK

APPLICANT

v.

THE REPUBLIC OF RAKKAB

RESPONDENT

MEMORIAL *for the* APPLICANT

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STATEMENT OF JURISDICTION

Pursuant to the Joint Notification and Compromis concluded on 14 September, 2018, including the Corrections and Clarifications agreed to therein, between the State of Aurok [**“Aurok”**] and the Republic of Rakkab [**“Rakkab”**], and in accordance with Article 40(1) of the Statute of the International Court of Justice [**“ICJ”**], the Parties hereby submit to this Court their dispute concerning the Kayleff Yak.

In accordance with Article 3 of the Special Agreement, notified to the Court on 14 September, 2018, the ICJ is hereby requested to adjudge the dispute in accordance with the rules and principles of international law, including any applicable treaties.

Aurok and Rakkab have agreed to respect the decision of this Court.

QUESTIONS PRESENTED

- I. WHETHER RAKKAB IS RESPONSIBLE FOR THE INTERNATIONALLY WRONGFUL ACTS DESCRIBED IN SUB-PARAGRAPHS (B)-(D), *INFRA*, 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?

- II. WHETHER THE HARVESTING OF THE YAK IN RAKKAB VIOLATES RAKKAB'S INTERNATIONAL OBLIGATIONS RELATING TO THE PROTECTION OF ENDANGERED SPECIES AND THE ENVIRONMENT, INCLUDING THOSE UNDER RELEVANT CONVENTIONS, AND 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 PEOPLE OF AUROK, AND RAKKAB MUST PROHIBIT SUCH HUNTING FORTHWITH?

- IV. WHETHER 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?

STATEMENT OF FACTS

BACKGROUND:

Aurok, the Applicant in these proceedings is a least-developed country composed almost entirely of descendants of the Pivzao civilization, that arose in Gaur Highlands. Aurok comprises of 70% of Gaur Highlands. Rakkab, the Respondent, is a developed country with a multi-ethnic population, encompassing 30% of Gaur Highlands. There are fewer than 200 adherents of Pivzao traditions in Rakkab. These adherents, and nearly all Aurokans self-identify as indigenous.

THE PIVZAO CIVILIZATION AND KAYLEFF YAK:

Gaur Highlands have been the exclusive habitat of Kayleff Yak [“**Yak**”] for more than 250,000 years. In spring-summer, young Yaks are born and stay in their northern grazing lands in Aurok, while in autumn-winter, they migrate to Rakkab for mating.

The Pivzao civilization relied upon subsistence hunting of Yak for every aspect of their lives, including food, medicine, construction materials, and clothing. Accordingly, it formed a central part of their culture and religion. They even based their calendar on Yak’s migration patterns. Traditional hunting of Yak, which continues presently, was a community event, and those who participated in it were rewarded with a traditional dish, *Tirhinga Nos Lustuk* [“**Tirhinga**”], which includes Yak gallbladder. It was known that *Tirhinga*’s consumption confers health benefits and longevity.

ESTABLISHMENT OF DORTA:

In 1965, Rakkab established the Department of Research, Technology & Application to discover new medicines [“**Department**”]. In February, 1996, Rakkab’s Parliament adopted a legislation to privatize the Department into a company, DORTA M/S [“**DORTA**”]. According to the legislation, and DORTA’s private charter, Rakkabi government must always own at least 9.9% and no more than 19.9% of DORTA’s shares. DORTA’s Board of Directors [“**Board**”] includes four former Rakkabi Cabinet Ministers, and three former leaders of Rakkab’s major political parties. Further, DORTA possesses a legislatively-granted, and government-enforced monopoly

on the sale of prescription medication within Rakkab, and Rakkabi government subsidizes its research and development activities. Further, Rakkabi government regularly meets with DORTA officials to discuss Rakkab's national priorities.

MANUFACTURE OF GALLVECTRA:

Since 1997, Dr. Isaac Bello [**“Dr. Bello”**], a Rakkabi-licensed medical doctor and employee of DORTA, has worked in a DORTA-operated hospital in Rakkab. During his practice, he observed incidence of diabetes was consistently lower in Aurokan patients. In 2001, after spending a year living in rural Aurok, and studying Aurokan dietary and cultural practices, he learnt this was due to Lustuk Enzyme present within Yak gallbladder, which Aurokans consumed in substantial quantities in *Tirhinga*.

In 2003, Dr. Bello and DORTA scientists isolated Lustuk Enzyme, and used it to produce an experimental medication to treat diabetes and related disorders. On 11 November, 2004, DORTA filed a patent application with the Rakkabi Intellectual Property Ministry [**“Ministry”**] for Gallvectra, a medication derived from Lustuk Enzyme. In March 2005, Aurokan Minister of Intellectual Property notified Rakkab that Gallvectra was not a novel invention of Dr. Bello, who discovered Lustuk Enzyme only by studying Aurokan practices. Despite this, the Ministry granted the patent. In May, 2011, DORTA began marketing Gallvectra in other countries. Its worldwide sales topped €2 billion in 2014, and €3.2 billion in 2017.

HUNTING OF YAK AND YLSA'S REPORT:

In February, 2016, Brisbane-based *Courier-Mail* published an investigative report revealing that DORTA has been offering substantial cash rewards for Yak gallbladders through advertisements since 2011. Licenses granted increased each year. Further, from October 2015 to February 2016, Rakkabi hunters killed nearly 30,000 Yak, more than what they had killed in 2014, and delivered their gallbladders to DORTA. In February, 2016, owing to increased Yak hunting, the Aurokan Parliament legislated a five-year moratorium on hunting of female Yak of breeding age.

Since 1994, the Yak Life Sciences Academy [**“YLSA”**], an international NGO studying yak species, has surveyed Yak migration along Aurok-Rakkab border. Its 2016 report [**“YLSA**

report”] concluded that DORTA-sponsored Yak harvesting has disrupted the delicate balance between Yak and its traditional users, which was not attributable to natural causes. It also revealed particularly high rates of decline among young and female Yaks, and Yak’s potential extinction by 2040. On 2 October, 2016, in a ministerial meeting, DORTA’s CEO acknowledged that Rakkab understood fragility of the situation, and it will proceed carefully.

YAKTRAKKER’S RELEASE:

On 16 November, 2016, Rakkab released YakTrakker, an application for all major digital platforms, which provided real-time tracking of Yak herds in Rakkab. YLSA reported it was being used by hunters to hunt Yaks more efficiently. Both Aurok and YLSA called upon Rakkab to remove YakTrakker. However, Rakkab did not respond. YakTrakker remains operational presently. During the winter of 2016-17, DORTA killed approximately 30,000 Yak, roughly 5% of its entire population. YLSA’s subsequent survey concluded that Yak population declined by 10% in two years, with a disproportionate impact continuing among females of breeding age. In June, 2017, Aurokan Parliament adopted the Yak Protection Act which prohibited export of Yak products, and subjected Yak hunting to strict licensing requirements. Further, on 29 September, 2017, the Yak was included in Appendix III of the Convention on International Trade in Endangered Species of Wild Flora and Fauna [“CITES”]. Since then, Rakkabi Ministry of Agriculture [“MoA”] has issued certificates of origin for Lustuk Enzyme in all batches of Gallvectra exported from Rakkab.

IMPACT ON AUROK:

On 19 September 2017, Aurokan Prime Minister stated that *Tirhinga* has become scarce in Aurok, and the northernmost Aurokan settlements received no opportunity to hunt Yak. She noted that by not passing into adulthood through their traditional hunting, young Aurokans were discouraged from starting a family. She demanded that Rakkab cease DORTA-sponsored Yak harvesting, and pay Aurokans their rightful share of profits realized from Aurokan people’s traditions and ancestral knowledge.

CMS DECISION:

In October 2017, the Yak was included in Appendix I of the Convention on Migratory Species [“**CMS**”]. Pursuant to this, Rakkab promulgated Regulation AG/2017-0300 [“**Regulation**”] that subjected Yak hunting in Rakkab to mandatory licenses, and imposed sanctions for its violations. Further, it provided that MoA at its discretion may require license applicants to demonstrate their familiarity with environmental rules. Rakkab also conducted an environmental impact assessment [“**EIA**”] for impact of continued Yak hunting, which concluded that the Regulation would be adequate to protect Yak population’s sustainability. After obtaining a license in November, 2017, DORTA continued Yak harvesting. MoA has issued 21 licenses till present date.

CIVIL SUIT IN RAKKAB:

In November 2017, twenty village leaders from Aurok, and three religious leaders from Rakkabi Pivzao community filed a civil suit against DORTA in a Rakkabi Court, alleging that depletion of Yak, and appropriation of Pivzao traditional knowledge were violations of Aurokans’ cultural and religious rights. The Court dismissed Aurokan plaintiffs on the ground that they lacked *locus standi* to allege violations of Rakkabi law. Rakkabi Supreme Court affirmed this judgement. No further review is available under Rakkabi law.

TREATIES IN FORCE BETWEEN AUROK AND RAKKAB:

Both Aurok and Rakkab are parties to CITES, CMS, the International Covenant on Civil and Political Rights [“**ICCPR**”], the International Covenant on Economic, Social and Cultural Rights [“**ICESCR**”], the Indigenous and Tribal Peoples Convention [“**C169**”], the Convention on Biological Diversity [“**CBD**”], and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization [“**Nagoya**”].

In 2018, both Aurok and Rakkab agreed to submit their disputes for resolution by the ICJ.

SUMMARY OF PLEADINGS

-I-

Rakkab is responsible under international law for DORTA's wrongful activities, since such activities are attributable to Rakkab. Such attribution exists because DORTA is a *de facto* organ of Rakkab and is completely controlled by Rakkab. Such complete control is evident through its shareholding pattern, connections on the Board, and by providing access to markets and funding for its activities. Alternatively, DORTA exercises governmental authority by acting as the sole provider of prescription drugs in Rakkab and it conducted the wrongful activities pursuant to such governmental authority. Even if such criteria are not satisfied, Rakkab exercises effective control over DORTA's wrongful acts through its involvement in DORTA's Yak hunting and by facilitating the manufacture and sale of Gallvectra. In any event, DORTA's wrongful acts have been adopted and acknowledged by Rakkab at an international forum and in its subsequent actions through the Ministry of Agriculture. Even if DORTA's actions are not attributable to Rakkab, Rakkab breached its obligations under international law to take reasonable measures to prevent DORTA from committing such wrongful acts.

