



Team: 020 R

**ELSA MOOT COURT COMPETITION ON WTO LAW
2009–2010**

**Ipland – Measures Affecting the Protection and
Enforcement of Intellectual Property Rights**

Freeland
(Complainant)

vs

Ipland
(Respondent)

SUBMISSION OF THE RESPONDENT

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A. WTO AGREEMENTS

1. *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948).
2. *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), and its Annexes, including:
 - i. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C.
 - ii. *General Agreement on Tariffs and Trade*, Annex 1A.
 - iii. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2.

B. OTHER TREATIES AND CONVENTIONS

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III LIST OF ABBREVIATIONS

ABR	Appellate Body Report
AB	Appellate Body
Article 31 <i>bis</i>	<i>Amendment to the TRIPS Agreement</i> (8 December 2005)
CFPR	Cold and Flu Prevention and Remedy product
Covered Agreements	The Agreements listed in Annex 1 of the DSU
CRTA	Committee on Regional Trade Agreements
Decision	<i>Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health</i> (30 August 2003)
Declaration	<i>Doha Declaration on the TRIPS Agreement and Public Health</i> (14 November 2001)
DSU	<i>WTO Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
EEC	European Economic Community
ELSA Case	ELSA Moot Court Competition on WTO Law Case
ELSA Clarifications	ELSA Moot Court Competition on WTO Law Case Clarifications
FTA	Free-Trade Area
GATT	<i>General Agreement on Tariffs and Trade 1994</i>
GI	Geographical indication
GPR	GATT Panel Report
ICJ Statute	<i>Statute of the International Court of Justice</i>
IHB	Ipland Herb Board
IPR	Intellectual property right
LPEA	<i>Local Production Encouragement Act</i> (2007)
Marrakesh Agreement	<i>Marrakesh Agreement Establishing the World Trade Organization</i>
MIFFTA	Midonia-Ipland-Freeland Free Trade Agreement
Paris Convention	<i>Paris Convention for the Protection of Industrial Property</i>
PR	Panel Report
PREA	<i>Protection of Rights Encouragement Act</i> (2007)
TRIPS	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
VCLT	<i>Vienna Convention on the Law of Treaties</i>
WCO	World Customs Organization

IV SUMMARY

Jurisdiction

MIFFTA governs this dispute

- MIFFTA satisfies the customary international law requirements of *inter se* treaty modification.
- MIFFTA is *lex posterior* of the WTO Agreements.
- Therefore, MIFFTA art 23.9 is a legal impediment to this Panel's jurisdiction.

Estoppel is a legal impediment to this Panel's jurisdiction

- Estoppel applies in WTO disputes. It prevents Freeland from departing from MIFFTA art 23.9.

Claim 1: Local Production Encouragement Act (2007)

The LPEA is consistent with TRIPS art 27.1

- Article 27.1 permits local working. Article 27 prohibits discrimination rather than mere differential treatment. Local working requirements are not discriminatory as they are recognised as fulfilling a bona fide purpose.

In any event, the LPEA is consistent with TRIPS art 28.1 and 27.1 by virtue of art 31

- TRIPS art 31 provides an exception to arts 27 and 28.
- Ipland has effectively waived the art 31(b) requirement for the LPEA due to a 'national emergency'. The Declaration contains an authoritative interpretation of art 31(b) such that a Member may unilaterally determine that a national emergency exists. Even so, objectively assessed, the LPEA responds to a 'national emergency'.

LPEA is not inconsistent with GATT art III:4

- The LPEA does not fall within the scope of GATT art III:4
- Even if Freeland discharges its burden of proving that the LPEA is inconsistent with GATT art III:4, the LPEA is justified under GATT art XX(b) as it is 'necessary' for the protection of human health and is applied in a manner consistent with the *chapeau*.

Claim 2: Transit Restrictions and Seizure of Revitall

Freeland is estopped from challenging the seizure of Revitall as WTO-inconsistent

- MIFFTA art 2.2 represents that MIFFTA parties may seize illegally traded goods in transit; Revitall is such a good. Freeland may not depart from this representation.

Ipland may seize goods in transit for violation of Iplandian IP Law

- The seizure of Revitall in transit is consistent with TRIPS art 1.1. Although it exceeds minimum standards of protection, it does not contravene other TRIPS provisions.

- The seizure of Revitall in transit is consistent with TRIPS art 41.1 as it does not create barriers to *legitimate trade*.
- The seizure of Revitall in transit is consistent with TRIPS art 51, which permits Members to seize goods in *transit*. The law of the country of transit applies.

Transit restrictions on Revitall are consistent with TRIPS and GATT

- The transit restrictions on Revitall are consistent with TRIPS art 53.1. Freeland cannot prove that Iplandian customs authorities are *unable* to require security.
- The transit restrictions on Revitall are consistent with GATT art V. They impose restrictions on traffic in transit consistent with GATT arts V:3 and V:4.
- Even Freeland discharges its burden of proving inconsistency with GATT art V, the transit restrictions are justified under GATT art XX(d). The transit restrictions are designed to secure compliance with IP Law and are consistent with the art XX *chapeau*.

Claim 3: Transit Restrictions and Seizure of CFPR

Freeland is estopped from challenging the seizure of CFPR as WTO-inconsistent

- MIFFTA art 2.2 represents that MIFFTA parties may seize illegally traded goods in transit; CFPR is such a good. Freeland may not depart from this representation.

Ipland may seize goods in transit for violation of Iplandian IP Law

- The seizure of CFPR in transit is consistent with TRIPS art 1.1. Although *ex officio* seizure on the basis of patent infringement exceeds minimum enforcement obligations, it does not contravene other TRIPS provisions.
- The seizure of CFPR in transit is consistent with TRIPS art 41.1 as it does not create barriers to *legitimate trade*.
- The seizure of CFPR in transit is consistent with TRIPS art 51, which permits Members to seize goods in *transit*. The law of the country of transit applies.
- The seizure of CFPR in transit is consistent with TRIPS art 58, which permits Members to provide for *ex officio* seizure on the basis of patent infringement.

