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INDIAN INSTITUTE OF TECHNOLOGY, KHARAGPUR
THE IIT LAW SCHOOL**

1st IIT LAW SCHOOL NATIONAL MOOT COURT COMPETITION
2014

(14th to 16th November 2014)

MOOT PROPOSITION

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I

1. Tempai is a developed country situated in the Northern Hemisphere.
2. Because of the influence of Gamerican culture, the teenagers of Tempai have developed a tendency to get involved in social consumption of alcohol at an early age and as a result a majority of them develop an intestinal cyst, which has to be surgically removed.
3. The Government of Tempai, to promote medical research on these intestinal cysts, had passed an Act in the year 2025 which provided that any patient, who wishes to contribute to the Medical Research in the field of Intestinal cysts, may do so by voluntarily contributing his or her surgically removed intestinal cyst to a depository known as the Tempai Bio Material Depository (TBMD). The TBMD is a research undertaking of the Ministry of Health, Government of Tempai. The Act further provided that any such material voluntarily submitted would become the property of the Government of Tempai.
4. Riki is a teenage boy living with his parents in the suburbs of Tempa, the capital city of Tempai. On his sixteenth birthday, in February 2031, he too developed an intestinal cyst which was surgically removed. Riki, after following the due process, voluntarily submitted the surgically removed cyst to TBMD. The cyst was marked as “Riki’s Cyst” and kept in Incubator No. 9345 at TBMD for proper preservation and storage.
5. In December 2031, because of negligence of Ms. Krit, a medical intern at TBMD, Incubator no. 9345 became contaminated by the Chibola virus, a virus which affects human beings, causing them to sleep for 15 hours a day. Notably TBMD is also conducting research on Chibola virus. Chibola infection is a very rare disease and only four cases had been reported worldwide till date.
6. It was found out that all other samples kept in the Incubator 9345 except “Riki’s cyst” became infected with the Chibola virus. Upon further examination of Riki’s cyst sample by the scientists of TBMD it was found that the cyst was carrying a microbe within its cells. The microbe appeared similar in structure to Valkyrie 007, a microbe occurring naturally in soil, all around the world, but it had slight variations. Valkyrie 007, in its natural habitat, feeds on the humus content of the soil and is known to infect neither plants nor humans. The newly discovered microbe was named as Valkyrie X.

7. Surprisingly, the scientists, upon carrying out further medical examination on Riki, discovered that Riki's entire intestine had been harbouring Valkyrie X microbes which had caused his body to produce antibodies against the Chibola virus. However, the microbes were not causing any harm to Riki but were merely living benignly in the intestine.
8. Riki's case was published in the September 2032 issue of the International Journal of Health and Microbiology under the title: "*New microbes similar to soil microbes forming symbiosis with humans - Neo Evolution?*"
9. To unravel the mystery of the presence of Valkyrie X in Riki's body an investigation committee was constituted under the guidance of Prof. Suzi Wonjung, a senior scientist at TBMD, by the Government of Tempai. Unfortunately, Riki along with his family died in a car crash impending investigation.
10. Following publication of the article in September 2032, Kokichi Enterprise (Kokichi), one of Tempai's largest vaccine and pharmaceutical manufacturers, purchased Riki's cyst sample and all of TBMD's research for 100 Million Dollars for the development of a vaccine.
11. In 2035, there was a sudden massive outbreak of Chibola in the countries belonging to the Northern Hemisphere. To exploit the situation to the fullest, the expertise of Prof. Gogi Jung, a Nobel Laureate, was roped in by Kokichi to develop a vaccine. Within six months, Prof. Jung, developed a vaccine using Valkyrie X isolated from Riki's sample, which was capable of being safely administered to all persons irrespective of their age, race or gender. Kokichi invested about 10 Billion Dollars into this project. For the complete legal protection of its invention, Kokichi obtained patents across many jurisdictions (including Shankhamala).
12. Meanwhile, after successfully completing clinical trials, Kokichi started to sell and distribute the vaccine in the Northern hemisphere. The profit generated by the sales in the Northern Hemisphere approximately ran into hundreds of billions of Dollars.
13. In 2040, an outbreak of Chibola took place in Hazrat, one of the northern island states in the country of Shankhamala (*FIG.1*). Shankhamala lies in the Southern hemisphere and it