-II-

Rakkab's actions violate its obligations under international law concerning the conservation of endangered species and the environment. Under CMS, Rakkab is obligated to prohibit hunting except for scientific purposes or under extraordinary circumstances. Rakkab's actions cannot be exempted under these exceptions as the only purpose of hunting is commercial benefits and due to the presence of alternate effective medicines, there is absence of extraordinary circumstances. Further, under CBD, Rakkab is required to use the components of biological diversity in a sustainable manner. Rakkab is over-exploiting Yaks, despite being aware of the significance of their existence for Aurokans, leading to decline in their size. Such decline is impacting the environment of Aurok, thereby causing transboundary harm. Furthermore, under CITES, Rakkab's over-exploitation of Yaks is violating its obligation to cooperate in good faith with other States to sustainably use species listed in Appendix III.

-III-

Rakkab is under an extra-territorial obligation to respect the cultural and religious rights of Aurokans, since the ordinary interpretation of human rights treaties requires universality, especially in obligations concerning respect, if not for positive obligations. Consequently, Rakkab's actions violates the rights of Aurokans under the ICCPR, ICESCR and C169, by general reduction of their cultural and religious resource, leading to hindrance in Aurokans' way of life, in complete absence of consultation. Such rights are especially violated since Aurokans are vulnerable as indigenous people. Even if Aurokans are not considered indigenous people, Rakkab violates the rights of Aurokans as individuals by inequitable use of a shared natural resource, i.e. Yak. In any event, Rakkab's unsustainable Yak hunting does not constitute valid derogation under ICCPR or ICESCR, since it was not imposed by law and it is not obligatory for Rakkab to protect the health of people beyond Rakkab.

-IV-

Aurokans have been using the Lustuk enzyme for its medicinal and curative properties and it constitutes their traditional knowledge. Rakkab is unlawfully appropriating and exploiting such traditional knowledge since Gallvectra is directly derived from the traditionally known medicinal properties of Yak gallbladder, with minor modifications made to it by the DORTA scientists. Consequently, Rakkab is obligated to share benefits with Aurok. Rakkab also violates its obligations under CBD and Nagoya. Nagoya applies to the traditional knowledge acquired and utilized before its entry into force and in any event, this is a continuing act which began in 2001. Alternatively, Rakkab has unjustly enriched from the sales of Gallvectra as the source of the drug remains what was traditionally known to the Aurokans. Additionally, Rakkab cannot justify its actions under the law of public domain as Aurokans retain ownership over their traditional knowledge even if it becomes publicly available.

PLEADINGS

A. RAKKAB IS RESPONSIBLE FOR THE INTERNATIONALLY WRONGFUL ACTS DESCRIBED IN (B)-(D), INFRA, BECAUSE DORTA’S ACTIONS ARE ATTRIBUTABLE TO RAKKAB, OR IN THE ALTERNATIVE, RAKKAB IS RESPONSIBLE FOR ITS OWN FAILURE TO PREVENT DORTA FROM COMMITTING THESE WRONGFUL ACTS.

Rakkab is responsible for DORTA’s internationally wrongful acts since DORTA’s actions are attributable to Rakkab [I]. Alternatively, Rakkab is responsible for its own failure to prevent DORTA from committing environmental and human rights violations and appropriating Aurokan traditional knowledge without providing adequate compensation [II].

I. DORTA’s actions are attributable to Rakkab.

DORTA’s actions are attributable to Rakkab since DORTA is a *de facto* State organ of Rakkab [a]. Alternatively, DORTA exercises elements of governmental authority while committing the wrongful acts [b]. Alternatively, Rakkab exercises effective control over DORTA’s wrongful actions [c]. In any event, DORTA’s wrongful acts have been adopted and acknowledged by Rakkab [d].

a) DORTA IS A *DE FACTO* STATE ORGAN OF RAKKAB.

Under customary international law [“CIL”],¹ a corporation, despite having separate legal personality, will be treated as a State organ if it acts in ‘complete dependence’ on the State.² ‘Complete dependence’ arises when the State exercises control to such an extent that the entity

¹ International Law Commission [“ILC”], Articles on Responsibility of States for Internationally Wrongful Acts, 56th Sess., A/RES/56/83 (2002), art. 4(2) [“ARSIWA”]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶385 (Feb. 26) [“Bosnian Genocide”].

² *Bosnian Genocide*, 392; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U. S.A.) 1986 I.C.J.14, ¶109 (Jun. 28) [“Nicaragua”]; Deutsche Bank A.G. v. Sri Lanka, ICSID Case No. ARB/09/2, Award of Oct. 31, 2012, ¶405(a) [“Deutsche”].

‘lacks any real autonomy’.³ Such control is indicated by the extent of shareholding, composition of the Board of Directors [**“Board”**],⁴ and making provisions for access to markets and funds.

(i) *Rakkab controls DORTA through its minority shareholding.*

Holding minority shares provides control through the capacity to block critical decisions on important corporate matters.⁵ For instance, France increased its stake in Renault from 15% to 19% to block shareholder resolutions.⁶ Rakkab’s shareholding in DORTA is mandated by law to remain between 10% and 19.9%, currently owning 12%.⁷ Consequently, Rakkab will always have the right to block critical decisions of the company and block the appointment of directors it does not approve. Therefore, Rakkab controls DORTA through its minority shareholding.

(ii) *Rakkab controls the Board of DORTA.*

States retain control over Boards even after privatization, by presence of former ministers and politicians.⁸ Such control does not require direct State intervention, as evidenced in *Yukos*, where specific proof of control was not required since persons involved in setting government policies were also the top officials of the company.⁹

³ *Bosnian Genocide*, ¶¶391-392.

⁴ *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-U.S. Cl.Tr. 228 (1986).

⁵ C. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 324 (2001).

⁶ *France buys extra 1.7 pct stake in Air France KLM*, Reuters, May 8, 2015, <https://www.reuters.com/article/airfrance-state/update-1-france-buys-extra-1-7-pct-stake-in-air-france-klm-idUSL5N0XZ14W20150508>; Jason Chow, *France plans to maintain influence over Renault*, *The Wall Street Journal*, Apr. 9 2015, <https://www.wsj.com/articles/french-state-to-raise-its-stake-in-renault-1428486008>.

⁷ *Case Concerning the Kayleff Yak (The State of Aurok v. The Republic of Rakkab)*, ¶10 [**“Compromis”**].

⁸ N. Boubakri & W. Saffer, *Political Connections of Newly Privatized Firms*, CREF 07-02, 6 (2007); B. Bortolotti & M. Faccio, *Government Control of Privatized Firms* 26 (Purdue CIBER Working Paper No. 52, 2007).

⁹ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Award of Jul. 18, 2014, ¶1480.

Similarly, senior officials of DORTA including the CEO, a former Rakkabi Minister of Intellectual Property, are involved in effecting Rakkabi policies since they regularly meet with government representatives and discuss national priorities.¹⁰ Apart from the CEO and senior executives, DORTA's 15-member board consists of four former cabinet ministers and three former leaders of Rakkab's major political parties, who all support government policies.¹¹ Therefore, Rakkab exercises control over DORTA's Board.

(iii) Rakkab controls DORTA since it provides access to markets and funds for DORTA.

Control is established by providing access to markets and funds to a corporation.¹² Rakkab subsidizes DORTA's research and development activities inside and outside Rakkab.¹³ Further, it has legislatively-granted and enforced DORTA's monopoly on the sale of prescription drugs, generating a large portion of DORTA's revenue.¹⁴ Consequently, Rakkab controls DORTA. Owing to such control, DORTA acts in 'complete dependence' on Rakkab and is a *de facto* State organ.

b) ALTERNATIVELY, DORTA EXERCISES ELEMENTS OF GOVERNMENTAL AUTHORITY WHILE COMMITTING THE WRONGFUL ACTS.

DORTA exercises elements of governmental authority while committing wrongful acts concerning environment and human right violations by Yak hunting¹⁵ and non-sharing of benefits obtained from manufacturing Gallvectra.¹⁶ Under CIL,¹⁷ acts of a corporation are

¹⁰ *Clarifications*, ¶4; *Compromis*, ¶21.

¹¹ *Compromis*, ¶11.

¹² *International Thunderbird Gaming Corporation v. United Mexican States*, Ad-Hoc Tribunal (UNCITRAL), Award of Jan. 26, 2006, ¶108.

¹³ *Compromis*, ¶11.

¹⁴ *Id.*

¹⁵ *Infra* Issues B, C.

¹⁶ *Infra* Issue D.

attributable to the State when it exercises elements of governmental authority in carrying out the specific act.¹⁸ Such governmental authority, *first*, includes provision of essential public services, even commercially, and is not limited to exercise of regulatory powers,¹⁹ and *second*, such authority must be exclusively granted to the entity under the law of the State.²⁰ For instance, in *Bosh*, provision of higher education services by an autonomous university was considered an exercise of governmental authority since it was empowered to do so under Ukrainian law.²¹ DORTA enjoys a legislatively-granted and government-enforced monopoly on prescription drugs, making it the sole provider of a vital service to the population.²² Consequently, the manufacture of Gallvectra by DORTA amounts to exercise of governmental authority.

Moreover, such exercise of authority also extends to any act integral to the provision of essential public services.²³ Therefore, the hunting of Yak which is integral to the manufacture of Gallvectra, also becomes an exercise of governmental authority.

¹⁷ *ARSIWA*, art. 5; Lukáš Bureš v. The Czech Republic, 2012 ECHR 1819.

¹⁸ ILC, Report of the International Law Commission on the Work of Its Fifty-Third Session, 56th sess, Supp No 10, ch. IV(E), 42-43, A/56/10 (2001) [**“ARSIWA Commentary”**].

¹⁹ Summary Record of the 1251st Meeting, A/CN.4/SR.1251 (May 6-Jul. 26, 1974) in I Y.B. INT’L L. COMM’N ¶16 (1974); *RENFE v. Spain*, ECHR, Application 35216/97 (Sep. 8, 1997); *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of Oct. 12, 2005, ¶82.

²⁰ J. CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 132 (2013) [**“Crawford Commentary”**].

²¹ *Bosh International Inc. and B&P Ltd. Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Oct. 25, 2012, ¶173.

²² *Compromis*, ¶11.

²³ G. PETROCHILOS, *ATTRIBUTION: STATE ORGANS AND ENTITIES EXERCISING ELEMENTS OF GOVERNMENTAL AUTHORITY, IN ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 353 (2018); *Petrolane, Inc. et. al. v. Iran et. al.*, 27 Iran-U.S. Cl.Tr. 64, ¶¶85–97 (1991).

c) ALTERNATIVELY, RAKKAB EXERCISES EFFECTIVE CONTROL OVER DORTA'S WRONGFUL ACTS.

Under CIL,²⁴ the conduct of an entity will be attributable to the State if it was under instructions or direction or control of that State while carrying out such act.²⁵ The degree of control required for such attribution is 'effective control'. Such 'effective control' requires both general control over the entity and specific control over the act by the State.²⁶ General control is established if the State controls decision-making and funding of the entity.²⁷ Rakkab exerts general control over DORTA, as evidenced by its funding and decision-making powers.²⁸ Specific control is established when the State is involved in implementing the specific act.²⁹ In case of a monopoly, the State's exercise of regulatory powers translates into direct involvement of the State in the company's activities.³⁰ Rakkab is involved in both wrongful acts i.e. *first*, environment and human right violations by Yak hunting and *second*, non-sharing of benefits obtained from manufacturing Gallvectra.