Transit restrictions on CFPR are consistent with TRIPS and GATT

- *Ex officio* customs action is consistent with TRIPS arts 41 and 58(b). The PREA does not entail any ‘unreasonable time limits’ or ‘unwarranted delays’ and provides for prompt notification of right holders.
- Even Freeland discharges its burden of proving inconsistency, the transit restrictions are justified under GATT art XX(d). The transit restrictions are designed to secure compliance with IP Law and are consistent with the art XX *chapeau*.

V STATEMENT OF FACTS

1. Ipland, Freeland and Midonia are all WTO members and share a common border. The major highway linking Freeland to Midonia passes through Ipland. These states are all parties to MIFFTA, which covers 72% of tariff lines and 87% of trade by volume between parties. MIFFTA provides for exclusive recourse to its dispute settlement mechanism for matters concerning intellectual property, human health or the environment.
2. Ipland does not have the manufacturing capacity to produce the essential medicines needed to combat pandemics. It seeks to protect its population through measures aimed at developing large-scale local production of pharmaceuticals. One such measure is the LPEA, which encourages local production through the grant of compulsory licenses for failure to locally work a patent. The LPEA was enacted in light of recent pandemic concerns, such as TIR1, which has the potential to infect 25% of the global population, with a mortality rate of 4%.
3. In response to foreign exploitation of its biological resources, Ipland has strengthened regulation of its herbal remedy industry through the *Herbal Remedy Protection Act* (2007), which creates the IHB and empowers it to regulate the production and trade in indigenous herbs. The IHB has registered ‘Sambati’ as a GI and trademark. Sambati is an indigenous herb, which grows only in the mountainous jungle terrain common to Ipland, Freeland and Midonia. It has the potential for use in a medicine to treat TIR1.
4. Recent investigations have revealed significant trade in illegal goods between Midonia and Freeland transiting through Ipland. Iplandian customs authorities have been granted further powers to investigate alleged IPR infringements *ex officio*. Ipland has removed the requirement that rights holders provide security when applying for seizure of goods and imposed more stringent conditions on the release of seized goods.
5. The IHB has used these procedures to request customs officials to confiscate in transit a shipment of Revitall that, by bearing the word Sambati on the label, infringes the IHB’s trademark and GI. The Sambati was used without the IHB’s consent. Separately and acting in an *ex officio* capacity, customs officials also confiscated in transit a shipment of CFPR exported from Midonia and destined for importation into Freeland. CFPR is manufactured using a process patented by the IHB under Iplandian law.

VI IDENTIFICATION OF THE MEASURES AT ISSUE

Measure 1: The LPEA, which provides that compulsory licenses will be issued for failure to locally work a patent.

Measure 2: The transit restrictions and seizure of ‘Revital’ on the basis of trademark and GI infringement, pursuant to the Iplandian customs regime as modified by the PREA.

Measure 3: The transit restrictions and seizure of CFPR on the basis of patent infringement, pursuant to the Iplandian customs regime as modified by the PREA.

VII LEGAL PLEADINGS

JURISDICTION

1: Legal impediments preclude this Panel’s jurisdiction

1. WTO Panels ‘have certain powers that are inherent in their adjudicative function’,¹ including the right to determine whether they have jurisdiction in a given case, and the scope of that jurisdiction.² In *Mexico – Taxes on Soft Drinks*, the AB left open the possibility that ‘legal impediments’ may prevent a Panel from ruling on the merits of a case.³ MIFFTA art 23.9 and the principle of estoppel are legal impediments to this Panel’s jurisdiction.

2: MIFFTA art 23.9 governs the resolution of this dispute

2. MIFFTA art 23.9 modifies DSU art 23 as between MIFFTA parties in relation to certain disputes. Article 23.9.2 grants Ipland the right to have this dispute decided solely under MIFFTA dispute settlement procedures, as it arises under MIFFTA Chapter 15 and concerns measures adopted to protect human health.

2.1: MIFFTA art 23.9 is an *inter se* modification of DSU art 23 under VCLT art 41

2.1.1: VCLT art 41 applies to the WTO Agreements

3. Customary international law applies to WTO Members to the extent that the WTO Agreements do not ‘contract out’ of it.⁴ Under customary international law, parties to a multilateral treaty may modify that treaty between themselves (i.e. *inter se*), subject to the conditions codified in VCLT art 41.⁵ VCLT art 41(1)(a) allows such modification if it is *permitted* by the treaty. Further, VCLT art 41(1)(b) allows modification if it is *not prohibited* by the treaty, and (i) does not affect the rights and obligations of other signatories and (ii) does not relate to a provision derogation from which is incompatible with the effective

¹ ABR, *Mexico – Taxes on Soft Drinks* [45].

² ABR, *US – 1916 Act* [54]; ABR, *Mexico – Taxes on Soft Drinks* [45].

³ ABR, *Mexico – Taxes on Soft Drinks* [54].

⁴ PR, *Korea – Government Procurement* [7.96].

⁵ PR, *Turkey – Textiles* [9.181]–[9.182]; ILC (2006) [306]; Pauwelyn (2003) 475; Trachtman (2004) 859.

execution of the object and purpose of the treaty as a whole. MIFFTA art 23.9 falls within either VCLT art 41(1)(a) by virtue of GATT art XXIV or, alternatively, VCLT art 41(1)(b).

2.1.2: MIFFTA art 23.9 is a valid inter se modification pursuant to VCLT art 41(1)(a)

4. MIFFTA art 23.9 is permitted by GATT art XXIV and thus satisfies VCLT art 41(1)(a). The *chapeau* of art XXIV:5 indicates that the provisions of GATT ‘shall not prevent ... the formation of a ... free-trade area’ as defined in GATT art XXIV:8(b), subject to the requirements of GATT art XXIV:5(b). As the DSU elaborates and modifies GATT arts XXII and XXIII,⁶ it should also be considered subject to the operation of the *chapeau* of GATT art XXIV:5. As explained below, MIFFTA art 23.9 complies with GATT arts XXIV:5(b) and XXIV:8(b) and is therefore a permitted modification of DSU art 23.

5. MIFFTA meets the definition of an FTA under GATT art XXIV:8(b) as it covers ‘substantially all the trade’ between MIFFTA parties. ‘Substantially all the trade’ has not been defined by the CRTA⁷ and allows some flexibility in implementation.⁸ The EEC interpreted it to mean as little as 80% of trade by volume.⁹ MIFFTA exceeds this standard by covering 87% of trade by volume. Moreover, it covers a substantial majority of tariff lines, at 72%. Midonia and Freeland are developing countries and should be given flexibility in implementing FTAs.¹⁰ As such, MIFFTA clearly fulfils the requirements of art XXIV:8(b).