has nine islands where each island has a unique set of flora, fauna and other biological resources. The Government of Shankhamala is similar to that of India and the laws of India are applicable *mutatis mutandis* and are *in pari materia* with the laws of Shankhamala, with any limited exception created within this problem. The only viable method of transport between the islands of Shankhamala is through an advanced ferry system owned and operated by the State.

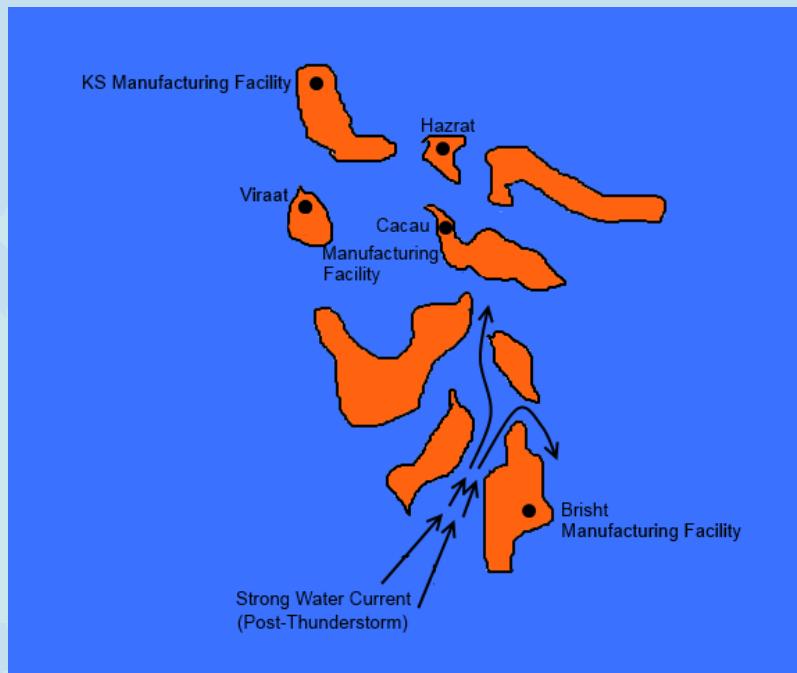


FIG. 1: Political Map of Shankhamala

14. By 2041, the Chibola outbreak had spread to all the islands of Shankhamala, except the island of Viraat, a small island in the North, inhabited exclusively by the Ghasi tribe. Kokichi, having established a presence in Shankhamala through its fully owned subsidiary, has started selling its patented vaccine drug in Shankhamala. The Ghasi tribe are the aborigines of the island of Viraat.
15. The Ministry of Health, Govt. of Shankhamala, upon investigation found that the Ghasi tribals harness Valkyrie X in their intestine due to which they are immune to the Chibola virus. Further investigation showed that as part of the Tribe's religious rituals, each newborn baby in the tribe is taken to the temple of their chief deity, the Shrine of Seven Monks. Here the baby is administered with a special preparation made by boiling the soil

of the shrine with Ayurtulasi (a herb endemic to the island of Viraat and only one other nation in the Northern hemisphere) for three days, in a traditional vessel. In Viraat, the herb Ayurtulasi is found only on a particular mountain known as Astagiri. The Shrine of Seven Monks is located on the mountain of Astagiri which is sacred to the people of Ghasi tribe.