First, Rakabbi Prime Minister's promise to monitor DORTA's Yak hunting, authorization of DORTA to hunt the same number of Yaks as before,³¹ and releasing YakTrakker to enable

²⁴ *ARSIWA*, art. 8; *Bosnian Genocide*, ¶398.

²⁵ *ARSIWA*, art 8.

²⁶ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award of Nov. 6, 2008, ¶173; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of Jun. 18, 2010, ¶179.

²⁷ *Deutsche*, ¶405(b).

²⁸ *Supra* Issue A.I.a.iii.

²⁹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of Aug. 27, 2009, ¶¶125-129.

³⁰ H. Christiansen, *Balancing Commercial and Non-Commercial Priorities of State-Owned Enterprises* 14, 31 (OECD Corporate Governance Working Papers No. 6, 2013).

³¹ *Compromis*, ¶45.

efficient hunting, highlight the close involvement of Rakkab in DORTA's Yak hunting³² *Second*, Rakkab allowed DORTA to test the efficacy of Gallvectra, approved its use as a prescription drug and granted a patent over it.³³ Therefore, Rakkab exercises effective control, by involvement in both wrongful acts.

d) IN ANY EVENT, DORTA'S WRONGFUL ACTS WERE ADOPTED AND ACKNOWLEDGED BY RAKKAB.

Under CIL, conduct of a private entity is attributable to the State if it acknowledges and adopts the conduct as its own.³⁴ Such acknowledgement can be express or implied.³⁵ Rakkab impliedly adopted and acknowledged both of DORTA's wrongful acts i.e. environment and human right violations by Yak hunting and non-sharing of benefits obtained from manufacturing Gallvectra. In *Lighthouses*, Greece was attributed responsibility based on its implied adoption by continuing the situation created by Crete, as if it were a 'regular transaction'.³⁶ Similarly, despite protests from the international community,³⁷ Rakkab, *first*, continued the Yak hunting, granting DORTA a license to hunt 30,000 Yak annually.³⁸ *Second*, Rakkab was aware that Gallvectra was inspired by Aurokan traditional knowledge since Aurokans had protested against DORTA's patent application.³⁹ Despite such protests, Rakkab subsequently granted DORTA the patent over

³² *Compromis*, ¶¶31, 33.

³³ *Compromis*, ¶¶14, 17, 20.

³⁴ *ARSIWA*, art. 11; *ARSIWA Commentary*, 52.

³⁵ *Lighthouses Arbitration between France and Greece (Claims Nos. 11 to 4)*, (1956) 23 ILR 81, 91 [**"Lighthouses"**]; *A-G (Israel) v. Eichmann*, (1962) 36 ILR 277; *ARSIWA Commentary*, 53; *Crawford Commentary*, 183.

³⁶ *Lighthouses*, 91.

³⁷ *Compromis*, ¶¶28, 30, 45.

³⁸ *Compromis*, ¶¶23, 35.

³⁹ *Compromis*, ¶17.

Gallvectra.⁴⁰ Consequently, Rakkab impliedly acknowledged and adopted DORTA's unsustainable Yak hunting and non-sharing of benefits from manufacture of Gallvectra as its own.

II. Alternatively, Rakkab is responsible for its own failure to prevent DORTA from committing wrongful acts.

ICCPR,⁴¹ ICESCR,⁴² and Nagoya⁴³ to which both States are parties,⁴⁴ and the CIL to prevent harm to the environment of other States,⁴⁵ all impose a due diligence obligation on States to prevent private entities from violating the obligations contained therein.⁴⁶ Such due diligence obligation is applicable to Rakkab [a] and it violates the same by failing to prevent DORTA[b] from committing the wrongful acts.

⁴⁰ *Compromis*, ¶19.

⁴¹ International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, art. 2(1) [“**ICCPR**”].

⁴² International Covenant on Cultural, Economic and Social Rights, Jan. 3, 1976, 993 U.N.T.S. 3, art. 2(1) [“**ICESCR**”].

⁴³ 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, Oct. 29, 2010, UNEP/CBD/COP/DEC/X/1, art. 16 [“**Nagoya**”].

⁴⁴ *Compromis*, ¶48.

⁴⁵ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. 14, ¶101 (Apr. 28, 2010) [“**Pulp Mills**”].

⁴⁶ *Pulp Mills*, ¶197; Velásquez Rodríguez v Honduras, IACHR, Series C No. 4 (Jul. 29, 1988), ¶172 [“**Velásquez**”]; E. MORGERA, UNRAVELING THE NAGOYA PROTOCOL: A COMMENTARY ON THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING TO THE CONVENTION ON BIOLOGICAL DIVERSITY 380 (2015) [“**Unraveling Nagoya**”].

a) RAKKAB IS UNDER AN OBLIGATION TO PREVENT DORTA FROM COMMITTING THE WRONGFUL ACTS.

The obligation to undertake due diligence by preventing third party abuse is applicable when the State has a nexus with the private actor.⁴⁷ Specifically, the State remains responsible for acts of erstwhile public bodies, which have been privatized, and still undertake public services.⁴⁸ This obligation also extends to preventing such private actors within a State's jurisdiction from violating human rights of persons outside its territory.⁴⁹ Consequently, Rakkab is under an obligation to prevent DORTA from committing wrongful acts.

b) RAKKAB'S ACTIONS VIOLATE ITS DUE DILIGENCE OBLIGATION BY FAILING TO PREVENT DORTA FROM COMMITTING WRONGFUL ACTS.

Due diligence obligation to prevent third party abuse requires States to take all reasonably appropriate measures to prevent, punish and redress such violations.⁵⁰ Such measures include having adequate legislation, monitoring of activities of private entities, and providing enforceable remedies in case of abuse,⁵¹ such as in case of *SERAC*.⁵² Rakkab took no such measure and in fact, allowed DORTA to continue hunting the same amount of Yaks annually.⁵³

⁴⁷ M. Hakimi, *State Bystander Responsibility*, 21 EJIL 341, 354 (2010).

⁴⁸ Ximenes Lopes v. Brazil, IACHR, Series C No. 149, ¶141 (Jul. 4, 2006); U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, Principle 4 (Mar. 21, 2011) ["UNGP"].

⁴⁹ *The Environment and Human Rights*, OC-23/18, IACHR, Series A No. 23, ¶101 (Nov. 15, 2017).

⁵⁰ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Case No. 17, Feb. 1, 2011, ¶120; *Ilaşcu and others v. Moldova and Russia*, 2004 ECHR 318, ¶ 334; *Nagoya*, art. 16.

⁵¹ *Velásquez*, ¶175; *UNGP*, Principle 1; *Pulp Mills*, ¶197.

⁵² *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, ACHR, Communication No. 155/96, ¶58 (Oct. 27, 2001).

⁵³ *Compromis*, ¶¶36, 44.

Further, Rakkab is facilitating appropriation of traditional knowledge by granting patent over Gallvectra,⁵⁴ failing to ensure mutually acceptable benefit sharing terms.⁵⁵ Moreover, Rakkabi law failed provide redress for DORTA's acts.⁵⁶ Therefore, Rakkab is responsible for its failure to take reasonable measures to prevent DORTA from committing environmental and human right violations by Yak hunting,⁵⁷ and non-sharing of benefits obtained from manufacturing Gallvectra.⁵⁸

B. THE HARVESTING OF THE YAK IN RAKKAB VIOLATES RAKKAB'S INTERNATIONAL OBLIGATIONS RELATING TO THE PROTECTION OF ENDANGERED SPECIES AND THE ENVIRONMENT, INCLUDING THOSE UNDER RELEVANT CONVENTIONS, AND RAKKAB IS OBLIGATED TO END YAK HARVESTING ON ITS TERRITORY.

Rakkab fails to fulfill its obligations under the CMS⁵⁹ [I], CBD⁶⁰ and CIL [II], and CITES⁶¹ [III]. Consequently, Rakkab is obligated to end Yak hunting on its territory [IV].

I. Rakkab's actions violate its obligation under CMS.

Rakkab's actions violate Article III.5 of the CMS, which prohibits hunting, since Rakkab's hunting is not conducted for scientific purposes [a] or under extraordinary circumstances [b] which are the only exceptions.

⁵⁴ *Compromis*, ¶19.

⁵⁵ *Nagoya*, art. 16.

⁵⁶ *Clarifications*, ¶3.

⁵⁷ *Infra* Issues B, C.

⁵⁸ *Infra* Issue D.

⁵⁹ Convention on the Conservation of Migratory Species of Wild Animals, Jun. 6, 1979, 1651 U.N.T.S. 333 ["CMS"].

⁶⁰ Convention on Biological Diversity, Jun. 5, 1992, 1760 U.N.T.S. 79 ["CBD"].

⁶¹ Convention on the International Trade in Endangered Species on Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 ["CITES"].

a) RAKKAB'S HUNTING IS NOT EXEMPTED AS IT IS NOT FOR SCIENTIFIC PURPOSES.

Article III.5.a allows hunting for 'scientific purposes'. 'Science' is a systematic study of structure and behaviour through observation and experiment.⁶² The expression 'purpose' excludes all other purposes⁶³ including a commercial activity, not for the purposes of systematic study through observation and experiment. In *Whaling in the Antarctic*,⁶⁴ it was held that Japan's project's design and implementation was not according to scientific purposes as there was no analysis of usage of lethal methods, no rationale for sample sizes, and no setting up of time frame for the research. Further, commercial purpose involves forms of economic benefit,⁶⁵ and all incidental activities.⁶⁶

The design and implementation of Rakkab's activity is unreasonable to achieve its purposes as *first*, there is no analysis on procuring gallbladder without killing Yaks, *second*, no rationale for keeping the limit as 30,000 for DORTA's license⁶⁷ and *third*, Rakkab has not set any time frame for the research. Rakkab's hunting is purely commercial as it is for manufacturing drugs.⁶⁸ Therefore, Rakkab's hunting is not exempted under the exception for scientific purposes.

⁶² Vienna Convention on the Law of the Treaties, Jan. 27, 1980, 1155 U.N.T.S. 332, art. 31 ["VCLT"]; *Science Definition*, Oxford Online, <https://en.oxforddictionaries.com/definition/science>.

⁶³ Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), 2009 I.C.J. 213, ¶61 (Jul. 13) ["Costa Rica"].

⁶⁴ *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), 2014 I.C.J. 226, ¶¶67, 144, 147, 214 (Mar. 31).

⁶⁵ CITES Conference of Parties ["CoP"], Resolution Conference 5.10, Rev. CoP15, (Mar. 13-25, 2010).