6. MIFFTA satisfies art XXIV:5(b) because it has not led to the imposition of ‘higher or more restrictive’ duties and other regulations of commerce on non-FTA WTO Members, as compared with the situation before its entry into force. There is no evidence before the Panel as to the duties and other regulations of commerce maintained by Ipland, Freeland and Midonia prior to MIFFTA. As MIFFTA art 1.1 affirms the Agreement’s consistency with GATT art XXIV, and as Members are obliged to perform treaty obligations in good faith,¹¹ no art XXIV:5(b) inconsistency should be presumed.

2.1.3: MIFFTA art 23.9 is a valid inter se modification pursuant to VCLT art 41(1)(b)

7. Alternatively, MIFFTA art 23.9 is not prohibited by the WTO Agreements, and satisfies the VCLT art 41(1)(b) requirements for *inter se* modification. Article 23.9 does not affect the rights and obligations of other WTO Members, who remain free to initiate WTO disputes against MIFFTA parties for breaches of the Covered Agreements. Any derogation from DSU

⁶ DSU art 3.1.

⁷ PR, *Turkey – Textiles* [9.148].

⁸ ABR, *Turkey – Textiles* [48].

⁹ Committee on Treaty of Rome [30].

¹⁰ CRTA, Note on the Meetings of 23–24 September 1998 [13].

¹¹ ABR, *EC – Sardines* [278].

art 23 arising from MIFFTA art 23.9 is not ‘incompatible with the effective execution of the object and purpose of the treaty as a whole’.¹² The term ‘treaty as a whole’ refers to ‘the WTO Agreement and all its Annexes’.¹³ The object and purpose of the WTO Agreement and its Annexes is ‘the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations.’¹⁴ WTO Members recognise the role of FTAs in facilitating such integration.¹⁵

2.2: MIFFTA is *lex posterior* of the WTO Agreements

8. VCLT art 30(4) reflects customary international law¹⁶ and thus applies to the WTO Agreements.¹⁷ Article 30(4) codifies the principle of *lex posterior*: subject to VCLT art 41,¹⁸ when certain parties to an earlier treaty conclude a subsequent treaty regarding the same subject matter, the later treaty prevails as between those parties to the extent of any incompatibility. As a valid *inter se* modification of DSU art 23 pursuant to VCLT art 41, MIFFTA art 23.9 governs the resolution of this dispute.

3: Estoppel is a legal impediment to this Panel’s jurisdiction

9. Estoppel is a ‘general principle of law recognized by civilized nations’.¹⁹ The AB in *EC – Export Subsidies on Sugar* held that a Panel may examine estoppel in determining whether a Member has engaged in dispute settlement in ‘good faith’ in accordance with DSU art 3.10.²⁰

10. Estoppel operates where a party has been ‘induced to act in reliance on assurances of another party’ such that it would ‘be prejudiced were the other party later to change its position’.²¹ MIFFTA art 23.9 is an assurance by Freeland that it would not bring the matters referred to in that provision before a WTO Panel. If the Panel hears this matter, Ipland will suffer the detriment of being brought before a Panel whose jurisdiction it explicitly sought to exclude in relation to the matters set out in MIFFTA art 23.9.2. Freeland is thus estopped from bringing this claim: this forms a legal impediment to this Panel’s jurisdiction.

11. However, should the Panel find that it has jurisdiction in this matter, Ipland submits that the measures at issue are not inconsistent with either TRIPS or GATT.

¹² VCLT art 41(1)(b)(ii).

¹³ ABR, *EC – Chicken Cuts* [195]; PR, *US – Cotton Yarn* [7.46].

¹⁴ Marrakesh Agreement Preamble.

¹⁵ GATT art XXIV:4.

¹⁶ PR, *EC – Poultry* [206]; Aust (2007) 228; Villiger (2009) 410.

¹⁷ PR, *Korea – Government Procurement* [7.96]; see above para 3.

¹⁸ VCLT art 30(5).

¹⁹ ICJ Statute art 38(1)(c). See *Denmark v Norway* 48; Brownlie (2008) 18; MacGibbon (1958) 468.

²⁰ ABR, *EC – Export Subsidies on Sugar* [307].

²¹ PR, *Guatemala – Cement II* [8.23].

CLAIM 1: LOCAL PRODUCTION ENCOURAGEMENT ACT (2007)**4: The LPEA is consistent with TRIPS art 27.1**

12. TRIPS art 27.1 provides that ‘patent rights [shall be] enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced’. Paragraph 795 of the LPEA creates a local working requirement: a compulsory license will be issued if a product patented in Ipland is not locally manufactured.

13. DSU art 3.2 requires the Panel to interpret WTO Agreements ‘in accordance with customary rules of interpretation’, namely, VCLT arts 31 and 32.²² Under VCLT art 31(1), ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ Interpreting art 27 in this manner, the LPEA does not violate art 27.1 because failure to locally work is a valid basis for compulsory licensing.

4.1: TRIPS art 27.1 prohibits discrimination, rather than differential treatment

14. Discrimination is distinct from differential treatment: it is ‘pejorative in connotation and refers to the results of the unjustified imposition of differentially disadvantageous treatment’.²³ Article 27 does not ‘prohibit *bona fide* exceptions to deal with problems that exist only in certain product areas’.²⁴ Thus, while the Panel in *Canada – Pharmaceutical Patents* found that Canada’s measure applied only to pharmaceuticals, this did not constitute discrimination as to ‘field of technology’.²⁵ It is similarly permissible to differentiate as to ‘whether products are imported or locally produced’, which is also listed under art 27. This is subject to the caveat that differential treatment be adopted for a *bona fide* purpose.²⁶

15. The LPEA local working requirement merely *differentiates* between domestically produced patented products and imported patented products for the *bona fide* purpose of ensuring that patents are locally worked.