16. It was also discovered that as a result of this method of making the preparation, radical alterations take place in the Valkyrie 007 microbe and it gets converted into Valkyrie X. Valkyrie X, when taken as part of the preparation, lives in the intestine of the babies and makes them immune to Chibola virus. However, the preparation was found to be unfit for adult consumption, since adults would, without exception, throw up as soon as the preparation is administered to them.
17. The Archaeology Department of Shankhamala preserves in its museum the copy of an ancient manuscript found in the Shrine of Seven Monks in which there is mention of this ritual and an indication of the lifelong positive effect the ritual has on the health and well-being of the members of the Tribe.
18. The Ministry of Health, Government of Shankhamala in an attempt to investigate the link between the commercially available Chibola vaccine and the innate immunity of the Ghasi tribe to Chibola ordered an investigation into the source of Kokichi's Chibola vaccine development programme. The investigation revealed Riki's cyst sample to be the source from which the vaccine was developed. It was also found that Riki's parents were documentary film makers, and in the year 2016 when Riki was born, were visiting Viraat for making a documentary film on the Ghasi tribe and the Shrine of Seven Monks. At the time of his birth, upon the advice of the Tribal Chief of Ghasi Tribe, Riki was taken to the Shrine of the Seven Monks where he had undergone the same ritual.
19. Up conclusion of the investigation, the National Biodiversity Authority (NBA) of Shankhamala ordered Kokichi to share the benefits obtained from the sales of the Chibola vaccine on the grounds that they had accessed the biological resources and the associated traditional knowledge of Shankhamala and have derived commercial benefit from it. Kokichi was asked by the NBA to contribute a percentage of the total benefit from sales of the Chibola vaccine to the National Biodiversity Fund. Moreover, since Kokichi had

failed to seek prior approval before accessing the biological resources and before applying for protection of intellectual property based on research carried out on the biological resource, they had acted in contravention of the provisions of the Shankhamala Biodiversity Act and were therefore ordered by the NBA to deposit a fine of 10 billion Dollars. Aggrieved by the order of National Biodiversity Authority, Kokichi has filed a writ petition in the Supreme Court against NBA's order stating that they have accessed neither the biological resources in Viraat nor the traditional knowledge of the Ghasi Tribe for the development of the vaccine and therefore the imposition of a fine and the order to share benefits are not sustainable.

20. At the time of giving the aforementioned orders, the NBA had also filed a petition for revocation of Kokichi's patent on the Chibola vaccine before the Intellectual Property Appellate Board (IPAB) on grounds of traditional knowledge being non-patentable subject matter and that the invention is anticipated. IPAB had revoked the patent of Kokichi for the vaccine drug for Chibola on the grounds of prior use, obviousness and non-patentability of traditional knowledge. Kokichi has approached the Supreme Court by way of special leave petition to dismiss the order of IPAB. The Supreme Court has admitted the petition for hearing under Article 136, although alternative remedies have not been exhausted.

II

21. Kokichi Shankhamala Pvt. Ltd., (KS) the fully-owned subsidiary of Kokichi Enterprise in Shankhamala, started to manufacture and market the vaccine in Shankhamala. But as the said vaccine needed to be stored at a temperature of -20 degree Celsius, there were problems in successfully introducing the vaccine in the markets of Shankhamala because of a lack of appropriate storage infrastructure and established distribution channels. Subsequently, KS began exploring the possibility of use of a stabilizing agent (also known as stabilizer) in order to increase the shelf life of its vaccines. At the time of KS's first foray into the market, the other companies involved in the manufacture of vaccines in Shankhamala were Anek, Brisht, Cacau and Dhanush.

22. KS entered into a 5-year long cross licensing agreement with Cacau with an option for further extension for a term of 5 years, as part of which Cacau was granted a license to manufacture the Chibola vaccine among many other patented vaccines, and KS was granted the license to manufacture the stabilizers which were the intellectual property of Cacau.

23. KS's vaccine and stabilizer manufacturing units were located on the northernmost island of Shankhamala. Cacau's manufacturing operations were based in an island just above the middle of the group of islands comprising Shankhamala. Brisht, which was now the only other company to be involved in the manufacture of both vaccines as well as stabilizers, carried out its manufacturing operation from the southernmost island of Shankhamala.