⁶⁶ *Costa Rica*, ¶73.

⁶⁷ *Compromis*, ¶45.

⁶⁸ *Compromis*, ¶23.

b) RAKKAB'S HUNTING IS NOT EXEMPTED AS THERE ARE NO EXTRAORDINARY CIRCUMSTANCES.

Article III.5.d allows hunting in extraordinary circumstances. 'Extraordinary circumstances' means 'very unusual or remarkable'.⁶⁹ Since the purpose of the CMS is to protect endangered species from becoming extinct,⁷⁰ this exception is narrowly interpreted and is applicable when hunting is *first*, the only option available to face the extraordinary circumstances.⁷¹ *Second*, such exception must be precise in time and space and *third*, when it is not disadvantageous to the species.⁷²

First, various processes and drugs are available for the treatment for diabetes,⁷³ including Metformin, specifically mandated by WHO as an essential medicine for diabetes.⁷⁴ Therefore, in absence of evidence that Gallvectra is more effective than other medicines, it is not the only option. *Second*, Rakkab's law imposes no limit on hunting and period of license, and it is not

⁶⁹ *VCLT*, art. 31; *Extraordinary Definition*, Oxford Online, <https://en.oxforddictionaries.com/definition/extraordinary>.

⁷⁰ *CMS*, Preamble, art. II.2.

⁷¹ Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly, A/CN.4/SER.A/1966/Add.1 in II Y.B. OF THE INT'L L. COMM'N 219 (1966) [**"Yearbook"**]; A. Trouwborst, *Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species*, 2 CORNELL INT'L L. J. ONLINE 41, 44 (2014).

⁷² *CMS*, art. III.5.

⁷³ *History of Diabetes*, <http://www.diabetes.org/research-and-practice/student-resources/history-of-diabetes.html>; *History of Diabetes, Treating Diabetes: 1921 to the Present Day*, <https://www.diabete.qc.ca/en/understand-diabetes/all-about-diabetes/history-of-diabetes/treating-diabetes-1921-to-the-present-day>.

⁷⁴ World Health Organization, *20th Essential Medicines List*, Jun. 6, 2017, http://www.who.int/medicines/publications/essentialmedicines/20th_EML2017.pdf [**"WHO"**].

mandatory for MoA to monitor compliance and impose sanctions.⁷⁵ *Third*, it is unsustainable for Yaks⁷⁶ and cannot be exempted under the exception of extraordinary circumstances.

II. Rakkab fails to fulfill its obligation under CBD and CIL.

Rakkab is causing harm to the ecosystem by hunting Yaks unsustainably under the CBD [a], causing transboundary harm to Aurok [b], and failing to cooperate with Aurok [c] under CBD and CIL.

a) RAKKAB IS HUNTING YAKS UNSUSTAINABLY.

CBD requires States to use its resources sustainably.⁷⁷ Unsustainable use *inter alia*, is exhibited when hunting exceeds reproduction;⁷⁸ when hunting affects the dependent community economically,⁷⁹ or when other parts of the carcass of the animals remain unused.⁸⁰ To minimize effects on biodiversity and ensure sustainable use, States must adopt measures in good faith.⁸¹ Subsequent State practice evidences that such measures include full and effective participation of local communities in policy making, effective monitoring, and implementation of best practices.⁸² Accordingly, Russia along with other Caspian States,⁸³ Fiji⁸⁴ and over 80 States⁸⁵

⁷⁵ *Compromis*, ¶44.

⁷⁶ *Infra* Issue B.II.

⁷⁷ *CBD*, art. 2, 10.

⁷⁸ CBD CoP, Decision VII/12, UNEP/CBD/COP/DEC/VII/12 ¶8(1) (Apr. 13 2004) [**“Decision VII/12”**]; Secretariat of the Convention on Biological Diversity, *Conservation and Use of Wildlife-Based Resources: The Bushmeat Crisis*, 33 CBD TECHNICAL SERIES 7 (2008) [**“CBD Report”**].

⁷⁹ *CBD Report*, 7.

⁸⁰ T. Carnie, *Animal Waste of Use to Muti Trade*, Sunday Times, Oct. 7, 2018, <https://www.pressreader.com/south-africa/sunday-times/20181007/282716227944863>; M. Murray, *Overkill and Sustainable Use*, 299 SCIENCE 1851 (2003).

⁸¹ *VCLT*, art. 26; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1954-9*, 35 BRIT. Y.B. INT'L L. 183, 207-16 (1959); *CBD*, art. 10.

⁸² *Decision VII/12*; CBD CoP, Decision XII/12, UNEP/CBD/COP/DEC/XII/12 (Oct. 13, 2014).

banned the capturing of sturgeons, sea turtles and whales respectively. Similarly, Peru entrusted management of wildlife in a reserve to local communities to ensure sustainable harvesting.⁸⁶

Aurokans have been harvesting Yaks for centuries, their population *consistently* being 750,000.⁸⁷ This evidences that Aurokans were harvesting according to reproduction rates, as confirmed by the YLSA report, which is reliable as it is an independent organization conducting multiple surveys.⁸⁸ Contrarily, Rakkab, although a developed State,⁸⁹ issued nearly 300 licenses for killing Yaks against erstwhile 20-30 licenses,⁹⁰ knowing the dependence of Aurokans on Yaks and the slow reproduction of Yaks.⁹¹ Consequently, the number of Yaks reduced to 680,000 in 2016 from 750,000,⁹² exhibiting that the hunting exceeded reproduction. Moreover, Rakkabi hunters leave the carcasses on the fields rendering the remaining carcasses useless, which Aurokans would use for their subsistence.⁹³ Further, the new regulations facilitate increase in

⁸³ A. Blomfield, *Russia Bans Sturgeon Fishing in Caspian Sea*, The Telegraph, Mar. 28, 2008, <https://www.telegraph.co.uk/news/earth/earthnews/3337528/Russia-bans-sturgeon-fishing-in-Caspian-Sea.html>.

⁸⁴ S. Solomon, *On a Fijian Island, Hunters Become Conservators of Endangered Turtles*, The New York Times, Jan. 2, 2017, <https://www.nytimes.com/2017/01/02/world/asia/on-a-fijian-island-hunters-become-conservators-of-endangered-turtles.html>.

⁸⁵ *Commercial Whaling*, International Whaling Commission, <https://iwc.int/commercial>.

⁸⁶ *CBD Report*, 7.

⁸⁷ *Compromis*, ¶1.

⁸⁸ *Compromis*, ¶27; *Bosnian Genocide*, ¶135.

⁸⁹ *Compromis*, ¶8.

⁹⁰ *Compromis*, ¶23.

⁹¹ *Reproduction in the Yak* in FOOD AND AGRICULTURE ORGANIZATION, THE YAK SECOND EDITION (2003).

⁹² *Compromis*, ¶24.

⁹³ *Compromis*, ¶24.

hunting⁹⁴ and do not require effective monitoring of Yaks, as the license is given for 3 years without any exception of monitoring before such time period.⁹⁵ Therefore, Rakkab has been hunting Yaks unsustainably.

b) RAKKAB IS CAUSING TRANSBOUNDARY HARM TO AUROK.

(i) *Rakkab is causing transboundary harm to Aurok.*

States must not use their territories in a way which harms the environment of other States under CBD⁹⁶ and CIL, as affirmed by judicial decisions.⁹⁷ Such harm requires a causal link⁹⁸ and must be ‘significant’, which is interpreted as more than detectable, not necessarily serious⁹⁹ with proof on balance of probabilities.¹⁰⁰ Such harm to the environment includes harm to quality of life and health of human beings¹⁰¹ and to the biological resources such as flora and fauna, including¹⁰²

⁹⁴ *Clarifications*, ¶9; *Compromis*, ¶45.

⁹⁵ *Compromis*, ¶45.

⁹⁶ *CBD*, art. 3.

⁹⁷ *Trail Smelter (United States, Canada)*, 3 U.N.R.I.A.A. 1905, 1965; *Rio Declaration on Environment and Development*, Jun. 14 1992, 31 I.L.M. 874, Principle 2 [**“Rio Declaration”**]; *Corfu Channel (U.K. & Northern Ireland v. Albania)*, 1949 I.C.J. 4, 22.

⁹⁸ X. HANQIN, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW* 6 (2003); J. BARBOZA, *THE ENVIRONMENT, RISK AND LIABILITY IN INTERNATIONAL LAW* 11 (2011).

⁹⁹ *Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001* in *Report of the International Law Commission on the Work of its Fifty-Third Session, A/CN.4SER.A/2001/Add.1 (Part 2)* 152 (Apr. 23-June 1, July 2-Aug. 10, 2001) [**“ILC on Transboundary Harm”**].

¹⁰⁰ *Pulp Mills*, ¶26 (Separate Opinion of Judge Greenwood).

¹⁰¹ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, ¶29 (Jul. 8).

¹⁰² *Eleventh Report of the Special Rapporteur on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law, A/CN.4/468*, ¶6 (May 25, 1995) (Julio Barboza).

harm to key biological processes such as migration.¹⁰³ Such migration undertakes important functions like seed dispersion and nutrient cycling by seed dispersion, pest control and manuring.¹⁰⁴

Aurokans witnessed a significant decline in the size of herds of Yaks, with Yaks not reaching the northernmost region.¹⁰⁵ It evidences disturbed migration pattern, due to extensive hunting by Rakkab, in absence of any natural cause.¹⁰⁶ Such decline itself constitutes more than significant harm, to a Yak-dependent least-developed country's quality of life,¹⁰⁷ as it will lead to their extinction by 2040.¹⁰⁸ Additionally, disrupted migration of Yaks affects the ecosystem as Yaks undertake important functions, like seed dispersion and manuring.¹⁰⁹ Therefore, Rakkab's hunting which is more than what it was before the Regulation¹¹⁰ is causing transboundary harm to Aurok.

(ii) In any event, Rakkab failed to fulfill its due diligence obligations.

States, especially developed ones, must undertake due diligence, that is, appropriate measures to prevent significant transboundary harm, if there is a risk of such harm.¹¹¹ Such measures include

¹⁰³ R. Fischman & L. Robert, *The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance*, 28 VA. ENVTL. L. J. 173, 176 (2010).

¹⁰⁴ *Id.*

¹⁰⁵ *Compromis*, ¶29.

¹⁰⁶ *Compromis*, ¶27.

¹⁰⁷ *Compromis*, ¶7.

¹⁰⁸ *Compromis*, ¶27.

¹⁰⁹ K. RAMESHA ET. AL., *INDIGENOUS TRADITIONAL KNOWLEDGE OF YAK REARERS 2* (2009).

¹¹⁰ *Clarifications*, ¶9; *Compromis*, ¶45.

