

Welcome to the seventh edition of the Asia Pacific Economic Consulting practice newsletter.

These newsletters recap some of the latest developments in the dispute, litigation and international arbitration communities, and will keep you up-to-date with our recent activities, including our latest engagements in the public domain, sponsored events, speaking arrangements and upcoming industry affairs.

If you have any queries, comments or feedback, please feel free to contact us using the details below.

Thank you,

Montek Mayal

Consultant, Economic Consulting

FTI Consulting | Singapore

montek.mayal@fticonsulting.com

Cases and Decisions

APAC

Indonesia v Raat Ali Rizvi | 13/05/2013

- **Damages arising from government bail-out and conviction for fraud and money laundering:** A panel from the International Centre for Settlement of Investment Disputes (ICSID) has rejected a US\$75 million claim against Indonesia made by claimant, Raat Ali Rizvi, a UK shareholder in a bailed-out bank.
- Rizvi filed a claim: "seeking damages for losses arising from the Indonesian government's US\$700 million bailout of Bank Century in 2008 and his subsequent conviction by the Indonesian courts for fraud and money laundering".
- However, the majority ruled that Rizvi had failed to marshal sufficient evidence to demonstrate that the Indonesian banking regulator was aware of his status as a shareholder in the bank when the alleged "de facto" admission occurred following the government bail-out.
- Further, the majority ruled it did not have to consider Indonesia's arguments as to whether the Bilateral Investment Treaty (BIT) required a "direct" investment for protection. For the purposes of the bifurcated proceeding, it was also not necessary to determine whether Rizvi did in fact own the shares at the time the BIT dispute arose.
- Counsel to Rafat Ali Rizvi: Dentons. Counsel to Indonesia: Office of the Attorney General of the Republic of Indonesia; and KarimSyah Law Firm. Expert Witness for Rafat Ali Rizvi: Hiswara Bunjamin & Tandjung. Expert Witness for Indonesia: PT Adinata Pandita. *Source: Global Arbitration Review.*

Devas Multimedia v Antrix | 13/05/2013

- **Damages arising from breach of contract:** Devas Multimedia, as claimant, is set to proceed with a US\$ 1.6 billion International Chamber of Commerce (ICC) claim against Antrix, the commercial arm of the Indian Space Research Organisation.
- The dispute arose after Antrix cancelled the parties' 2005 contract for the launch of two space satellites. The contract would have allowed the claimant to: "establish a hybrid satellite and terrestrial communications network to supply wireless audio-visual, broadband and mobile internet services across India," based on the allocation of the necessary spectrum and supporting satellite services to the claimant.
- The respondent, Antrix, justified the termination of the contract and allocation of the necessary spectrum to the claimant on the grounds of national security.
- Counsel to Devas Multimedia: Skadden Arps Slate Meagher & Flom. Counsel to Antrix: Solicitor General of India; Curtis Mallet-Prevost Colt & Mosle; and Khaitan & Co. *Source: Global Arbitration Review.*

Other

Paraguay v BIVAC | 19/07/2013

- **Claim for unpaid bills:** The government of Paraguay has agreed to issue US\$21 million in treasury bonds to finance the settlement of its six-year running arbitration against BIVAC, a Swiss subsidiary of Bureau Viratas.
- BIVAC, an inspection services provider, had sought up to US\$76 million under the Switzerland-Paraguay BIT for unpaid bills and interest dating back to the late 1990s.

About FTI Consulting

FTI Consulting, Inc. is a global business advisory firm dedicated to helping organisations protect and enhance enterprise value in an increasingly complex legal, regulatory and economic environment. FTI Consulting professionals, who are located in all major business centers throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges in areas such as investigations, litigation, mergers and acquisitions, regulatory issues, reputation management and restructuring. More information can be found at www.fticonsulting.com.

- Counsel to BIVAC: Freshfields Bruckhaus Deringer; and Mersán Abogados. Counsel to Paraguay: Venable; and Attorney general's office. *Source: Global Arbitration Review.*

Canada v Eli Lilly | 16/07/2013

- **Patent dispute:** U.S. pharmaceuticals company, Eli Lilly intends to seek more than US\$480 million in a NAFTA claim against Canada over the revocation of two patents that were challenged by generic manufacturers.
- Eli Lilly seeks damages over the Canadian court's revocation of its patent for Strattera, a drug used to treat attention deficit hyperactivity disorder.
- *"Eli Lilly alleges that recent Canadian case law has imposed a higher standard on the granting of patents for medicines than is found in the rest of the world, and is in breach of Canada's obligation under NAFTA to provide patents for all "useful" inventions".*
- Eli Lilly further claims that such a doctrine has resulted in the invalidation of various patents on *"grounds of inutility relating to medicines that have been approved as safe and effective"*.
- Counsel to Eli Lilly: Gowling LaFleur Henderson; and Covington & Burling. *Source: Global Arbitration Review.*