24. Cacau is Shankhamala's leading manufacturer of pharmaceutical stabilizers according to market share. It also holds an expansive portfolio of patents related to stabilizers and their process of manufacture. Other Shankhamalan companies which can manufacture stabilizers of the same quality as Cacau include Brisht, Xanado, Yardin and Zavi among others (FIG. 2).

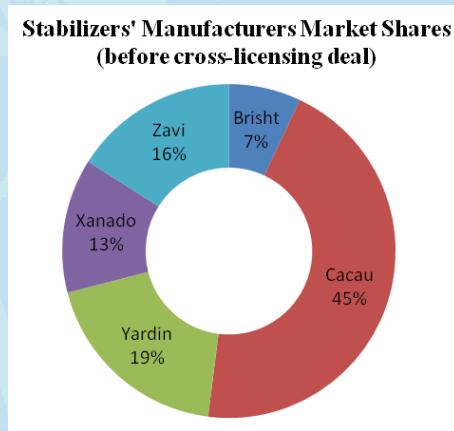


FIG. 2

25. Cacau, owing to its prominent position in the stabilizer market in Shankhamala and an established distribution network, had been the preferred pharmaceutical stabilizer supplier for Anek and Dhanush. However, in the aftermath of the cross-licensing agreement with KS, and its subsequent increase in production of its own vaccines, it did not maintain uniform supply of stabilizers to other vaccine manufacturers.

26. Soon after the cross licensing deal came into effect, Vaccine retail prices across Shankhamala came down by an average of 7% and the availability of the Chibola and other vaccines in southern Shankhamala increased manifold owing to the increased presence of vaccines manufactured by Cacau in that region.

27. The market shares of the various players in the vaccine market in Shankhamala over time are shown in the following diagram (FIG. 3).