¹¹¹ *ILC on Transboundary Harm*, 153.

enacting and enforcing appropriate legislation, and monitoring activities.¹¹² As the Aurokans hunt Yaks for their subsistence,¹¹³ it is likely that such hunting could significantly harm Aurok. Further, Rakkab has been a party to the CBD before it started its activities of manufacturing Gallvectra in 2011, yet till 2016, Rakkab did not enact any legislation or monitor activities.¹¹⁴ Therefore, Rakkab failed to fulfill its due diligence obligations.

c) RAKKAB FAILS TO DISCHARGE ITS OBLIGATION TO COOPERATE.

States have a duty to cooperate with other States,¹¹⁵ especially in case of shared natural resources¹¹⁶ under the CBD¹¹⁷ and CIL, as evidenced by State practice¹¹⁸ and *opinio juris*.¹¹⁹ Such cooperation entails *meaningful* negotiations with other States,¹²⁰ *directly* notifying other States,¹²¹ assessment of impacts¹²² and prior exchange of information.¹²³ Despite several

¹¹² *Pulp Mills*, ¶197; R. Higgins, *General Course on Public International Law*, 5 RECUEIL DES COURS 9, 207 (1991).

¹¹³ *Compromis*, ¶2.

¹¹⁴ *Clarifications*, ¶7.

¹¹⁵ MOX Plant (Ireland v. U.K.), ITLOS Case No. 10, Dec. 3, 2001, ¶83.

¹¹⁶ *Pulp Mills*, ¶113; Gabčíkovo-Nagymaros Project (Hungary/Slovakia) 1997 I.C.J. 7, ¶150 (Sept. 25) [“**Gabčíkovo**”].

¹¹⁷ *CBD*, art 5.

¹¹⁸ *CBD*, art. 5; *CMS*, art. I; *Rio Declaration*, Principles 9, 12.

¹¹⁹ Cooperation in the Field of the Environment Concerning Natural Resources Shared by Two Or More States, A/RES/3129 (XXVIII) (Dec. 13, 1973) [“**UNGA 3129**”]; The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, A/RES/2625 (XXV) (Oct. 24, 1970) [“**UNGA 2625**”].

¹²⁰ Southern Bluefin Tuna (N.Z., Australia v. Japan) ITLOS Case No. 3, Aug. 27, 1999, ¶60 [“**Bluefin Tuna**”]; Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), 27 UNRIAA 133, ¶47 (2005).

¹²¹ *Pulp Mills*, ¶113; *UNGA 3129*.

¹²² *Pulp Mills*, ¶113.

attempts, Rakkab never considered the concerns of Aurokans¹²⁴ and refused to halt hunting temporarily.¹²⁵ Further, Rakkab neither notified Aurok about the advertisement which accelerated hunting nor did it assess the impacts before starting its activities.¹²⁶ Therefore, Rakkab fails to discharge its duty to cooperate.

III. Rakkab's actions violate its obligations under CITES.

Article II.3 of the CITES requires all the States to cooperate in controlling trade in a species listed in Appendix III. Such cooperation in good faith,¹²⁷ requires all range States to issue certificate of origin¹²⁸ and to keep trade limited in line with the objective of sustainable use under CITES.¹²⁹ Although Rakkab fulfilled the requirement of issuing certificates of origin,¹³⁰ it failed to keep trade limited, as evidenced from the sales of Gallvectra¹³¹ and unsustainable hunting of Yaks,¹³² despite Yaks being under Appendix III.¹³³ Therefore, by failing to take measures to limit the trade under good faith, Rakkab's actions violate its obligations under CITES.

¹²³ Cooperation between States in the Field of the Environment, A/RES/2995 (XXVII) (Dec. 15, 1972); P. BIRNIE ET. AL., INTERNATIONAL LAW AND THE ENVIRONMENT 171 (1992).

¹²⁴ *Compromis*, ¶¶17, 18, 25.

¹²⁵ *Compromis*, ¶31.

¹²⁶ *Clarifications*, ¶7.

¹²⁷ *VCLT*, art. 26; *UNGA 2625*.

¹²⁸ *CITES*, art. V.3.

¹²⁹ CITES CoP, Resolutions 16.3, 16.4, Rev. CoP17 (Mar. 3-14, 2013).

¹³⁰ *Clarifications*, ¶6.

¹³¹ *Compromis*, ¶¶21, 38.

¹³² *Supra* Issue B.II.

¹³³ *Compromis*, ¶40.

IV. Rakkab is obligated to end Yak hunting in its territory.

Under international law, States are obligated to cease a wrongful activity, in case it is continuing in nature.¹³⁴ Rakkab's actions violate its obligations under CMS, CBD, CITES and CIL by hunting Yaks and consequently, it is obligated to end such hunting.

C. THE HARVESTING OF YAK ON THE TERRITORY OF RAKKAB VIOLATES THE CULTURAL AND RELIGIOUS RIGHTS OF THE PEOPLE OF AUROK, AND RAKKAB MUST PROHIBIT SUCH HUNTING FORTHWITH.

Rakkab has extra-territorial obligations towards Aurokans [I] to respect their cultural and religious rights as, indigenous people [II] and in any event, as individuals [III], which it violates. Alternatively, Rakkab's actions do not constitute valid derogations or restrictions to Aurokan's rights [IV]. Consequently, Rakkab must prohibit such Yak hunting.¹³⁵

I. Rakkab is under an extra-territorial obligation to respect cultural and religious rights of Aurokans.

Rakkab is obligated to respect Aurokans' cultural and religious rights under ICESCR, C169 [a], and ICCPR [b].

a) RAKKAB IS OBLIGATED TO RESPECT AUROKANS' CULTURAL AND RELIGIOUS RIGHTS UNDER ICESCR AND C169.

Article 15 of ICESCR and Article 14 of C169 provide for cultural and religious rights to indigenous people and individuals. The object and purpose¹³⁶ of such human rights treaties is protecting the universality of human rights, as evidenced by their Preambles.¹³⁷ Accordingly, in

¹³⁴ *ARSIWA*, art. 30.

¹³⁵ *ARSIWA*, art. 30; *Supra* Issue B.IV.

¹³⁶ *VCLT*, art. 31(a).

¹³⁷ *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, OC-2/82, IACHR, Series A No. 2, ¶29 (Sep. 24, 1982).

absence of provisions limiting applicability, States are obligated to respect¹³⁸ rights of people, indigenous or otherwise, located outside their jurisdiction or control also under C169¹³⁹ and ICESCR,¹⁴⁰ when their actions have effects on people outside their own territory.¹⁴¹ For instance, in absence of any applicability-limiting provision, the Convention on Elimination of Discrimination,¹⁴² and American Charter on Human Rights have been applied to effects of State actions beyond their territory,¹⁴³ especially towards indigenous people.¹⁴⁴ Therefore, Rakkab is obligated to respect Aurokans' rights which are being affected by their unsustainable hunting.¹⁴⁵

b) RAKKAB IS OBLIGATED TO RESPECT AUROKANS' CULTURAL AND RELIGIOUS RIGHTS UNDER ICCPR.

Article 2(1) of the ICCPR obligates States to 'respect' and 'ensure' the rights of individuals within their 'jurisdiction and control'. The phrase 'jurisdiction and control' imposes a territorial

¹³⁸ *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Preliminary Note on Mission to Ecuador and Colombia*, A/HRC/7/11/Add.3, ¶17 (Mar. 4, 2007) [**"Report on Health"**].

¹³⁹ B. SAUL, *INDIGENOUS PEOPLES AND HUMAN RIGHTS: INTERNATIONAL AND REGIONAL JURISPRUDENCE* 104 (2016) [**"Saul"**].

¹⁴⁰ M. LANGFORD ET. AL., *GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW* 189 (2013).

¹⁴¹ ETO CONSORTIUM, *MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS* Principle 9(b) (2013); *Report on Health*, ¶17; UN Committee on Economic, Social and Cultural Rights [**"UNCESCR"**], *General Comment No. 12: The Right to Adequate Food*, E/C.12/1999/5, ¶36 (May 12, 1999).

¹⁴² UN Committee on the Elimination of Racial Discrimination [**"CERD"**], *Concluding Observations on The Eighteenth to Twentieth Periodic Reports of The United Kingdom and Northern Ireland*, CERD/GBR/CO/18-20, ¶29 (Sept. 1, 2011).

¹⁴³ *Saldaño v. Argentina*, IACHR, Annual Series Report No. 38/99, ¶17 (Mar. 11 1999).

¹⁴⁴ CERD, *Consideration of reports submitted by States parties under article 9 of the Convention: Concluding observations of CERD: Guatemala*, CERD/C/GTM/Co/11, ¶17 (May 15, 2006).

¹⁴⁵ *Supra* Issue B.II.e.

limitation only on the obligation to ‘ensure’ positive rights. However, this phrase does not limit the obligation to ‘respect’ to individuals within the State as per the object and purpose,¹⁴⁶ confirmed by *travaux préparatoires*¹⁴⁷ and subsequent State practice.¹⁴⁸ Therefore, Rakkab is obligated to respect Aurokan cultural and religious rights under ICCPR.

II. Rakkab’s actions violate the cultural and religious rights of Aurokans as indigenous people.

Aurokans have cultural and religious rights as indigenous people [a] which Rakkab’s unsustainable Yak hunt violates [b].

a) AUROKANS HAVE CULTURAL AND RELIGIOUS RIGHTS AS INDIGENOUS PEOPLE.

Under international law, a group of people is identified as ‘indigenous’, if it satisfies two criteria: *first*, they self-identify as indigenous;¹⁴⁹ and *second*, the people descend from the population inhabiting the country at the time of colonisation,¹⁵⁰ retaining some or all of their social or cultural institutions.¹⁵¹ Such institutions include religious practices¹⁵² and hunting practices for

¹⁴⁶ F. COOMANS & M. KAMMINGA, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, 227–99 (2004) *in* M. MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 213 (2013).

¹⁴⁷ Summary Record of 138th Meeting, E/CN.4/365, ¶21 (Statement of France) (Apr. 6, 1950).

¹⁴⁸ Lopez Burgos v. Uruguay, (1981) 68 ILR 29; Celiberti de Casariego v. Uruguay, (1981) 68 ILR 41.

¹⁴⁹ Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, 1650 U.N.T.S. 383, art. 1 [“C169”].

¹⁵⁰ Study on the Problem of Discrimination against Indigenous Populations, E/CN.4/SUB.2/1986/7ADD.4, ¶39, (1986) (José R. Martínez Cobo) [“Cobo”].

¹⁵¹ Cobo, ¶¶81, 83-103.