4.2: Local working is a bona fide purpose under Paris Convention art 5A(2)

16. Paris Convention art 5A(2) confers the right to ‘grant compulsory licenses to prevent ... abuses ... of the exclusive rights conferred by the patent, for example, failure to work.’ TRIPS art 2.1 incorporates certain provisions of the Paris Convention into TRIPS. Article 2.1 provides that, in observing their TRIPS obligations, Members ‘shall comply with’ arts 1–12 and 19 of the Paris Convention. As such, these provisions form part of the ‘context’ for

²² ABR, *US – Gasoline* 17; ABR, *US – Shrimp* [158].

²³ PR, *Canada – Pharmaceutical Patents* [7.92]; see ABR, *EC – Tariff Preferences* [174].

²⁴ PR, *Canada – Pharmaceutical Patents* [7.94] (emphasis added); see Dinwoodie and Dreyfus (2007) 445.

²⁵ PR, *Canada – Pharmaceutical Patents* [7.105]; see *Patent Act* (1985) (Canada) s 55.2(1).

²⁶ Gervais (2008) 348.

interpreting art 27.²⁷ In particular, the meaning of ‘failure to work’ in Paris Convention art 5A(2) guides the interpretation of art 27.

17. The term ‘work’ in art 5A(2) refers to actual manufacture of the patented product within the territory of the patent-granting country. Bodenhausen, an ‘eminent authority’,²⁸ states that local working stems from the word ‘working’: importation alone will not normally constitute *working* of a patent.²⁹ As the Paris Convention recognises failure to locally work as abuse of a patent and grounds for issuing a compulsory license, this meaning extends to TRIPS art 27.

18. Both Paris Convention art 5A(2) and TRIPS art 8.2 refer to ‘prevention of abuse’ of IPRs. The term ‘abuse’ should be interpreted consistently between the two agreements.³⁰ Furthermore, Paris Convention art 19 stipulates that any future agreement cannot contradict the provisions of the Paris Convention. This confirms that local working rights under the Paris Convention cannot be diminished by the obligations under TRIPS art 27.³¹

4.3: Local working requirements are consistent with the object and purpose, subsequent practice and negotiating history of TRIPS

19. Article 27 must be interpreted in light of the ‘object and purpose’ of TRIPS outlined in the Preamble and arts 7 and 8.³² A balance should be sought between the interests of patent owners, on the one hand, and the importance of technological innovation and the dissemination of technology on the other. Manufacturing a patented product locally is a direct method of technology transfer: it develops domestic human capital and encourages foreign direct investment.³³ This benefit to the patent-granting country is balanced against its minimal interference with patentee rights. Only the art 28 right to *import* is interfered with. Patent owners may still make, use, offer for sale and sell the patented product.³⁴

20. ‘Subsequent practice’ in the application of TRIPS establishes agreement regarding this interpretation of art 27.³⁵ The ‘vast majority’ of WTO Members, industrialised and otherwise, maintain local working requirements.³⁶

21. Recourse to negotiating history confirms this interpretation of art 27.³⁷ Article 34 of the Brussels Draft prohibited the grant of a compulsory license for failure to work where

²⁷ ABR, *US – Havana Club* [124]–[125]; VCLT art 31(1).

²⁸ VCLT art 31(3)(c); ICJ Statute art 38(1)(d).

²⁹ Bodenhausen (1968) 71.

³⁰ ABR, *Korea – Dairy* [81]; ABR, *US – Upland Cotton* [547]–[549]; Correa (2007) 48.

³¹ Reichman and Hasenzahl (2003) 10.

³² VCLT art 31(1).

³³ Maskus and Reichman (2005) 13.

³⁴ See TRIPS art 28.1.

³⁵ VCLT art 31(3)(b); ABR, *Japan – Alcoholic Beverages II* 106; Van Damme (2009) 339.

³⁶ Champ and Attaran (2002) 372; Correa (2005) 240. See *Patents Act* (USA) ss 204, 209; *Patents Act* (1977) (UK) ss 46–50; *Industrial Property Act* (1996) (Brazil) art 68(1).

‘importation [was] adequate to supply the local market’. The parties to TRIPS rejected this provision: this indicates that they did not consider importation *sufficient* to satisfy ‘working’. As such, failure to work must be interpreted to mean failure to *locally* work.

5: The LPEA is consistent with TRIPS arts 28.1 and 27.1 by virtue of art 31

5.1: TRIPS art 31 provides an exception to arts 28.1 and 27.1

22. Even if compulsory licensing for failure to locally work is otherwise inconsistent with art 27 or the exclusive rights conferred on a patent owner by art 28, the LPEA falls within the exception in TRIPS art 31. Article 31 is an exception to both these provisions.

23. Articles 27 and 28 both grant *patentee rights*. Article 27 requires, *inter alia*, that ‘patent rights [be] enjoyable’ without discrimination. Article 28 defines the ‘rights conferred’ by a patent. Article 30 grants ‘limited exceptions’ to patent rights conferred by Members. Article 31 provides for ‘other use without authorization of the [patent] right holder’. Pursuant to fn 7, ‘other use’ refers to use other than the ‘limited exceptions’ available under art 30. Therefore, arts 30 and 31 both provide *exceptions* to patent *rights*. As such, art 31 is an exception to patent rights as granted and defined under arts 27 and 28.

5.2: TRIPS art 31 permits compulsory licenses for failure to locally work

24. Article 31 does not define the *grounds* upon which compulsory licenses may be issued: it merely specifies the *conditions* that must be observed before a compulsory license is granted. Paragraph 5(b) of the Declaration recognises that Members have ‘the freedom to determine the grounds upon which such licenses are granted’. Therefore, a Member may use compulsory licensing to ensure local working provided that it complies with the procedural safeguards in art 31.

5.3: The LPEA satisfies TRIPS art 31(b)

25. Article 31(b) requires that the license holder first engage in negotiations with the patent owner with the aim of executing a voluntary license. This requirement may be waived in the case of a national emergency, as has occurred in the present case.

5.3.1: The Declaration must be used to interpret art 31(b)

26. Marrakesh Agreement art IX:2 grants the Ministerial Conference and General Council the ‘exclusive authority to adopt interpretations’ of the WTO Agreements, including TRIPS. A Panel is bound to follow these interpretations.³⁸ The Ministerial Conference adopted the

³⁷ VCLT art 32.

³⁸ VCLT art 31(3)(a); Ehlermann and Ehring (2005) 807.

