



5th **LAWASIA** International Moot

MOOT PROBLEM 2010



Organiser of the LAWASIA International Moot Competition

THE INTERNATIONAL COURT OF ARBITRATION,
NEW DELHI

GOOD HEALTH COMPANY
(CLAIMANT)

V

DIRECTOR OF INTELLECTUAL PROPERTY, STATE OF MARU
(RESPONDENT)

THE ARBITRAL TRIBUNAL SHALL FOLLOW “Understanding on Rules and
Procedures Governing the settlement of Disputes” of the WORLD TRADE ORGANIZATION

MOOT PROBLEM

Good Health Company v. Director of Intellectual Property, State of Maru

1. Maru is a small country with a population of just over half a million people. It currently has a small but relatively democratic form of government. The economy of Maru is based mainly on tourism, hotel restaurant and retail business. Maru is famous for its eco-tourism and in the last five years (2005-2009), more than 5 million tourists have visited to see birds, corals and animals.
2. In early 2009, a new government was elected based on its promise to diversify the economy of Maru. In order to attract foreign investment, it adopted an “open door” policy allowing foreign investment in all areas of the economy. The Commerce Minister announced in parliament that:

For many years, the people of Maru have been living on the income derived from foreign tourists. That means our source of income has been dependent on foreigners and our economy is too concentrated in one sector of the economy. Look around at our neighbouring countries; they are flourishing due to new economic initiatives. It's our time to break the shackle and embrace new challenges. Let's open our door and let the foreigners come to our country. We do not say where they should invest, and we do not restrict how much they should invest. Let them decide for their business and let us focus on our economic growth.

3. “Good Health Company” (GHC) is one of the largest pharmaceutical companies in the world. It has its headquarters in Hori, one of the world’s economic giants. GHC owns patents on a wide range of medical and pharmaceutical products. In 2006, GLC developed a new drug which was developed to treat a wide range of new types of flu viruses. It is protected by a number of patents covering the chemical composition of the drug, its method of manufacture, and its manner of use. The patents were initially obtained in Hori and were subsequently patented in all countries which, like Maru, are members of the Patent Cooperation Treaty. [See Appendix A - An abstract of Patent No. 9,876,543 issued by the Maru Patent office on January 5, 2010. The validity and ownership of the patent are not being disputed by the parties.] GHC markets the new drug as “The Miracle Cure,”

asserting that it promised to be effective against all types of animal and bird flu. GHC's *Miracle Cure* has only been tested in the laboratory; its effectiveness in treating humans has not been established and many scientists have expressed skepticism about the claimed effects. It has not been approved for use by the Hori Food & Drug Administration.

4. The Chairman of the GHC, Mr. Smart was on holiday in Maru when he read about the announcement of the "open door" policy by the Maru government. He wanted to take this opportunity and called upon the Commerce Minister of Maru who was his classmate during his university days. In the meeting, he discussed about his plan to set up a pharmaceutical company which will produce jobs for at least fifty thousand people. The proposed pharmaceutical company will also have a research arm for developing new drugs. He also suggested conducting clinical trials of the new *Miracle Cure* developed by GHC in Maru. The Commerce Minister was very pleased to hear the idea and thanked his friend for coming forward to help Maru in diversifying its economy. At the end of the meeting, they hugged each other and recalled the saying "a friend in need is a friend indeed".
5. Shortly thereafter, GHC established a new company in Maru (GHLC-Maru). At the ground breaking ceremony at the manufacturing site, the Chairman of GHC stated:

We are thankful to the Government of Maru for allowing us to set up our manufacturing and research base here in Maru. In return, we promise the people of Maru that GHC will help develop the economy of Maru, provide jobs and do everything for the people of Maru.