¹⁵² Cobo, ¶¶109, 90, 108.

traditional subsistence.¹⁵³ Subsequent State practice establishes marginalization is not a criterion for being recognized as indigenous¹⁵⁴ as evidenced by ‘Inuits’ of Greenland.¹⁵⁵

Aurokans have not only inhabited Gaur Highlands since before they were colonised¹⁵⁶ but have also retained their culture.¹⁵⁷ They still follow religious beliefs of their Pivzao ancestors, such as worshipping Kayleff,¹⁵⁸ celebrating festivals,¹⁵⁹ traditional Yak hunting,¹⁶⁰ and consumption of meat of Yak at communal events.¹⁶¹ They have also self-identified as ‘indigenous’.¹⁶² Therefore, Aurokans have cultural and religious rights as indigenous people.

b) RAKKAB’S ACTIONS VIOLATE CULTURAL AND RELIGIOUS RIGHTS OF AUROKANS.

(i) *Rakkab’s actions violate the right of Aurokans to participate in cultural life.*

States must respect the rights of indigenous people to participate in their culture under C169,¹⁶³ ICESCR,¹⁶⁴ and CIL, as evidenced by State practice¹⁶⁵ and *opinio juris*.¹⁶⁶ Additionally, Article

¹⁵³ *Report of the Human Rights Committee, CCPR/C/21/Rev.1/Add.5, ¶¶3.2, 7 (Apr. 8, 1994); Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, E/CN.4/2002/97/Add.1, ¶13 (Mar. 6, 2002) (Rodolfo Stavenhagen).*

¹⁵⁴ *VCLT*, art. 31(3)(b); Report of the Special Rapporteur in the Field of Cultural Rights on her Visit to Botswana, A/HRC/31/59/Add.1, ¶11 (Jan. 12, 2016); Eur. Parl. Doc. PV 58(II) ¶¶A, 1 (Feb. 9, 1994).

¹⁵⁵ UN Human Rights Committee, Report of the Working Group on the Universal Periodic Review, A/HRC/18/4 (Jul. 11, 2011).

¹⁵⁶ *Compromis*, ¶6.

¹⁵⁷ *Compromis*, ¶7.

¹⁵⁸ *Compromis*, ¶22, 24.

¹⁵⁹ *Compromis*, ¶2, 30.

¹⁶⁰ *Compromis*, ¶7.

¹⁶¹ *Compromis*, ¶4, 13.

¹⁶² *Compromis*, ¶21, 42.

¹⁶³ *C169*, art. 2(1), 5, 6, 13, 14.

27 of the ICCPR specifically mandates that States respect the cultural rights of indigenous people as ‘minorities’.¹⁶⁷ The participation in culture arises from following a way of life using cultural resources,¹⁶⁸ traditional hunting,¹⁶⁹ practice of religion related to natural resources,¹⁷⁰ and observing cultural values attached to food.¹⁷¹ Such right is violated if there is a general reduction in the cultural resources available to the people,¹⁷² especially when the resources is required for subsistence of the vulnerable population.¹⁷³ Consequently, States are obligated to conduct

¹⁶⁴ *ICESCR*, art. 15; *UNCESCR, General Comment No. 21: Right of everyone to take part in cultural life*, E/C.12/GC/21, ¶¶37, 55 (Dec. 21, 2009) [“**GC21**”].

¹⁶⁵ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Mar. 18, 2007, 2440 U.N.T.S. 311, art. 2; *International Convention on the Elimination of All Forms of Racial Discrimination*, Jan. 4, 1969, 660 U.N.T.S. 195, art. 5(e)(vi); *Political Constitution of the Bolivarian Republic of Venezuela* 1999, art. 119.

¹⁶⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, art. 11(1) (Oct. 2, 2007) [“**UNDRIP**”]; *ASEAN Declaration on Cultural Heritage*, art. 1(d) (Bangkok, 2000).

¹⁶⁷ S. CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 839-840 (2013) [“**ICCPR Commentary**”]; *Report of the Human Rights Committee*, A/45/40vol.1, 95 (1990) in J. ANAYA, *INDIGENOUS PEOPLE IN INTERNATIONAL LAW* 100 (2000).

¹⁶⁸ *GC21*, ¶15.

¹⁶⁹ *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, CCPR/C/21/Rev.1/Add.5, ¶7 (Apr. 8, 1994).

¹⁷⁰ *GC21*, ¶¶32, 55(c); *African Commission on Human and Peoples’ Rights v. the Republic of Kenya*, ACHR, Application 006-2012, ¶160 (May 26, 2017).

¹⁷¹ *GC21*, ¶16(e).

¹⁷² *Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP)*, Doc. GB 270/16/4.

¹⁷³ *Yakye Axa Indigenous Community v. Paraguay*, IACHR Series C No. 125, ¶163 (Jun. 17, 2005).

effective consultations to obtain consent of people;¹⁷⁴ mere general announcement does not suffice,¹⁷⁵ especially in case of shared resources as with Huichol people.¹⁷⁶

Aurokans' festivals, and calendars are based on Yak's migration¹⁷⁷ and Yak hunting is intrinsic to Aurokan culture and subsistence.¹⁷⁸ However, Rakkab's unsustainable hunting¹⁷⁹ lead to scarcity of Yak for food consumption,¹⁸⁰ traditional hunting,¹⁸¹ and rites of passage for Aurokans. Moreover, Rakkab failed to carry out any assessment or consultation before hunting Yak. Therefore, Rakkab's actions violate Aurokans' cultural right.

(ii) Rakkab's actions violate the right of Aurokans to practice their religion.

States must respect the rights of indigenous people to practice their religion as an absolute¹⁸² right under ICCPR,¹⁸³ C169¹⁸⁴ and CIL, as evidenced by State practice¹⁸⁵ and *opinio juris*.¹⁸⁶

¹⁷⁴ GC21, ¶¶15, 55(e); ICCPR, art. 27; Poma Poma v. Peru, UNHRC, Communication No. 1457/06, ¶7.6 [“Poma”].

¹⁷⁵ Judgment SU-039/97, Columbian Constitutional Court, in ILO, APPLICATION OF CONVENTION NO. 169 BY DOMESTIC AND INTERNATIONAL COURTS IN LATIN 71 (2009) [“CASEBOOK”]; Poma, ¶7.6.

¹⁷⁶ Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education, Doc. GB 270/16/3, ¶34 [“Mexico”].

¹⁷⁷ *Compromis*, ¶¶1, 3.

¹⁷⁸ *Compromis*, ¶¶7, 22, 31, 41.

¹⁷⁹ *Supra* Issue C.II.c.i.

¹⁸⁰ *Compromis*, ¶41.

¹⁸¹ *Compromis*, ¶¶29, 41.

¹⁸² Atasoy and Sarkut v. Turkey, UNHRC, Communication No. 1853-54/08, ¶17.45 (Jun. 19, 2012).

¹⁸³ ICCPR, art. 18, 27; ICCPR Commentary, 860.

¹⁸⁴ C169, art. 5(1), 13.

Such practice includes ceremonial rituals,¹⁸⁷ dietary regulations,¹⁸⁸ observing holidays and rites of passage.¹⁸⁹ Article 18(2) of the ICCPR bars practices that restrict access to religion. Reduction in religious resources restricts such access.¹⁹⁰

Yak has religious significance for Aurokans, since it was formed in the image of their God,¹⁹¹ its arrival was celebrated as festivals and its soup was consumed as a ritual.¹⁹² Rakkab's hunt denied young Aurokans exercise of religious rights of starting families and participating in their religion,¹⁹³ without consultation.¹⁹⁴ Therefore, Rakkab's actions violate the religious rights of Aurokans.

¹⁸⁵ Political Constitution of Nicaragua, art. 180; Plan de Sánchez Massacre v. Guatemala, IACHR, Series C No. 105, ¶ 36(4); ICCPR, art. 18.

¹⁸⁶ UNDRIP, art. 12.

¹⁸⁷ ICCPR Commentary, 566.

¹⁸⁸ Hudoyberganova v. Uzbekistan, UNHRC, Communication No. 93/100, ¶17.19 (Nov. 5, 2004).

¹⁸⁹ CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), ¶4, CCPR/C/21/Rev.1/Add.4 (Jul. 30, 1993) [“GC22”].

¹⁹⁰ Mexico, ¶19.

¹⁹¹ Compromis, ¶2.

¹⁹² Compromis, ¶4.

¹⁹³ Compromis, ¶41.

¹⁹⁴ Supra Issue C.II.a.i.

III. In any event, Rakkab’s actions violate the cultural and religious rights of Aurokans as individuals.

ICCPR and ICESCR recognize cultural and religious of every individual,¹⁹⁵ the same having collective elements too.¹⁹⁶ Therefore, Aurokans have such rights, even if they are not indigenous people and Rakkab violates both cultural [a] and religious rights of Aurokans [b].

a) RAKKAB’S ACTIONS VIOLATE THE CULTURAL RIGHTS OF AUROKANS.

Article 15 of ICESCR mandates States to respect the right of people to participate in national culture,¹⁹⁷ including following a way of life.¹⁹⁸ CIL provides that such rights over shared natural resources are violated if there is inequitable utilization of the same.¹⁹⁹ Equitable utilization requires consultation²⁰⁰ and proportional utilization as per past use,²⁰¹ considering dependent population, and economic and social needs.²⁰²

¹⁹⁵ ICCPR, art. 1, 18; ICESCR, art. 1, 15.

¹⁹⁶ GC21, ¶9.

¹⁹⁷ B. SAUL, ET. AL, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 1203 (2016) [“ICESCR Commentary”].

¹⁹⁸ Concluding observations of the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.13, ¶14 (May 20, 1997).

¹⁹⁹ Gabčikovo, ¶¶78, 85; UNGA 3129.

²⁰⁰ Charter of Economic Rights and Duties of States, A/RES/29/3281, art. 3 (Dec. 12, 1974); *Pulp Mills*, ¶81.

²⁰¹ Inter-American Bar Association, Proceedings of the Tenth Conference, Buenos Aires 1957 in G. Handl, *The Principle of ‘Equitable Use’ as Applied to Internationally Shared Natural Resources: Its Role in Resolving Potential International Disputes Over Transfrontier*, 14 RBDI 40, 49 (1977–8).

²⁰² International Law Association, *Report of the 52nd Conference* 484 (1967); The Law of Transboundary Aquifers, A/RES/68/118, art. V (Dec. 19, 2013).

Aurokans have central social and economic needs for Yak as their subsistence and they have harvested Yak in greater numbers as per past utilization.²⁰³ However, Rakkab is hunting Yak even for people of 85 other countries,²⁰⁴ causing a reduction in availability of Yak.²⁰⁵ Thus, Rakkab's inequitable use violates the cultural rights of Aurokans.

b) RAKKAB'S ACTIONS VIOLATE THE RELIGIOUS RIGHTS OF AUROKANS.