Declaration pursuant to this mandate. Paragraph 4 indicates that it expresses the intention of the Members regarding the manner in which TRIPS ‘should be interpreted’. As such, the Declaration is an authoritative interpretation of TRIPS art 31(b).

5.3.2: Ipland may unilaterally determine that a national emergency exists

27. The art 31(b) requirement ‘may be waived by a Member in the case of a national emergency’. If a Member determines that a national emergency exists, it has the right to waive art 31(b) without any external consultation or review. This is reinforced by Declaration para 5(c), which supports Members’ right to ‘determine what constitutes [an emergency], it being understood that public health crises ... can represent a national emergency’.

28. This interpretation of art 31(b) is consistent with the TRIPS object and purpose of supporting Members’ rights to protect public health.³⁹ If Members are not entitled to exercise sovereignty in responding to health crises as contemplated by para 5(c), the art 31(b) waiver will be severely limited. The AB has recognised Members’ sovereign right to protect the health of their citizens.⁴⁰ Thus, Ipland may determine whether it faces a national emergency.

5.3.3: The LPEA responds to a ‘national emergency’

29. In any event, the spate of influenza viruses in Ipland objectively constitutes a ‘national emergency’ for the purposes of art 31(b). T1R1 is a potentially deadly virus. Health experts predict that T1R1 could infect 25% of the world’s population, with a global mortality rate of 4%. The purpose of the LPEA is to respond to this national emergency and, more broadly, to protect public health. It seeks to develop the domestic Iplandian manufacturing capacity to produce pharmaceuticals because, in a pandemic situation, the security of foreign supplies is not guaranteed. Foreign suppliers may prioritise domestic supply over exportation to Ipland if they too are experiencing a health crisis. Reducing reliance on foreign suppliers is necessary for Ipland to secure long term access to pharmaceuticals and safeguard its health interests. These are important interests.⁴¹

6: The LPEA does not fall within the scope of GATT art III:4

30. The scope of GATT art III:4 is limited to measures that affect ‘products as such’.⁴² The AB has approached treaty interpretation in a manner that emphasises the literal meaning of words in their context.⁴³ Because the LPEA affects *patent rights*, rather than *products*, it falls outside the scope of art III:4.

³⁹ TRIPS art 8.1.

⁴⁰ See ABR, *EC – Asbestos* [172]; ABR, *Brazil – Retreaded Tyres* [144].

⁴¹ Decision para 6(i); TRIPS art 31*bis*(3); Voon and Mitchell (2009) 590.

⁴² GPR, *US – Tuna Dolphin I* [5.11]; GPR, *US – Tuna Dolphin II* [5.8].

⁴³ See ABR, *US – Shrimp*; ABR, *US – Cotton Yarn* [87]; ABR, *US – Lamb Safeguards* [94].

7: In any case, the LPEA is justified under GATT art XX(b)

31. Even if Freeland discharges its burden of proving that the LPEA is inconsistent with GATT art III:4, the LPEA is nevertheless justified under GATT art XX(b). Article XX(b) exempts a measure from compliance with the provisions of GATT where it is ‘necessary to protect human ... life or health’. The LPEA is provisionally justified under art XX(b) and is consistent with the art XX *chapeau*.⁴⁴

7.1: The LPEA is necessary to protect human life and health

32. A measure does not have to be ‘indispensable’ to be ‘necessary’.⁴⁵ Necessity is assessed in two steps. A measure is first ‘weighed and balanced’ according to three factors: (1) the importance of the interests protected; (2) the contribution to its goal; and (3) its impact on international trade.⁴⁶ It is then confirmed as necessary where there are no reasonably available, less trade-restrictive alternatives that achieve the same level of protection.⁴⁷

7.1.1: The LPEA is ‘necessary’ on a weighing and balancing of relevant factors

33. First, the LPEA protects fundamental interests. Protection of human health from potentially life-threatening influenza viruses is ‘vital and important in the highest degree’.⁴⁸ Accordingly, Ipland has a broader margin of appreciation in designing its measure.⁴⁹ Second, in assessing ‘contribution’, deference should be given to Members to adopt their desired level of protection.⁵⁰ The level of protection chosen by Ipland is long-term access to pharmaceuticals. The LPEA makes a ‘material, not merely marginal or insignificant’ contribution to this objective, even if this contribution is not ‘immediately observable’.⁵¹ Third, compulsory licenses are less trade-restrictive than measures such as import bans that the AB has previously found ‘necessary’.⁵² Producers may locally work as well as import.

7.1.2: There are no reasonably available alternatives to the LPEA

34. Freeland bears the burden of identifying alternatives to the LPEA.⁵³ Freeland may suggest that Ipland import pharmaceuticals under a compulsory license to obtain quick, short-term access to drugs. This is not a ‘genuine alternative’ because it does not preserve Ipland’s right to choose and achieve its desired level of protection. Importing under a compulsory

⁴⁴ ABR, *US – Gasoline* 22; ABR, *US – Shrimp* [118].

⁴⁵ ABR, *Brazil – Retreaded Tyres* [150]; ABR, *Korea – Various Measures on Beef* [161].

⁴⁶ ABR, *Brazil – Retreaded Tyres* [143]; ABR, *US – Gambling* [306].

⁴⁷ ABR, *Brazil – Retreaded Tyres* [156]; ABR, *US – Gambling* [311].

⁴⁸ ABR, *EC – Asbestos* [172]; ABR, *Brazil – Retreaded Tyres* [144].

⁴⁹ ABR, *EC – Asbestos* [172]; ABR, *Korea – Various Measures on Beef* [162].

⁵⁰ ABR, *Brazil – Retreaded Tyres* [150]–[151].

⁵¹ See above paragraph 29; ABR, *Brazil – Retreaded Tyres* [151]; ABR, *US – Gasoline* 21.

⁵² ABR, *US – Shrimp* [171]; ABR, *Brazil – Retreaded Tyres* [150].