6. Since the new manufacturing plant was to be operational in a year's time, GHC decided to start clinical trials of the *Miracle Cure* in Maru. The *Miracle Cure* was administered on patients with flu symptoms. The targeted group of people for the clinical trials included both older adults and babies. GHC also invited adults to take part in the clinical trial and in return, GHC promised to pay US\$20 as a reward which was more than a week's earnings for those people. The clinical trials of the *Miracle Cure* were successful and it was reported as a breakthrough in medical science. As a result of the patents it holds throughout the world, GHC is the only company which can manufacture or distribute the "*Miracle Cure*."
7. At the end of year 2009, an unknown disease struck one of the provinces of Maru which was the main tourist destination. The source or the cause of disease

- was unknown. It started from a young boy of the age of 7 who showed the symptoms of flu with rising temperature. He was put into hospital and treated with regular flu medicine. However, the boy died within a day. The next day, around 20 young and old people came to the hospital and complained about the same flu-like symptom. In the next few days, a large number of people from the same province became sick and the number of patients was increasing day by day. Sporadic influx of people from other provinces with the same type of flu was also reported. Doctors named that flu “Killer Flu”.
8. In fear of “Killer Flu”, tourists started leaving Maru as soon as they could. Flights from foreign countries were coming in empty. WHO issued a travel advisory against travelling to Maru. This caused havoc amongst tourists and Maru suffered yet another blow. Attack of “Killer Flu” and the absence of tourists affected the economy of Maru economy significantly.
 9. The blood test of these patients showed signs of a new strain of virus which was a combination of bird flu and swine flu. A few hundred samples of the Miracle Cure remaining from the clinical trials were in the Maru City Hospital’s pharmacy and these were administered to as many patients as possible. It seemed to produce a positive response amongst patients. In a short span of time, patients were showing signs of recovery. However, it was not certain whether the Miracle Cure really cured the disease or merely controlled it temporarily.
 10. The news of the use and temporary effectiveness of the Miracle Cure was given to the Health Minister. He instructed the doctors to use the Miracle Cure to stop the spread of this flu in Maru. In a telephone conversation with the Director of the Hospital, the Health Minister said *“use all the Miracle Cure you have in your stock to control the spread of this flu. If you run short of the Miracle Cure, ask GHC-Maru to produce more. They have to supply you immediately or else they will face the consequence. I want this flu to end as soon as possible so that we can restore normalcy in Maru.”*
 11. Tourists flown out of Maru after the outbreak of the flu carried the virus with them thus, leading to the spread of the killer flu in their home countries. The neighbouring countries also started showing signs of “killer flu”.
 12. GHC and its shareholders were very pleased to learn that the Miracle Cure which it developed after many years of research and after spending huge amounts of money finally proved to be a commercial success in the event of flu. The news of the “killer flu” around the world presented an opportunity to recover the cost of

research as well as to make profits as GHC was the only company which had an effective treatment for this new “killer flu”. The Chairman of GHC made a statement in the Board meeting

“Gentlemen! The “Killer Flu” in Maru and around the world has provided us an opportunity to make huge profits by selling our “Miracle Cure” at a higher price. I never thought we would see such a profitable situation so soon. Let’s make the most of it. We are the only one who could provide the Miracle Cure at this moment. However, considering the demand of the Miracle Cure, our manufacturing base in Hori is not sufficient. Therefore, we need to start our factory in Maru soon. Double the effort now! Start manufacturing the Miracle Cure within a week in Maru. We start selling from Maru and within a month, the Miracle Cure will be everywhere in the world. “We will begin by selling the Miracle Cure in Maru but will expand sales to the rest of the world as soon as possible.”

13. As the new “Killer Flu” spread, requests for the Miracle Cure came from countries around the globe and to keep up with the demand from overseas; the Director of the Intellectual Property Department of Maru authorised GHC-Maru to also produce the Miracle Cure for export. Fearing that GHC-Maru might be unable to produce sufficient Miracle Cure quickly enough to deal with the anticipated spread of “Killer Flu” in Maru, the Director of the Intellectual Property Department of Maru, at the request of the Minister of Health, invited Fizer Pharma, GHC’s largest competitor, to manufacture the Miracle Cure at Fizer’s manufacturing base in near-by Porta for export to Maru. To facilitate its production of Miracle Cure, the Director of the Intellectual Property Department of Maru directed management of the GHC-Maru facility to make available all test results and “know-how” regarding the manufacture of Miracle Cure to the management of Fizer’s facility in Porta. After consultations between the Director of the Intellectual Property Department of Maru, and his good friend, Dr. A.J. Francis, Director of the Intellectual Property Department of Porta, Dr. Francis agreed not to interfere with the manufacture of the Miracle Cure in Porta.
14. Fizer was happy to take this opportunity and after obtaining all relevant technical information from the Manager of the GHC-Maru facility, it immediately began producing the Miracle Cure in Porta. It was Fizer’s understanding that all the Miracle Cure produced in Porta would initially

be sent to Maru, but once the “killer flu” was under control in Maru, it would be entitled to produce the Miracle Cure for distribution and use in Porta and neighbouring countries. As compensation, the Intellectual Property Department of Maru agreed to pay GHC \$20 per vaccine, the estimated cost of production by GHC in Hori for all Miracle Cure produced by Fizer in Porta and delivered to Maru. Fizer agreed to reimburse the Intellectual Property Department of Maru for its payments to GHC.