Article 18 of the ICCPR requires States to respect the rights of all people to access their religion, even for majority religions.²⁰⁶ As established previously, Rakkab's actions have violated Aurokans' rights by adversely impacting religious practices of Aurokans.²⁰⁷

IV. Rakkab's actions do not constitute valid limitation to Aurokan's rights.

Article 4 of the ICESCR provides that limitations that erode the 'minimum core' of obligations,²⁰⁸ which includes right to participate in cultural practices,²⁰⁹ are not valid. Article 18(3) of ICCPR at most, provides for limitations on external manifestations of freedom of religion,²¹⁰ when *first* such limitation is prescribed by law and *second*, when necessary to protect public health. Similar limitation is permissible under Article 4 of the ICESCR and in state practice.²¹¹ *First*, Rakkab has not notified an effective legislation imposing the restriction till

²⁰³ *Compromis*, ¶41.

²⁰⁴ *Compromis*, ¶20.

²⁰⁵ *Compromis*, ¶41.

²⁰⁶ *GC22*, ¶9.

²⁰⁷ *Supra* Issue C.II.a.ii.

²⁰⁸ *ICESCR Commentary*, 247.

²⁰⁹ *GC21*, ¶¶55(c), (e).

²¹⁰ *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, CCPR/C/21/Rev.1/Add.10, ¶7 (Mar. 29, 2000).

²¹¹ American Convention on Human Rights, Jul. 18, 1978, art. 13(2) [*“AmCHR”*]; African Charter on Human and Peoples' Rights, Oct. 21, 1986, 21 I.L.M. 58, art. 9(2).

2017, since the number of Yak hunted is the same despite legislation.²¹² *Second*, Rakkab’s obligation here is to ensure public health only for the people of its own territory or within its jurisdiction, as shown by the words “within the State party”.²¹³ However, Rakkab failed to take any alternative measures and hunted enough Yak to market Gallvectra to 85 countries,²¹⁴ therefore severely restricting Aurokans’ rights.

Moreover, such restriction should be proportional²¹⁵ i.e. means that there must not be any other method of achieving the same result in a less restrictive manner.²¹⁶ This is confirmed by the obligation to provide essential medicines,²¹⁷ having to be respectful of culture of individuals.²¹⁸ However, in presence of other diabetes medicines, Rakkab’s hunting is not proportional.²¹⁹

D. RAKKAB MUST PAY AUROK A PORTION 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’s manufacturing of Gallvectra amounts to unlawful appropriation and exploitation of Aurokan traditional knowledge [I]. Consequently, Rakkab has an obligation to compensate Aurok [II]. In any event, Rakkab cannot justify its actions under the law on public domain [III].

²¹² *Compromis*, ¶45.

²¹³ UNCESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, ¶12 (a), (b) (Aug. 11, 2000) [“GC14”].

²¹⁴ *Compromis*, ¶20.

²¹⁵ GC22, ¶8; *AmCHR*, art. 13.

²¹⁶ E. Howard, *Reasonable Accommodation of Religion and other Discrimination Grounds in EU Law*, 38(3) EUROPEAN L. REVIEW 360-375.

²¹⁷ Summary Record of the 19th Meeting, E/C.12/1987/SR.19, ¶12 (Mar. 24 1987).

²¹⁸ GC14, ¶12 (c).

²¹⁹ *Supra* Issue B.I.b.

I. Rakkab is unlawfully appropriating and exploiting Aurokan traditional knowledge.

The use of Lustuk Enzyme to cure diseases is traditional knowledge of the Aurokans [a] which Rakkab is unlawfully appropriating and exploiting by manufacturing Gallvectra [b].

- a) THE USE OF LUSTUK ENZYME TO CURE DISEASES IS TRADITIONAL KNOWLEDGE OF THE AUROKANS.

Under international law, there is no universally accepted definition of ‘traditional knowledge’,²²⁰ but common practice of States²²¹ shows that it means the knowledge of a community passed-on from generation-to-generation,²²² including medicinal knowledge.²²³ Such medicinal knowledge includes knowledge about use of animal organs to cure diseases,²²⁴ even if they cannot scientifically explain the disease, or the curative enzyme.²²⁵ Aurokans have been consuming Yak gallbladder for thousands of years,²²⁶ knowing it confers health-benefits, longevity, and protection against disease,²²⁷ and passed on this knowledge from generation-to-generation.²²⁸

²²⁰ Regulation No. 511/2014 of the European Parliament and Council, 2014.

²²¹ Appellate Body Report, *United States–Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/AB/RW, ¶¶141-45 (2002).

²²² African Regional Intellectual Property Organization, Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010, §2.1 [**“Swakopmund Protocol”**]; Law No. 27811, OFFICIAL JOURNAL EL PERUANO, 2002, art. 2(b) (Peru) [**“Peruvian Legislation”**]; Protection of Traditional Knowledge and Cultural Expressions Act, 2016, art. 6 (Kenya).

²²³ Law No. 1/13 of July 28th, 2009 on Industrial Property, art. 247 (Burundi); WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources [**“WIPO-IGC”**], Traditional Knowledge and Folklore, WIPO/GRTKF/IC/11/15 (2007), ¶¶304, 311-12.

²²⁴C. CORREA, PROTECTION AND PROMOTION OF TRADITIONAL MEDICINE IMPLICATIONS FOR PUBLIC HEALTH IN DEVELOPING COUNTRIES 7 (2002).

²²⁵ R. WILLIAMSON, GENETIC ENGINEERING 143 (1982); D. Selisteanu, *Microbial Production of Enzymes: Nonlinear State and Kinetic Reaction Rates Estimation*, 91 BIOCHEM. ENG. J. 23 (2014).

²²⁶ *Compromis*, ¶¶2, 4, 16-17.

²²⁷ *Compromis*, ¶¶4, 16-17.

Therefore, such consumption of Lustuk Enzyme,²²⁹ constitutes their traditional knowledge, even if they cannot explain diabetes or Lustuk Enzyme scientifically.

b) RAKKAB IS UNLAWFULLY APPROPRIATING AND EXPLOITING AUROKAN TRADITIONAL KNOWLEDGE.

Under international law, the use of traditional knowledge in manufacturing pharmaceuticals without the consent of indigenous communities amounts to unlawful appropriation and exploitation of traditional knowledge.²³⁰ Such pharmaceuticals lack novelty²³¹ since they are only trivial modifications, and provide the same curative effects as traditional knowledge.²³² For instance, in *Pfizer*, the U.S. rejected a claim of novelty for a pharmaceutical derived from *icarinn*, a biological compound of plant *Epimedium*, to cure male impotence since Chinese communities used *Epimedium* for same purposes, even though they had no knowledge of *icarinn*.²³³

The use of Yak gallbladder, and its constituent Lustuk Enzyme to cure diseases is traditional knowledge of Aurokans,²³⁴ and since Gallvectra is derived from Lustuk Enzyme,²³⁵ with only

²²⁸ *Compromis*, ¶¶2, 7, 17.

²²⁹ *Compromis*, ¶13.

²³⁰ I. MGBEOJI, GLOBAL BIOPIRACY: PATENTS, PLANTS, AND INDIGENOUS KNOWLEDGE 11-15 (2006).

²³¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, art. 27(1); Patents Act, §7 (Australia).

²³² R. GOLD, GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE: CASE STUDIES AND CONFLICTING INTERESTS 106 (2012).

²³³ Ex-Parte Pfizer, U.S. Patent and Trademark Office, Board of Patent Appeals and Interferences 1-5, 21-22 (2010).

²³⁴ *Supra* Issue D.I.a.

²³⁵ *Compromis*, ¶14.

trivial modifications by scientifically isolating Lustuk Enzyme,²³⁶ as they both treat diabetes.²³⁷ Therefore, Rakkab is unlawfully appropriating and exploiting Aurokan traditional knowledge.

II. Consequently, Rakkab violates its obligation to compensate Aurok under international law.

Rakkab violates its obligation to compensate Aurokans under CIL [a]. Alternatively, Rakkab has failed to share benefits with Aurokans under CBD [b], and Nagoya [c]. In any event, Rakkab has unlawfully enriched from the sales of Gallvectra [d]. Accordingly, it must pay Aurok [e].

a) RAKKAB VIOLATES ITS OBLIGATION TO COMPENSATE AUROKANS UNDER CIL.

States are prohibited from appropriating and exploiting traditional knowledge, i.e. researching or commercializing such knowledge²³⁸ without prior informed consent of indigenous communities, and without compensating them under CIL, as evidenced by State practice²³⁹ and *opinio juris*.²⁴⁰ This is because these communities have a customary right to own their traditional knowledge.²⁴¹ Rakkab uses traditional knowledge of the Aurokans in scientific research, laboratory

²³⁶ *Compromis*, ¶¶13-14.

²³⁷ *Compromis*, ¶¶13, 16-18.

²³⁸ CBD CoP, Report of the Ad-Hoc Open-Ended Working Group on Access and Benefit-Sharing, UNEP/CBD/WG-ABS/9/INF/1, 31-33 (2010) [“**CBD Report-1**”].

²³⁹ *UNDRIP*, art. 28; African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, 2000, art. 1-12, 67; Pacific Community Model Law for the Protection of Traditional Knowledge and Expressions of Culture, 2002.

²⁴⁰ WIPO-IGC, WIPO/GRTKF/IC/11/15 (2007), ¶447 (Russian Federation, China, Indonesia); WIPO-IGC, WIPO/GRTKF/IC/12/5(b) (2008), 128-133 (Morocco, Indonesia, Ghana, Nicaragua).

²⁴¹ *ICESCR*, art. 27(2); *Swakopmund Protocol*, §6; V. Shiva, *Golden Rice and Neem: Biopatents and the Appropriation of Women's Environmental Knowledge*, 29(1/2) *WOMEN STUD. Q.* 20 (2001).

experiments, and for manufacturing Gallvectra,²⁴² without obtaining prior informed consent²⁴³ and therefore, has an obligation to compensate Aurokans.

b) ALTERNATIVELY, RAKKAB HAS FAILED TO SHARE BENEFITS WITH AUROKANS UNDER CBD. Article 15(7) of CBD obligates States to share benefits for utilization of genetic resources, i.e. research or commercialization of plant or animals.²⁴⁴ Subsequent practice of States shows that such an obligation also extends for traditional knowledge associated with genetic resources²⁴⁵ as traditional knowledge is inseparable from genetic resources.²⁴⁶ By utilizing Aurokan traditional knowledge associated with Yak gallbladder,²⁴⁷ Rakkab has an obligation to share benefits under the CBD.

c) RAKKAB FAILS TO SHARE BENEFITS WITH AUROKANS UNDER NAGOYA.

(i) *Nagoya must be applied retroactively.*

Under international law, retroactive application of a treaty is permitted, if it is intended by the State parties.²⁴⁸ Since the Nagoya applies to traditional knowledge “within CBD’s scope”,²⁴⁹ it

²⁴² *Compromis*, ¶¶14-15.

²⁴³ *Compromis*, ¶42.