⁵³ ABR, *Brazil – Retreaded Tyres* [156]; ABR, *US – Gambling* [311].

license would not safeguard long-term access to medicines and would reinforce Ipland's dependence on foreign suppliers. Freeland may also suggest that Ipland restrict the terms of the LPEA to pharmaceuticals rather than all patented products. This alternative is not 'reasonably available' as it could expose Ipland to the risk of WTO complaints on the basis of discrimination as to 'field of technology'.⁵⁴

7.2: The LPEA is applied in a manner consistent with the GATT art XX *chapeau*

35. The LPEA complies with the requirements of the *chapeau*. First, the application of the LPEA does not entail 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail'. The analysis of arbitrary or unjustifiable discrimination focuses on the rationale for the discrimination.⁵⁵ Any discrimination resulting from the LPEA is justified to ensure long-term security of supply of medicines. Reliance on foreign supplies is inadequate: see above para 29. The LPEA is therefore not an 'abuse' of the GATT art XX(b) exception.⁵⁶ Second, the LPEA is not a disguised restriction on international trade. The 'design, architecture and revealing structure'⁵⁷ of the LPEA does not reveal an intention to 'conceal the pursuit of trade restrictive objectives'.⁵⁸

CLAIM 2: TRANSIT RESTRICTIONS AND SEIZURE OF REVITALL

8: Freeland is estopped from challenging the WTO-consistency of the seizure of Revitall

36. As demonstrated above in paras 9–10, estoppel applies in WTO law and may inform an analysis of whether WTO Members have engaged in dispute settlement in good faith.⁵⁹

37. MIFFTA art 2.1 incorporates GATT art V, subject to MIFFTA art 2.2. Article 2.2 provides for freedom of transit for '*legally traded* goods in transit'⁶⁰. This qualification on the GATT art V obligation to allow freedom of transit constitutes an unambiguous representation by MIFFTA parties that, *inter se*, illegally traded goods may be seized in transit. Freeland is assumed to enter into, and to perform, treaty obligations in good faith.⁶¹ MIFFTA art 2.2 is thus a clear representation that Freeland considers seizure of *illegally traded* goods in transit to be permissible between MIFFTA parties.⁶²

38. Pursuant to art 2.2, Ipland has seized the shipment of Revitall in transit on the basis that it infringes Iplandian IP laws and is thus *illegally traded*. Should this Panel find these seizures

⁵⁴ See PR, *Canada – Pharmaceutical Patents*; Gervais (2008) 356.

⁵⁵ ABR, *Brazil – Retreaded Tyres* [225]–[228]; ABR, *US – Shrimp (21.5 – Malaysia)* [144].

⁵⁶ ABR, *US – Gasoline 24*; ABR, *Brazil – Retreaded Tyres* [227].

⁵⁷ PR, *EC – Asbestos* [8.236]; PR, *US – Shrimp (21.5 – Malaysia)*[5.142]; PR, *Brazil – Retreaded Tyres* [7.330].

⁵⁸ See above para 29; PR, *Brazil – Retreaded Tyres* [7.332]; ABR, *Korea – Various Measures on Beef* [158].

⁵⁹ ABR, *EC – Export Subsidies on Sugar* [307].

⁶⁰ Emphasis added.

⁶¹ See ABR, *US – Shrimp* [158]; ABR, *EC – Sardines* [278].

⁶² See PR, *EC – Bananas III (Article 21.5 – Ecuador II)/(Article 21.5 – US)* [228].

to be inconsistent with TRIPS or GATT, Ipland would face the detriment of being held in contravention of these Agreements by virtue of its reliance on MIFFTA art 2.2. By alleging the WTO-inconsistency of these seizures, Freeland has departed from its representation in art 2.2, and thereby failed to act in good faith in accordance with DSU art 3.10.⁶³ Freeland is estopped from making such allegations in this dispute: the Panel should not examine Claim 2.39. In any event, Ipland submits that the transit restrictions and seizure of Revitall in transit are consistent with TRIPS and GATT.

9: Ipland may seize goods in transit for violation of Iplandian IP Law

9.1: The seizure of Revitall in transit is consistent with TRIPS art 1.1

40. TRIPS imposes ‘minimum’ enforcement obligations,⁶⁴ and art 1.1 permits Members to implement ‘more extensive protection than is required’ by TRIPS, provided that this protection does not contravene TRIPS. The seizure of Revitall is consistent with art 1.1 as it ‘give[s] effect’ to Ipland’s obligations under TRIPS art 51. Although this protection exceeds the minimum enforcement standards mandated by art 51, it is consistent with art 1.1.

9.2: The seizure of Revitall in transit is consistent with TRIPS art 41.1

41. Article 41.1 requires Members to apply enforcement procedures ‘in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.’ The seizure of Revitall merely restricts trade in goods in respect of which there is prima facie evidence of IPR infringement. TRIPS clearly acknowledges the need for restrictions on trade for the purpose of enforcing IPRs.⁶⁵ The trade in IPR-infringing goods is not ‘legitimate’ and placing restrictions on it does not create ‘barriers to legitimate trade’.⁶⁶

9.3: The seizure of Revitall in transit is consistent with TRIPS art 51

9.3.1: Suspension of goods in transit is consistent with art 51

42. Footnote 13 to art 51 provides that ‘there shall be no obligation to apply [suspension] procedures to ... goods in transit.’ On its ordinary meaning, footnote 13 implies that Members have the *option* but not the *obligation* to seize goods in transit. This interpretation is confirmed in the context of TRIPS as a treaty of minimum obligations and in light of the flexibilities provided for elsewhere in art 51. For example, art 51 second sentence permits Members to broaden the range of IPRs enforceable by suspension procedures. Similarly, art 51 third sentence permits Members to apply suspension procedures to goods ‘destined for exportation’.

⁶³ ABR, *EC – Bananas III (Article 21.5 – Ecuador II)/(Article 21.5 – US)* [228].

⁶⁴ ABR, *US – Havana Club* [206]; PR, *China – IP Rights* [7.180]; PR, *EC – Trademarks/GIs (Aus)* [7.714].

⁶⁵ See TRIPS Part III; Weissman (1996) 1069.

⁶⁶ TRIPS art 41.1 (emphasis added).