15. GHC was very upset with the Intellectual Property Department for allowing its rival company to have access to its proprietary information and to produce its patented drug the Miracle Cure in Porta without its permission. It vowed to take this matter up to the highest level both politically and legally.
16. GHC-Maru filed a formal protest with the Director of the Intellectual Property Department against its decision. However, it was of no avail. The Director simply replied that he has the power to invite others to manufacture the Miracle Cure for public purposes. GHC then brought an infringement action against the Government of Maru for infringing its patent rights. Maru did not challenge the court’s jurisdiction or assert sovereign immunity but contended that it had the right to use the patented drug to combat the illness affecting the people of Maru. The court agreed with the Director’s reply and also held that the US\$20 per unit compensation was “more than fair.” After the judgment was rendered, GHC learned that the presiding judge of the intellectual property court was the classmate of the Chairman of Fizer at law school. GHC requested the presiding judge to disqualify himself, vacate the decision, and reset the matter for another hearing. The Presiding Judge denied the motion without convening the entire court.
17. The Director of the Intellectual Property Department anticipated that GHC would take additional steps to attempt to prevent the people of Maru from having access to the life-saving drug, Miracle Cure, and he decided to contact Better Life Pharmaceutical (BLP) from Ulka requesting it to distribute its drug “Sure Cure”. “Sure Cure” is a drug which is very similar but not identical to the “Miracle Cure”. [Miracle Cure contains an extract of the “Climbing Nightshade” (Solanum dulcamara), a toxic plant found in Maru and neighbouring countries combined with palm oil which neutralises the toxic effect of the extract. Sure Cure is also a combination of an extract of “Climbing Nightshade” but uses corn oil in place of palm oil to neutralise the toxic effects of the extract.] Both are administrated

orally. The Director of the Intellectual Property Department agreed to pay BLP US\$50 per unit for each unit delivered to Maru.

18. BLP and GHC are known to be fierce competitors in the global market and have engaged in numerous protracted and expensive litigations involving alleged infringement by one of the other's patents. "Sure Cure" had been held to infringe the GHC Patent in a law suit in Hori under the "doctrine of equivalents" [The Hori court adopted the reasoning of the United State Supreme Court in **Graver Tank & Manufacturing Co. v. Linde Air Products Co.**, 339 U.S. 605 (1950).]. When BLP began exporting "Sure Cure to Maru", GHC sought a preliminary injunction (Minerva injunction) in the Intellectual Property Court and requested an immediate hearing. After reviewing the supporting documents, the IP court denied the request in a brief order: "The Petitioner concedes that "Sure Cure" does not *literally infringe* Claim 1 of the Patent-in-suit as it does not use palm oil as the dispersant as required by the precise language of Claim 1. Petitioner urges the Court to hold that, nonetheless, it infringes the patent under the so-called the "doctrine of equivalents". However, the courts of Maru have never recognised any form of non-literal infringement (following the rulings in **Kirin-Amgen Inc. v. Hoechst Marion Roussel**, [2004] UKHL 46) Petition denied." The Constitutional Court of Maru dismissed a subsequent writ of appeal without opinion.
19. GHC requested the Commerce Minister of Hori to look into the matter. As GHC has suffered severe economic losses at a time when Hori was in the midst of a severe recession, and might be forced to cease all operations, the Commerce Minister of Hori called upon the Commerce Minister of Maru in an attempt to reach an amicable resolution to this dispute. The Intellectual Property Department of Maru is a branch of the Ministry of Commerce; however, for all practical purpose it acts on its own independently.
20. It was agreed that the matter should be referred for arbitration. At the request of both Commerce Ministers, the two parties - GHC/GHC-Maru and Intellectual Property Department of Maru - executed a written agreement that this dispute be resolved by private arbitration. They also agreed to conduct the arbitration pursuant to the "Understanding on Rules and Procedures Governing the Settlement of Disputes" of WTO. [The validity of the arbitration agreement has not been challenged by either party. A three member panel was constituted with the consent of GHC/GHC-Maru and Intellectual Property Department of Maru. The arbitration tribunal was asked to decide:

- (a) Whether the action of Intellectual Property Department of Maru was valid and justifiable under TRIPS in general and Article 31 of TRIPS in particular;*
- (b) Whether failure to recognise any infringement beyond the literal terms of patent violates Article 28 of TRIPS;*
- (c) Whether the action of Intellectual Property Department was valid and justifiable as per “Declaration on the TRIPS Agreement and Public Health (adopted on 14 November 2001) and Implementation of Paragraph 6 of the Doha Declaration on the TRIPS and Public Health (Decision of 30 August 2003);*
- (d) If the actions of the Intellectual Property Department of Maru are not justified under (a) and/or (b) and/or (c) then what remedies should be awarded to GHC/GHC-Mar.*

21. The Arbitral Tribunal has fixed the date of hearing from 10-14 November 2010 in New Delhi and invited GHC/GHC-Mar to make submissions on the issues submitted to it for the decision and/or recommendations. In the recommendations, the tribunal shall not decide on the amount of compensation. Parties will present their written submissions in the form of memoranda and make oral presentation before the tribunal. English shall be the language of arbitration. For the purpose of this arbitration Maru, Hori, Porta and Ulka are members of WTO. The tribunal shall follow “Understanding on Rules and Procedures Governing the settlement of Disputes” of WTO.

Patent No. 9,876,543

MIRACLE CURE, PROCESS FOR MAKING

MIRACLE CURE, AND USE OF MIRACLE CURE TO CURE SICKNESS

First issued by the Maru Patent Office on January 5, 2010. The named inventors were Drs Charles Best, Juan Gervas and William Henry. Similar patent were issued in Hori, Porta, Ulka and numerous other countries. All are presumed to be valid under the laws of the countries issuing the patents.

The patent was assigned to the Good Health Company

BACKGROUND OF THE INVENTION

1. Field of the Invention.

The present invention relates in general to pharmaceuticals and in particular to a miracle cure for all sorts of diseases.

2. Description of the Related Act.

For time immemorial, humans have been getting sick. And, for just about as long, people have been devising ways to make people well again. Initially, naturally occurring plants were used, but as technology progressed, synthetic pharmaceuticals and genetically-designed medicines became more common in medical facilities.

Many diseases are contracted from animals and birds, since humans have a large amount of contact with animals and birds. However, most medicines and/or vaccines are targeted toward a specific disease or illness, e.g., insulin for diabetes, etc., or towards a specific animal or bird. Even within a specific disease, e.g., influenza, different medications or vaccine serums are needed to combat the various strains of such diseases, e.g., swine flu, avian flu, etc. This makes medicines cost more and leaves many diseases un-studied and therefore lacking a cure or medicine to help people with symptoms. Further, as diseases mutate, it leaves society unprepared to handle a mutated strain of a given disease.

It can be seen, then, that there is a need in the art for a medicine that can cure many strains of the same disease. It can also be seen that there is a need for a medicine that can cure many different diseases.

SUMMARY OF THE INVENTION

The present invention discloses a miracle cure for many diseases.

DETAILED DESCRIPTION

The present invention, hereinafter referred to as “Miracle Cure,” can be used to cure a variety of diseases from multiple different animals and/or birds or other unknown sources.

The active ingredient in the Miracle Cure is neutralised with an edible substance, such as vegetable oil to reduce its toxicity.

WHAT IS CLAIMED IS:

1. A vaccine, comprising:
 - (a) an active ingredient, the extract of very toxic plant, solanum dulcamara (also known as “Climbing Nightshade) and
 - (b) a delivery agent such as palm oil, which is mixed with the active ingredient, such that the delivery agent delivers the active ingredient to a human.
2. A method for making a vaccine, comprising:
 - (a) purifying the active ingredient; and
 - (b) adding the active ingredient to a delivery agent, wherein the active ingredient and delivery agent are prepared for human delivery.

Wednesday, 1 September 2010