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THE VIII NLS - NEGOTIATION, MEDIATION AND CLIENT COUNSELLING COMPETITION

28 APRIL - 2 MAY, 2022

MEDIATION

FINALS

CONFIDENTIAL INFORMATION FOR THE REPUBLIC OF SILVERSTONE

MEDIATION FINALS

IN THE MATTER OF AN ARBITRATION UNDER
THE LCIA RULES (2014)
BETWEEN

Egg Maggi Pharmaceuticals LLC

Claimant

- AND –

The Republic of Silverstone

Respondent

ARB Case No. ACT/03/2022

MEDIATION SESSION

CONFIDENTIAL INFORMATION FOR THE REPUBLIC OF SILVERSTONE
(RESPONDENT)

You are Mx. Casey Canderwall, the Foreign Secretary of the Republic of Silverstone, accompanied by the Solicitor General of Silverstone. You have worked with the Foreign Investment department in Silverstone for over 5 years now and are privy to the details of the investment made by CMP, who was succeeded by Claimant. You want to endorse Silverstone as a viable destination for foreign direct investment (FDI), but the recent arbitration claims brought by Egg Maggi Pharmaceuticals (EMP or Claimant) have fuelled the view that Silverstone is a hostile destination for FDI. You ideally want to settle all claims in this mediation session, because an unfavourable award against Silverstone would be very harmful to its reputation. You have full authority to settle on behalf of the Republic of Silverstone on all matters outlined in this brief. Anything above and beyond would require the approval of the appropriate ministry of the Silverstonian Government.

A. Issue of Standing in Investment Arbitration Proceedings

The original investment in Silverstone was made by Claimant's wholly owned subsidiary, Chilli Maggi Pharmaceuticals. Although CMP was the original investor, there are several cases where claims brought by parent companies have been admitted in investment arbitration. You could argue that at the time of the alleged breach of the 2007 BIT, the Claimant did not own the investment and thus, cannot bring the claims now. However, there is a risk that this argument might not work and the claim is admitted. Moreover, given that you want to promote Silverstone as a favourable FDI destination, you can't risk having an adverse award. This makes you more amenable to settle this matter at the Mediation session itself, subject to the considerations outlined below.

B. Indirect Expropriation and Compensation

The relevant clause of the BIT, dealing with expropriation is as follows:
'Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose. The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by provisions for the payment of prompt, adequate and effective compensation.'
The 2007 BIT is broad enough to allow indirect expropriation of property through regulatory measures, such as the issuance of a compulsory license. However, if the host state carries out this expropriation for a public purpose, and in fulfilment of the conditions in the clause, then such action would amount to lawful expropriation which does not breach the BIT.
In the instant case, the compulsory licence was issued for a public purpose – the health emergency – and was in compliance with domestic patent law. Further, the compulsory licence

mean that they were deprived of their entire investment through regulatory action. However, your patent office issued a compulsory licence only against the drug manufactured by CMP, and not against any of the drugs manufactured by the domestic players. This could result in discriminatory action, even though the other drugs were less effective. Your primary motive behind the issuance of compulsory licence was to provide the best drugs to your ailing population at a reasonable price. Another issue in this case is that the patent office did not revoke the compulsory license after the public health emergency had ended. However, your government firmly believes in providing accessible public health services to its citizens and since EyeDropit was the most effective drug in the market, you stand by the policy decision to make the drug more affordable for the market. This stance is also supported by the public health exception in the 2007 BIT, which exempts actions taken in furtherance of public health from the BIT altogether.

That being said, you recognize that the continued compulsory license against Claimant might be unlawful and you are willing to revoke it. Since CMP does not exist anymore and Claimant has not restarted operations in Silverstone, you are also willing to buy the patent to EyeDropit in order to domestically manufacture it through a newly established State-owned entity at affordable prices. You are willing to pay up to $50 million to purchase the patent. In the alternative that Claimant wishes to continue manufacturing the same, you are willing to revoke the compulsory license but you want to use this as leverage to get an undertaking from Claimant that they will manufacture and sell the drugs at a lower price, in the range of $65-80, subject to cost of production. Your Government considers it absolutely imperative that EyeDropit is available affordably as scientists suggest that the fungal eye infection is likely to be a recurring problem in the tropical region.

With respect to compensation for alleged indirect expropriation, your legal team suggests that there is a chance that you might win the arbitration claim in light of the public health exception. However, should you receive an unfavourable award – apart from the reputational harms - you will not have the capacity to pay full damages and costs of the arbitration. Thus, a settlement on compensation is favourable.

Your experts divide the compensation claims into two categories:

1. The issuance of compulsory licence during the health emergency; and
2. The continuation of the compulsory licence after the health emergency had ended.

While you want to keep the total compensation awarded to the minimum, it is imperative for Claimant to drop all claims in arbitration as a result of any compensation paid in any settlement agreement entered into today. For the first category of losses, you are authorised to pay up to $75 million. For the second category, you are authorised to pay up to $100 million to cover their losses. The ministry has authorised an additional $10 million for any contingencies, but payment of this extra money should be a last resort to ensure this case does not proceed to arbitration.

C. Counterclaim

You did not levy a fine at the conclusion of the investigation because you did not have an accurate assessment of the extent of damage to the environment resulting from the toxic waste. However, you have now assessed the damages at $80 million due to contamination of the water body at Kneedi and the subsequent clean-up charges. You additionally want to impose a fine of 10 million on EMP for violating the environmental regulations. These amounts are non-negotiable and you must get at least a total of $90 million for the counterclaim in this settlement.

D. Getting EMP to Resume operations in Silverstone

Despite their high prices, the Claimant's R&D unit had made immense strides in developing effective medicines for various tropical diseases in Silverstone. In the event that Claimant does not wish to resume business in Silverstone, you want to purchase the IP of EyeDropit and several other drugs to manufacture them through the State-owned entity. While purchasing the existing IP is a good option, you also wish to develop the capacity in local researchers to engage in effective R&D to develop new drugs. For this purpose, you are willing to establish a collaborative agreement with EMP to train your officials and engage in collaborative R&D to jointly develop drugs.

In the event that EMP wishes to resume operations in the Silverstonian market, you want to play a more active role in the drug development and manufacture process – for which you are willing to fund some of their activities in exchange for certain rights. The Ministry has authorised you to enter into an in-principle agreement to explore a Joint Venture between EMP and the State-Owned Drug company in Silverstone, where the Government would own a minority stake (somewhere between 25%-30%, which allows you to block special resolutions under the Silverstonian Company Law). You recognise that a minority stake in the Joint Venture would not give you much control over prices, but you want some sort of mechanism in place to ensure that your recommendations are taken into account by the Management. Further, you want a minimum number of Silverstonian researchers working in the R&D unit of the Joint Venture. You are also willing to provide the Joint Venture with access to two domestic manufacturing plants in the cities of Kennedy and Desmouth, to allow the JV to increase production immediately. You recognise that Claimant would want some assurance for their patent rights, and you are willing to make reasonable accommodations for the same, such as providing them with an opportunity to address the concerns of the patent office before the compulsory license is issued. Should this course of action be a viable one, you want to ideally commence operations by early 2023.

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