9.3.2: Seizure of goods for trademark and GI infringement is consistent with art 51

43. Revitall was seized on the basis of trademark and GI infringement. Although art 51 does not *oblige* Members to provide for seizure of goods suspected of trademark infringement (other than counterfeiting) or GI infringement, art 51 second sentence expressly indicates that Members ‘may’ apply such measures to goods involving ‘other infringements of intellectual property rights’.⁶⁷ TRIPS art 1.2 defines ‘intellectual property’ as ‘all categories of intellectual property that are the subject of Sections 1 through 7 of Part II’ of TRIPS. Trademarks and GIs are the subject of TRIPS Sections 2 and 3. The seizure of goods on the basis of trademark and GI infringement is thus consistent with art 51.⁶⁸

9.3.3: Revitall ‘infringes’ an IPR within the meaning of art 51

44. Ipland has validly granted trademark and GI protection over the term ‘Sambati’, consistent with TRIPS arts 15, 16 and 22. Revitall bears the mark ‘Sambati’⁶⁹ and, as such, *prima facie* infringes the IHB’s exclusive rights under Iplandian law.⁷⁰

45. TRIPS art 52 conditions suspension under art 51 on infringement ‘under the laws of the country of importation.’ This corresponds with the minimum obligation under art 51 to apply suspension procedures in respect of *imported* goods. This indicates that infringement is assessed under the laws of the country applying the art 51 suspension procedures.

46. Article 51 gives Members the option to suspend goods in transit or ‘destined for exportation’.⁷¹ When Members exercise these options, art 52 must be read *mutatis mutandis* to refer to infringement ‘under the laws of the country of *transit*’ (or *export*), such that the relevant law is that of the country applying the suspension procedures. If art 52 is not read *mutatis mutandis* when procedures are applied to goods in transit or destined for exportation, customs authorities would be required to evaluate evidence of infringement of *foreign laws* — a task that they lack competency to perform.

10: Transit restrictions on Revitall are consistent with TRIPS and GATT

10.1: The transit restrictions on Revitall are consistent with TRIPS art 53.1

47. Article 53.1 provides that the competent authorities, administrative or judicial, ‘shall have the authority’ to require security or assurance from an applicant for seizure under TRIPS Part III, Section 4. The ordinary meaning of art 53.1 is that competent authorities must be

⁶⁷ See PR, *China – IP Rights* [7.222].

⁶⁸ See PR, *China – IP Rights* [7.225].

⁶⁹ ELSA Case [11]–[12].

⁷⁰ TRIPS art 16.1; art 22.2.

⁷¹ TRIPS art 51, fn 13; TRIPS art 51 third sentence; see above para 42.

‘permitted to order [security] by domestic law.’⁷² Consistently with the use of the phrase ‘shall have the authority’ elsewhere in TRIPS Part III,⁷³ art 53.1 provides for an ‘authority’ or option, rather than *mandating* the exercise of that authority.⁷⁴

48. The PREA merely removes the ‘*requirement* that rights holders provide a security’.⁷⁵ Freeland bears the burden of proving that Iplandian authorities are *unable* to order applicants to post security⁷⁶ and there is no evidence to this effect in the facts before the Panel.

10.2: The transit restrictions on Revitall are consistent with GATT art V

49. GATT art V:2 requires Members to provide ‘unrestricted access ... for traffic in transit’ by ‘the routes most convenient’.⁷⁷ However, GATT art V:3 permits Members to subject ‘traffic in transit’ to ‘restrictions’ for ‘failure to comply with ... customs laws’. The Iplandian Customs Law is a ‘customs law’ within the meaning of art V. The Customs Law directs customs officials to ‘fully enforce Iplandian Intellectual Property Law’,⁷⁸ which the Revitall shipment infringes. Thus, the transit restrictions are imposed consistently with art V:3.

50. The restrictions are consistent with the GATT art V:4 requirement that regulations ‘on traffic in transit ... shall be reasonable’. They are not ‘irrational or absurd’⁷⁹ as there is statistical data showing that large volumes of IPR-infringing goods transit through Ipland.⁸⁰ The restrictions are ‘commensurate’⁸¹ with the serious risk to right holders and consumers posed by the threat of IPR-infringing goods being diverted onto the Iplandian market.

10.3: In any case, the transit restrictions are justified under GATT art XX(d)

51. Article XX(d) exempts a measure from complying with GATT provisions where it is ‘necessary to secure compliance with laws ... not inconsistent with [GATT]’. Even if the transit restrictions are inconsistent with art V, they fall within the art XX exceptions. They are provisionally justified under art XX(d) and consistent with the art XX *chapeau*.⁸²

10.3.1: The transit restrictions are provisionally justified under GATT art XX(d)

⁷² PR, *China – IP Rights* [7.253] (original emphasis).

⁷³ TRIPS arts 43–48 and 50.

⁷⁴ Cf TRIPS arts 50.4, 50.6, 54, 55, 58(b), 61.

⁷⁵ ELSA Case [16] (emphasis added).

⁷⁶ ABR, *US – Wool Shirts and Blouses* 14.

⁷⁷ PR, *Columbia – Ports of Entry* [7.401].

⁷⁸ ELSA Case [16].

⁷⁹ PR, *US – Shrimp (Thailand)* [7.141].

⁸⁰ ELSA Case [16].

⁸¹ ABR, *US – Shrimp (Thailand)* [258].

⁸² ABR, *US – Gasoline* 22; ABR, *US – Shrimp* [118]–[119].

52. The transit restrictions are designed to ‘enforce’ compliance with Iplandian IP Law.⁸³ They enable customs officials to take custody of infringing goods and prevent them from harming right holders and consumers, pending determination on the merits of the case.

53. Iplandian IP Law is a ‘law’ that is ‘not inconsistent with’ GATT.⁸⁴ IP Law protects and enforces IPRs. Article XX(d) acknowledges the legitimacy of laws for ‘the protection of patents, trademarks and copyrights’. In any case, for the purposes of art XX(d), Ipland’s laws are presumed to be GATT-consistent until Freeland proves otherwise.⁸⁵

54. The transit restrictions on Revitall are *necessary* to secure compliance with Iplandian IP Law on a weighing and balancing of relevant factors.⁸⁶ First, IPR enforcement serves a ‘vital and important’⁸⁷ function in fostering innovation, consumer protection and trade.⁸⁸ Second, the restrictions contribute to IPR enforcement by preventing the release into channels of commerce of goods suspected of IPR infringement. Third, any restrictive effect on international trade is minimal as the measures are subject to procedural safeguards such as evidentiary standards.⁸⁹

55. Freeland has the burden of identifying a ‘reasonably available’ and ‘less trade restrictive alternative’⁹⁰ to the transit restrictions on Revitall that preserves Ipland’s right to achieve its desired level of protection.⁹¹ Ipland is not obliged to prove that no such measure exists.⁹²

56. In any case, Freeland cannot identify such a measure. For example, an undertaking not to market goods suspected of IPR infringement pending investigation would be less restrictive than suspension. However, it is not a ‘genuine’ alternative⁹³ as it does not achieve Ipland’s desired level of protection. Such undertakings are difficult to enforce and routinely breached: effective enforcement requires Iplandian Customs Officials to be empowered to act *ex parte* to provide for prompt provisional suspension of goods.⁹⁴

10.3.2: The restrictions are applied in a manner consistent with the art XX chapeau

⁸³ PR, *Mexico – Taxes on Soft Drinks* [8.175].