²⁴⁴ *CBD*, art. 15(7); *CBD CoP, Progress Report on the Implementation of the Programmes of Work on the Biological Diversity of Inland Water Ecosystems*, UNEP/CBD/COP/5/INF/7, 2 (2000).

²⁴⁵ *VCLT*, art. 31(3)(b); Preamble, Art. 16, Proclamation No. 482/2006, 2006 (Ethiopia); *CBD CoP, Report of the Ad-Hoc Open-Ended Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity*, UNEP/CBD/COP/9/7, 18 (2007) [**“CBD Report-2”**]; T. McClellan, *The Role of International Law in Protecting the Traditional Knowledge and Plant Life of Indigenous People*, 19(2) *WIS. INT’L L. J.* 260 (2001).

²⁴⁶ *CBD Report-2*, UNEP/CBD/COP/10/2 (2009), 36; Secretariat of the Convention on Biological Diversity, *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization*, 2, 10, 11 (2002).

²⁴⁷ *Supra* Issue D.I.

²⁴⁸ *VCLT*, art. 28; *Yearbook*, 212-13.

can be applied retroactively to receive benefits from traditional knowledge utilized since entry into force of CBD,²⁵⁰ before entry into force of Nagoya. Such intention of retroactivity is confirmed by *travaux préparatoires* where many States agreed that its temporal scope includes use of traditional knowledge that happened since CBD's entry into force.²⁵¹ Although Rakkab started utilizing Aurokan traditional knowledge when Nagoya was not in force,²⁵² since it was a party to the CBD, the Nagoya retroactively obligates Rakkab to share benefits after its ratification.

(ii) *Rakkab fails to share benefits for utilization of traditional knowledge.*

Under Nagoya, States are obligated to share benefits with indigenous communities whenever they utilize their “traditional knowledge associated with genetic resources”.²⁵³ When an indigenous community is present in two or more countries, those countries must cooperate to share benefits with them.²⁵⁴ Such obligation requires ‘coordinated action’ by States²⁵⁵ towards establishing benefit-sharing agreements with indigenous communities.²⁵⁶ For instance, when

²⁴⁹ *Nagoya*, art. 3, 4(4).

²⁵⁰ H. MEYER, *NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION: BACKGROUND AND ANALYSIS* 41 (2013).

²⁵¹ *VCLT*, art. 32; Submission by Like-Minded Megadiverse Countries, 9 *EARTH NEGOTIATIONS BULLETIN* 1 (2010).

²⁵² *Compromis*, ¶¶14-15,20.

²⁵³ *Nagoya*, art. 5(5); E. Kamau, *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?*, 6(3) *L. ENVIRON. DEV. J.* 253 (2010).

²⁵⁴ *Nagoya*, art. 11(2); D. Smith, *Explanation of the Nagoya Protocol on Access and Benefit Sharing and its Implication for Microbiology*, 163(3) *MICROBIOLOGY* 290 (2017).

²⁵⁵ *Bluefin Tuna*, ¶90(1)(e); R. Wolfrum, *International Law of Cooperation in MPEPIL* ¶2 (2010).

²⁵⁶ *Nagoya*, art. 5(5), 7, 12; Pakistan's Ministry of Climate Change, *Access and Benefit Sharing under the Convention on Biological Diversity and the Nagoya Protocol: Scope for Regional Cooperation* (2015).

South Africa patented P57, a compound in *hoodia* plant, it entered into benefit-sharing agreements with indigenous *San* communities in Angola, Botswana, and Namibia, that traditionally use *hoodia*.²⁵⁷ Accordingly, Rakkab has an obligation to share benefits with Aurokans under Nagoya.

(iii) In any event, Rakkab fails to share benefits for continuing utilization of Aurokan traditional knowledge.

Under international law, a treaty can apply to wrongful acts that continue after its entry into force²⁵⁸ and extends over a period of time in violation of international obligations.²⁵⁹ Consequently, Nagoya requires sharing benefits with indigenous people whenever their traditional knowledge is being utilized, even if the access was first obtained before Nagoya entered into force.²⁶⁰ Accordingly, failure to take their consent,²⁶¹ or compensate them will be a wrongful act, which will continue till these obligations are not fulfilled by the defaulting State, after Nagoya's entry into force.²⁶² Therefore, Rakkab fails to share benefits for continuing utilization of Aurokan traditional knowledge and has failed to do so.

²⁵⁷ *The San people and the Hoodia Plant, Case Study*, http://gfbr.global/wp-content/uploads/2015/09/Fifth_Casestudy4.pdf.

²⁵⁸ A. AUST, *TREATY LAW AND PRACTICE* 142 (2000); *Mondev International Ltd. v. U.S.A.*, ICSID Case No. ARB(AF)/99/2, ¶58 (Oct. 11, 2002).

²⁵⁹ J. CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* 136 (2002).

²⁶⁰ *Nagoya*, art. 5(5).

²⁶¹ *Nagoya*, art. 7.

²⁶² CBD CoP: 10 Highlights (Africa) *in* 9(540) *EARTH NEGOTIATIONS BULLETIN* 3 (2010); T. GREIBER, *AN EXPLANATORY GUIDE TO THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING* 72-73 (2012).

d) IN ANY EVENT, RAKKAB HAS UNLAWFULLY ENRICHED FROM THE SALES OF GALLVECTRA.

Under international law,²⁶³ the doctrine of unjust enrichment, requires States that have enriched from another's knowledge to return the profits.²⁶⁴ It extends to protect traditional knowledge against misappropriation.²⁶⁵ Such unjust enrichment occurs even when the State uses a modified version of the knowledge, if the substance remains same.²⁶⁶ Accordingly, profits realized from unlawful patents that are only modifications of traditional knowledge must be returned to indigenous communities.²⁶⁷ By failing to return profits to the Aurokans, Rakkab has unjustly enriched from the sales of Gallvectra, and must return the profits realized from it.

e) RAKKAB CANNOT JUSTIFY NOT SHARING BENEFITS UNDER THE LAW ON PUBLIC DOMAIN.

International law does not impose an obligation to share benefits if knowledge is in the 'public domain' i.e. any un-owned knowledge accessible to public that can be used without any compensation.²⁶⁸ However, when traditional knowledge is accessible to public through publication or internet, it is not 'freely available' for use,²⁶⁹ since indigenous communities still retain ownership rights over it²⁷⁰ requiring their consent.²⁷¹ For instance, Peruvian and Sri

²⁶³ United Nations, Statute of the International Court of Justice, Apr. 18, 1946, 33 U.N.T.S. 993, art. 38(1)(c); *Everhart v. Miles*, 47 Md. App. 136 (1980); *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, 1942 U.K.H.L. 4, 61-65.

²⁶⁴ Civil Code, 1896, art. 703 (Japan); The Civil Code of the Russian Federation, 2003, art. 1102-05.

²⁶⁵ D. Gervais, *Traditional Knowledge: A Challenge to the International Intellectual Property System*, 7 INT'L INTELL. PROP. L. & POL'Y 76-1 (2002).

²⁶⁶ *In Re Innovative Constr. Sys. Inc.*, 793 F.2d 875 (U.S.).

²⁶⁷ E. Amechi, *Combating the Scourge of Insider Biopiracy in Nigeria: Can the Law of Unjust Enrichment Offer a Solution to the Misappropriation of Traditional Knowledge of the Medicinal Uses of Plants?*, 5(2) INT'L J. L. POL'Y REV. 177 (2016).

²⁶⁸ Law No. 9.739 of December 17, 1937, on Literary and Artistic Property, art. 42 (Uruguay); Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property, art. 9 (Rwanda).

²⁶⁹ *CBD Report-1*, UNEP/CBD/WG-ABS/8/2 (2009), 21.

²⁷⁰ Draft Indian Biological Diversity Bill, 2000, Chapter 5; *Swakopmund Protocol*, §9.1.

Lankan laws require benefit-sharing with indigenous communities when products derived from their traditional knowledge in public domain are sold.²⁷² While traditional practices of Aurokans are published in journals,²⁷³ Aurokans retain ownership over their traditional knowledge.²⁷⁴ Therefore, Rakkab cannot justify not sharing benefits under the rule on public domain.

III. Accordingly, Rakkab must pay Aurok.

Under CIL²⁷⁵ on the right of diplomatic protection, a State can represent its nationals before international tribunals for violation of their rights by another State,²⁷⁶ after exhaustion of local remedies.²⁷⁷ Since the Rakkabi Supreme Court failed to admit Aurokans' lawsuit, in absence of an appellate body in Rakkab,²⁷⁸ Aurokans have exhausted all available local remedies.²⁷⁹ Therefore, Aurok can represent Aurokans before the ICJ, and Rakkab must pay Aurok.

²⁷¹ *Nagoya*, art. 7; Andean Community, Decision No. 486 Establishing the Common Industrial Property Regime, 2000, art. 3; Provisional Act No. 2,186-16, 2001, art. 8.1 (Brazil).

²⁷² *Peruvian Legislation*, art. 13; A Legal Framework for the Protection of Traditional Knowledge in Sri Lanka, Working Document Version-01, 2009, §5 (Sri Lanka).

²⁷³ *Compromis*, ¶¶7, 13, 16.

²⁷⁴ E. Tsioumani, *The Evolution of Benefit Sharing: Linking Biodiversity and Community Livelihoods*, 15(2) REV. EUR. COMMUNITY & INT'L ENVTL. L. 10 (2010).

²⁷⁵ *Mavrommatis Palestine Concessions (Greece v. U.K.)* (1924) P.C.I.J., Series A, No. 2, 12 (Aug. 30).

²⁷⁶ *Id.*; Report of the International Law Commission on the Work of Its Fifty-Third Session, 61st sess, Supp No 10, ch. IV(E), A/61/10 (2006).

²⁷⁷ *Interhandel Case (Switz. v. U.S.)* 1959 I.C.J. 27, ¶ (Mar. 21).

²⁷⁸ *Clarifications*, ¶3.

²⁷⁹ *Azinian, Davitian and Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award of Nov. 1, 1999, ¶¶102-103; J. PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 99 (2005).

PRAYER FOR RELIEF

Aurok respectfully requests this Court to adjudge and declare that:

- A. Rakkab is responsible for DORTA's internationally wrongful acts and in the alternative, Rakkab is responsible for its own failure to prevent DORTA from committing those wrongful acts;
- B. Rakkab's hunting of Yaks violates its international obligations relating to the protection of endangered species and the environment and therefore, it is liable to cease such hunting;
- C. Rakkab's hunting of Yaks in Rakkab violates the cultural and religious rights of Aurokans and therefore, it is liable to cease such hunting; and
- D. Rakkab's exploitation and appropriation of Aurokan traditional knowledge obligates it to pay Aurok a portion of profits realized from the sales of Gallvectra.

Respectfully submitted,

AGENTS FOR APPLICANT