

# **ELSA MOOT COURT COMPETITION (EMC<sup>2</sup>) 2009-2010**

## **CLARIFICATIONS TO THE CASE**

### **IPLAND – CERTAIN MEASURES AFFECTING THE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS**

**Case Author: Professor Bryan Mercurio  
The Chinese University of Hong Kong**

Over 170 Clarification requests from Registered Teams were received. The Case Author has considered all requests carefully and has chosen to answer only the following questions in order to ensure that competitors address the specific WTO legal claims of the Case. No further interpretation will be given as a result of the Clarification answers.

***Q1. In MIFFTA Art. 1.2, which parties are referred to by the term “both”?***

A1. This is an error, please replace “both” with “all”. The provision should read:

“The Parties affirm their existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which all Parties are a party, including the WTO agreements.”

***Q2. When did Ipland, Freeland and Midonia become members of the WTO?***

A2. All are all founding Members of the WTO.

***Q3. Are there any alternative routes from Freeland to Midonia than the one through the narrow strip of Ipland?***

A3. Yes, but see paragraph 1.

***Q4. Does the mountainous jungle common to Freeland, Midonia and Ipland geographically cover the narrow strip of Ipland?***

A4. No.

***Q5. Are Ipland, Freeland and Midonia are the signatories to the Paris Convention for the Protection of Industrial Property and the Vienna Convention on the Law of Treaties.***

A5. Ipland is not a party to either agreement, whereas Freeland and Midonia are signatories to both treaties.

**Q6. *Are all of the parties to MIFFTA a party to the Convention for Biological Diversity, the International Union for the Protection of New Varieties of Plants and the Convention on Civil Aviation ('Chicago Convention')*?**

A6. Yes.

**Q7. *Are Freeland, Midonia and Ipland parties in the Convention on Transit Trade of Landlock States of 1965?***

A7. No.

**Q8. *Is Midonia a third party to the dispute?***

A8. Yes

**Q9. *Has Freeland declared any public health crisis which may be considered a national health crisis?***

A9. No.

**Q10. *Is Freeland capable to produce the quantity of pharmaceutical products necessary for its population?***

A10. Yes.

**Q11. *Except for paragraph 795 of the Local Act, are there any other regulations regarding the issuance of a compulsory license?***

A12. Yes.

**Q12. *Does the spate of influenza viruses mentioned in paragraph 5 include, inter alia, the TIR1 virus? Is the spate of pandemic influenza taking place in Ipland?***

A.12 Yes. It is worldwide, including in Ipland.

**Q13. *Do the provisions of the Local Production Encouragement Act concerning the issuance of compulsory licence apply to patents on pharmaceutical products only or do they apply to all patents notwithstanding the sphere of technology?***

A13. The language of the Act is neutral.

**Q14. *What is the difference between "working a patent" and "locally working a patent"?***

A14. You need to make your own assessment of whether there is a difference and if it is relevant.

**Q15. *Has the Local Production Encouragement Act has been applied?***

A15. No.

**Q16. *Does the word "any" in paragraph 5 refer to pharmaceutical companies of only Iplandian nationality or of any nationality?***

A16. There is no limitation as to nationality.

**Q17. *Was the Local Production Encouragement Act enacted after the outbreak of concern regarding the pandemic influenza?***

A17. No, see paragraph 5.

**Q18. *What is the meaning of the notion of "legally traded" goods in the Article 2(2) of MIFFTA?***

A18. The Agreement does not define the term.

**Q19. *Are the measures of providing long leases of government owned land at less than fair market value, tax breaks and star-up funding to any pharmaceutical company establishing a manufacturing presence in Ipland comprised within the Local Production Encouragement Act?***

A19. No.

**Q20. *Is there any legally established definition of the term of "import" in the national legislation of any of the three countries?***

A20. No.

**Q21. *In paragraph 13 of the Case it is stated that "Midonia believed 'sambati' had become a generic term through use in the region". What area is Midonia referring to when using the term "region"?***

A21. Freeland, Ipland and Midonia.

**Q22. *Is there any distinction between "a common herbal remedy" and "a particular herbal remedy" mentioned in paragraphs 12 and 14, respectively?***

A22. No, but 'Revitall' and 'Cold and Flu Prevention Remedy' are separate products.