Gazprom v RWE Transgas | 3/07/2013

- **Gas price dispute:** An ICC panel has amended the price formula in a long-term gas supply contract between RWE Transgas and Gazprom's export arm by tying the gas price formula to the gas spot market rather than oil prices.
- RWE Transgas claims such a mechanism *"reflects the relevant conditions on the gas market at the time of the price revision in May 2010"*.
- The Tribunal further ordered Gazprom Export to reimburse RWE Transgas for overpayment of gas since May 2010 which was earlier indexed to oil prices.
- Counsel to RWE Transgas: Freshfields Bruckhaus Deringer. Counsel to Gazprom Export: Willheim Müller Rechtsanwälte. *Source: Global Arbitration Review*

Should you be interested in speaking to our team and discussing these cases further, please contact Montek Maytal at: montek.maytal@fticonsulting.com.

Industry Insight

Healthcare industry – an imminent patent cliff?

The term 'patent cliff' has come to refer to the roughly six-year period, between 2009 and 2015, when 18 of the top 20 blockbuster drugs¹ will lose their patent protection. This patent expiry will affect drugs that have estimated average annual sales of US\$40 billion.²

The expiry of patent protection allows generic drug³ manufacturers to enter the market with drugs that have the same active ingredient(s) as the patented drug, but which are sold at much lower prices. Competition from generics erodes the revenues and profits generated by the manufacturers of branded, patented pharmaceuticals.

Naturally, the generics industry is anticipating strong gains at the expense of the incumbent patent-holders, whose rate of new drug discoveries in recent years has been insufficient to offset the expected loss from the patent cliff.

In the last decade, the number of approved drugs has not gone up in proportion to R&D spending. In 2000, the industry spent a historic high of US\$22 billion on R&D and the number of approved drugs in that year was 40. Ten years later, the industry's R&D spending had increased to US\$41 billion, but the number of approved drugs had fallen to only 23.⁴

The big pharmaceutical companies⁵ are now taking a variety of measures to shield themselves from near-term declines in revenue and profits, alongside longer-term measures intended to encourage consistent innovation and growth.

One such measure is diversification and collaboration. The pharmaceutical companies affected by the patent cliff are looking to diversify their business by joining forces with the generics industry. French giant Sanofi-Aventis announced plans to become a diversified global healthcare leader, increasing non-patented drug and other product sales from five per cent to 12 per cent in the 2004 to 2009 period. In line with its diversification strategy, Sanofi-Aventis acquired the U.S. household and personal care company, Chattem, for US\$1.9 billion and the animal health specialist, Merial, for US\$4 billion in 2009.⁶

In addition to expansion into the generics drug market, the big pharmaceutical companies are looking to increase their presence in emerging markets. In 2011, North America (U.S. and Canada), Europe and Japan constituted about 80.6 per cent of global pharmaceutical sales. Growth prospects in these regions may be limited by squeezed government and

¹ Loosely defined as those with annual sales greater than USD1 billion.

² Bioassociate (Innovative Consulting) - The significance of the 2009-2015 pharmaceutical patent cliff

³ A generic drug is comparable to a brand/ reference listed drug in dosage form, strength, route of administration, quality and performance characteristics, and intended use. *Source: US FDA Generic Drug Definition.*

⁴ Genentech research

⁵ In this memo, the companies referred to are: AstraZeneca, Bristol-Mayers Squibb, Eli Lilly, GlaxoSmithKline, Merck, Novartis, Pfizer, Roche & Sanofi-Aventis.

⁶ Bioassociate (Innovative Consulting) - The significance of the 2009-2015 pharmaceutical patent cliff

consumer finances. It is notable that over 18 per cent of U.S. GDP is already spent on healthcare, a figure that may be at the limits of sustainability. In contrast, growing middle class and ageing populations make the Asian region potentially more attractive. China presents the greatest opportunity, with forecasted growth of pharmaceutical demand estimated at 20 per cent per annum, compared to the forecasted global average growth of five to eight per cent per annum through to 2014.⁷

Apart from the above steps, which should supplement their revenues, the big pharmaceutical companies are looking at new ways to develop drugs to ensure growth and profits in the long run.