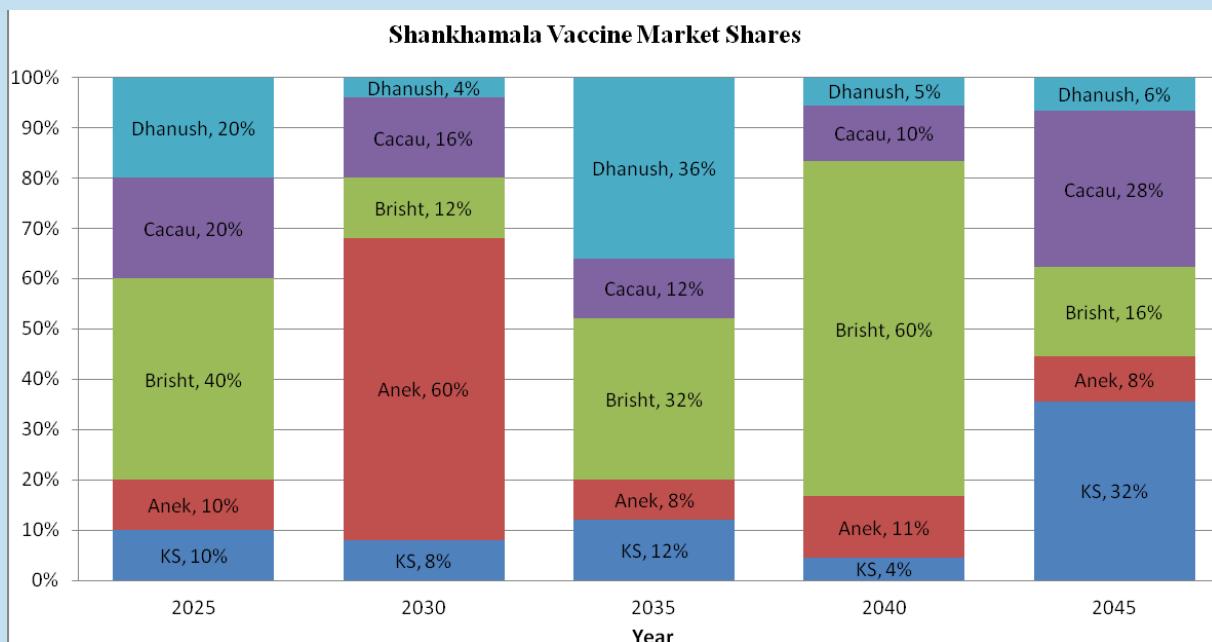


FIG. 3

28. In 2045, due to a powerful thunderstorm and the ensuing strong current near the southernmost island of Shankhamala, the ferry services to the southernmost island became disrupted for about a month. This led to a shortage of supplies including vaccines in the southernmost island during that time. Once services resumed, Brisht, with the aim of expanding its business operations and making the southernmost island self-sufficient in terms of essential vaccines, attempted to negotiate licensing deals with KS as well as Cacau for their respective patents, but the deals fell through because:

- a. An agreement could not be reached regarding the licensing fee and royalties.
- b. Brisht did not agree with Cacau's and KS's condition to price the vaccines within the existing price bracket for Chibola Vaccine.

29. Soon after, in 2046, Brisht filed a complaint with the Competition Commission of Shankhamala (**CCS**) alleging anticompetitive behaviour and abuse of dominance by KS and Cacau by:

- denying Brisht access to the market,
- refusing to deal with Brisht
- the use of dominant position in one market to enter into another market.
- attempting to control resale prices
- negotiating an Exclusive Supply Agreement between them

30. Upon finding *prima facie* evidence of anticompetitive behaviour and abuse of dominance by KS and Cacau under Sections 3(4) and 4 of the Competition Act of Shankhamala, the CCS directed the Director General (DG) of the CCS to conduct an investigation into the allegations.

31. The DG, upon careful consideration of the evidence, found the alleged companies guilty of anticompetitive behaviour under Sections 3(4) and 4 and submitted his report to the CCS and the Commission agreed with the DG's report in concluding that anticompetitive behaviour had been found to have been committed on the part of the companies.

32. Aggrieved by the order, KS and Cacau appealed before the Competition Appellate Tribunal (COMPAT); however, the COMPAT upheld the order of the Commission and found KS and Cacau guilty of contravening Sections 3(4) and 4 of the Act.

33. As a final recourse against the order of the COMPAT, the aggrieved parties approached the Supreme Court under Section 53T of the Act.

III

34. Meanwhile, in order to improve the quality and effectiveness of the Chibola vaccine, KS applied for the access to the plant Ayurtulasi for research purposes and also to test the

properties of the soil. The NBA of Shankhamala has granted them permission for the access to the plant Ayurtulasi and to undertake research in that area. The access given by the NBA is very limited in nature and many strict conditions have been imposed upon KS in order to protect the biodiversity of the particular region and also to protect the religious practices of the tribal population. Based upon the permission given by the NBA, KS has invested over a hundred million dollars for setting up a state of the art research facility in Viraat.

35. The people of Ghasi tribe however, soon became apprehensive about the decision of the NBA as they believed that access granted to a foreign MNC will spoil the sanctity of the mountain Astagiri and their customs will get disrupted. The Chieftain of the Ghasi tribe has filed a Writ Petition in the Supreme Court stating that the order of the Central Government to grant permission to KS to undertake research in the area in and around the mountain Astagiri will affect their fundamental right to practice and profess religion given in the Constitution of Shankhamala.
36. The Supreme Court of Shankhamala has decided to combine the Writ petitions, the Special Leave Petition and the appeal against the decision of the COMPAT in the interest of justice and equity and speedy resolution of the matter.

The arguments are to be made as follows:

- a) Writ Petition against order of NBA: KS v. NBA
- b) SLP in appeal against order of IPAB: KS v. NBA
- c) Appeal Under Section 53T of the Competition Act: KS & Cacau v. CCS & Brisht
- d) Writ Petition against order of NBA: Chieftain, Ghasi Tribe v. NBA & Union of Shankhamala