**Q23. *Are the "several shipments of a particular herbal remedy" mentioned in paragraph 14 the 'Cold and Flu Prevention and Remedy' product?***

A23. Yes.

**Q24. Does “Revital” actually contain Sambati?**

A24. Yes.

**Q25. Why was Herb Plus Inc’s herbal remedies seized**

A25. The product was originally seized for patent infringement and for use of unlicensed Sambati.

**Q26. Are Herb Plus Inc’s herbal remedies produced using the same extraction process that is patented in Ipland (i.e., are we talking about ‘Cold and Flu Prevention and Remedy’)? Does Herb Plus Inc. have a licence in Ipland to use this production process that is patented by the IHB?**

A26. Yes. No.

**Q27. Is the seizure of Herb Plus Inc’s herbal remedies the specific “seizure” that is referred to in Claim 3?**

A27. Yes.

**Q28. Do any Midonian or Freeland companies have a patent in their own countries to produce medicine made from sambati?**

A28. No.

**Q29. Does “thereafter” in paragraph 16 mean that the customs authorities must notify the rights holder of the suspension within 10 days after the trader applies for the release of the goods?**

A29. See paragraph 16. Customs must “promptly notify” the rights holder after the traders apply for the release of the goods.

**Q30. Under Protection of Rights Encouragement Act, if the right holder fails to commence proceedings within 10 days, what happens to the suspended goods – are they released or confiscated?**

A30. Released.

**Q31. Will the goods be released if the right holder/ customs authority (while acting ex officio) fail to commence proceeding even if traders haven’t applied for the release of goods?**

A31. No.

**Q32. The regulation that traders are restricted of applying release of the goods to no earlier than “10 days”, does the “10 days” refer to “10 calendar days” or “10 working days”?**

A32. Working days.

**Q33. *What standard of 'exhaustion of IP rights' is adopted by the countries involved, including Ipland?***

A.33 Ipland applies national exhaustion, whereas Freeland and Midonia adopt international exhaustion.

**Q34. *Has the case instigated by the producers of Revitall in Iplandian courts reached the merits phase (para. 13)?***

A34. No.

**Q35. *Is the price of "Revitall" which contains "Sambati" and manufactured in Midonia lower than that of like products manufactured in Ipland?***

A35. Yes.

**Q36. *Is the agreement between the parties to exclude "Sambati" from the scope of the MIFFTA contained in a specific provision of the said FTA or is it in a separate formal agreement?***

A36. It is simply not included in the relevant annex as a protected GI.

**Q37. *Do the goods Ipland has seized, which contain sambati, use the process Ipland has patented?***

A37. Yes.

**Q38. *Did Iplandian research perfect the complicated process of separating and extracting the medicinally relevant portion of the Sambati?***

A38. Yes.

**Q39. *Was this research based on the indigenous knowledge of the herb?***

A39. In part.

**Q40. *Is Revital's statement that the product was sourced from Midonian Territory just meters from the Iplandia Border true?***

A40. Yes

**Q41. *Is the Herbal Remedy seized by the Iplandian Customs (in an ex officio capacity), used for curing TIR1?***

A41. No.

**Q42. *Is the Herbal Remedy a prescription drug?***

A42. No.

**Q43. *Has there been an increase in research of the anti-virus quality in indigenous herbs after the discovery of the TIRI virus? Or has there already been extensive research of remedial qualities of indigenous herbs?***

A43. Yes, to both parts.

**Q44. *Does Ipland's Herbal Remedy Protection Act cover local and foreign-owned pharmaceutical companies (para. 8)?***

A44. Yes.

**Q45. *Did the parties make any commitments in the MIFFTA on sambati or any products that contain sambati?***

A45. No.

**Q46. *Is there any other type of assurance for filling an IP infringement suspension of release of goods complaint under Iplandian Law different from the US\$25,000 security?***

A46. No.

**Q47. *Did Ipland file requests in writing that the matter be considered under MIFFTA?***

A47. Yes.

**Q48. *Art.23.9 of MIFFTA refers to “either forum” and “dispute settlement procedures solely under this Agreement”. Do such procedures include arbitration?***

A48. Yes.