Diminishing returns on investment is a concern in the industry: It is proving uneconomical to perform expensive R&D internally, particularly to satisfy the current demands of regulators in the U.S. The pharmaceutical companies have responded by forming partnership agreements and licensing agreements with smaller, R&D-focused companies for drugs that have successfully made their way through early stage testing.⁸

However, new avenues of growth and opportunity bear their own specific risk. For instance, emerging markets lack stringent and comprehensive patent protection rights and the required legal framework to ensure sufficient security for the pharmaceutical companies. One obvious example is the recent Indian Supreme Court's ruling against Novartis. Novartis had submitted a patent application for a drug for which it held approved patents in the U.S. and other countries. India's Supreme Court, however, ruled against Novartis' application.

Some commentators expect the pharmaceutical industry to see a shift, from a market dominated by large integrated drug manufacturers that compete with each other for patents to a market place that is based on diversification and collaboration based on competence. Under this revised "industry model", large pharmaceutical companies with substantial capital and valuable brand reputation would invest in smaller R&D firms and generic manufacturers to facilitate development of new cures and medicines. Simultaneously, they would increase their reach to faster-growing developing markets, while managing costs and country exposure.

From a valuation perspective, future revenues and cash flows for pharmaceutical companies may be less reliant on historical performance as the patent cliff may affect the maintainable earnings of industry incumbents. Recent trends of diversification and outsourcing may have a long-term effect on earning potential. For example, R&D expense would need to be carefully considered especially as companies are looking to diversify their investments and outsource R&D. Similarly, while expansion into emerging markets may provide a significant opportunity for growth, it also brings higher investment risk, potentially offsetting the gains from growth.

⁷ Bioassociate (Innovative Consulting) - The significance of the 2009-2015 pharmaceutical patent cliff

⁸ OPTUMRx - Jumping Off the Patent Cliff...and Surviving.

Thought of the Month: Competitive Devaluation

The Bank of Japan has recently been intervening heavily in bond and currency markets to bring down the value of the yen and stimulate the Japanese economy. This is not the first such intervention by the Bank of Japan and nor is Japan the only country to seek to devalue its currency in recent years.

Yen devaluation may have severe consequences for the global economy if it were to lead to a "currency war" or competitive devaluation, in which each country competes to achieve a relatively lower exchange rate to ensure global competitiveness.

One way for countries facing pressure from their own exporters to combat Japan's measures would be to adopt trade restrictions. This was the common response among gold bloc countries.⁹ Increased trade protection, however, runs the risk of undermining the open markets, which have increased global trade significantly in the last 40 years.

Alternatively, countries might respond by printing more of their own currencies and consequently buying yen. *The Economist* suggests that such an action need not be globally harmful and might even have an effect similar to a coordinated stimulus. Stimulus aside, however, competitive devaluation would result in a larger money supply, increased global liquidity and, potentially, higher long-run inflation.¹⁰

Playing down public concerns over a global "currency war", G20 officials said in April that recent monetary easing measures by the Bank of Japan were intended to stop deflation and support domestic demand.¹¹ But other regional economies such as Korea and China, fear Japanese competition aided by the devalued yen. The monetary policies these countries adopt, could lead to either restrictions on global trade or higher domestic inflation.

In the short-run, therefore, might the Japanese monetary measures serve merely to increase uncertainty for businesses and consumers, choking off some of the demand they were originally intended to stimulate?

⁹ The term gold bloc was applied to seven nations, France, Belgium, Luxembourg, the Netherlands, Italy, Poland, and Switzerland, that kept the gold standard during the world economic crisis of 1929 to 1933.

¹⁰ <http://www.economist.com/blogs/freeexchange/2011/10/foreign-exchange>

¹¹ http://news.xinhuanet.com/english/world/2013-04/20/c_132324075.htm

FTI Consulting News

Recent and Upcoming Events

- The Foundation for International Arbitration Advocacy (“FIAA”) presented its most recent workshop in Singapore from 20-22 June 2013. FTI Consulting is a long term supporter and anchor sponsor of FIAA.
- James Searby, Managing Director, has continued the development of our dispute resolution practice in Asia Pacific with an 11-day visit to Australia.
- James Searby attended the opening of the Singapore International Arbitration Centre’s (SIAC) first overseas office in Mumbai. James Searby and Montek Mayal, Consultant plan to visit India in August as they look to grow our presence in the country.

Should you have any feedback or questions on anything you’ve read, please feel free to contact Montek by phone at +65 6831 7813 or by email: montek.mayal@fticonsulting.com.

To unsubscribe from this newsletter or alternatively share any comments, please email us at montek.mayal@fticonsulting.com

Confidentiality Notice: This email and any attachments may be confidential and protected by legal privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the e-mail or any attachment is prohibited. If you have received this email in error, please notify us immediately by replying to the sender and then delete this copy and the reply from your system. Thank you for your cooperation.