⁸⁴ ABR, *Korea – Various Measures on Beef* [157]; ABR, *Mexico – Taxes on Soft Drinks* [69].

⁸⁵ ABR, *US – Carbon Steel* [157]; ABR, *DR – Cigarettes* [111]; ABR, *US – Gambling* [138].

⁸⁶ ABR, *Korea – Various Measures on Beef* [164]; ABR, *Brazil – Retreaded Tyres* [141]–[142].

⁸⁷ See ABR, *EC – Asbestos* [172].

⁸⁸ Cottier (2005) 1046.

⁸⁹ ELSA Case [16].

⁹⁰ ABR, *Brazil – Retreaded Tyres* [156]; ABR, *US – Gambling* [311].

⁹¹ ABR, *US – Gambling* [308]; ABR, *EC – Asbestos* [172].

⁹² ABR, *US – Gambling* [311]; ABR, *China – Publications and Audiovisual Products* [319].

⁹³ ABR, *US – Gambling* [308]; ABR, *Brazil – Retreaded Tyres* [156].

⁹⁴ See WIPO, *Synthesis of Issues Concerning Difficulties and Practices in the Field of Enforcement* 10, 14.

57. The application of the transit restrictions does not constitute ‘abuse’ of GATT art XX.⁹⁵ First, the restrictions are not ‘applied in a manner that would constitute ... arbitrary or unjustifiable discrimination between countries where the same conditions prevail.’ They are applied to goods that are reasonably suspected of IPR infringement, without distinction as to origin. Second, the restrictions are not applied in a manner that constitutes ‘a disguised restriction on trade’. The PREA and IP Law are not ‘concealed or unannounced’ laws.⁹⁶ The objectively manifested aim of the laws is to protect Iplandian IPRs. The restrictions are not a ‘disguise to meet trade restrictive objectives’.⁹⁷

CLAIM 3: TRANSIT RESTRICTIONS AND SEIZURE OF CFPR

11: Freeland is estopped from challenging the WTO-consistency of the seizure of CFPR

58. Pursuant to the arguments at paras 36–38 above, estoppel precludes Freeland from challenging the WTO-consistency of the seizure of CFPR in transit.

59. In the alternative, Ipland submits that the transit restrictions and seizure of CFPR in transit are consistent with TRIPS and GATT.

12: Ipland may seize goods in transit for violation of Iplandian IP Law

12.1: The seizure of CFPR in transit is consistent with TRIPS art 1.1

60. *Ex officio* seizure of CFPR in transit on the basis of patent infringement exceeds the minimum enforcement standards under art 51. However, this does not infringe art 1.1 as it is not inconsistent with any other TRIPS provisions: see above para 40.

12.2: The seizure of CFPR in transit is consistent with TRIPS art 41.1

61. The suspension of CFPR does not restrict *legitimate* trade. It merely restricts the trade in goods in respect of which there is evidence of IPR infringement: see above para 41.

12.3: The seizure of CFPR in transit is consistent with TRIPS art 51

62. Seizure of goods in transit exceeds the minimum standards of protection required under art 51. However, fn 13 to art 51 indicates that suspension in transit is an optional extension of art 51 procedures: see above para 44. As such, seizure of CFPR in *transit* is consistent with art 51. Furthermore, *ex officio* seizure is consistent with art 51 when read in the context of art 58, which regulates the procedures that apply when ‘Members require competent authorities to act on their own initiative to suspend the release of goods’.

12.4: The seizure of CFPR in transit is consistent with TRIPS art 58

⁹⁵ ABR, *US – Gasoline* 22; ABR, *US – Shrimp* [156].

⁹⁶ ABR, *US – Gasoline* 25.

⁹⁷ ABR, *Brazil – Retreaded Tyres* [225]; PR, *EC – Asbestos* [8.236].

63. Article 58 permits Members to provide for *ex officio* seizure of goods where customs officials have acquired ‘prima facie evidence that an intellectual property right is being infringed’. Patents are *intellectual property rights* within the meaning of TRIPS art 1.2. As such, seizure of CFPR on the basis of *patent* infringement is consistent with art 58.

64. Articles 51 and 58 must be read ‘as a coherent set of procedures’.⁹⁸ As stated above in paras 45–46, infringement is assessed under the law of Ipland as the country of transit.

65. CFPR is manufactured using the process patented by the IHB, without authorization from the right holder. Consistent with art 58, this is prima facie evidence that CFPR infringes the IHB’s process patent granted under Iplandian law.⁹⁹

13: Transit Restrictions on CFPR are Consistent with TRIPS and GATT

13.1: *Ex officio* customs action is consistent with TRIPS arts 41 and 58(b)

66. CFPR was seized pursuant to the PREA. The transit restrictions prescribed by the PREA are consistent with TRIPS arts 41 and 58(b).

13.1.1: The restriction on application for release of goods is consistent with TRIPS art 41

67. The PREA restricts traders from applying for release of goods until 10 working days after notification of suspension. This is consistent with TRIPS. The only relevant TRIPS provisions are the art 41.1 requirement that enforcement procedures be ‘expeditious’ and the art 41.2 requirement that they not ‘entail unreasonable time-limits or unwarranted delays’.

68. The 10 day restriction is ‘expeditious’ and not ‘unreasonable ... or unwarranted’ as it balances, consistently with TRIPS art 7, any inconvenience to the importer with the goal of more effective and cost-efficient enforcement of IPRs. Article 55 gives Members the option to extend to 20 days the period within which the right holder may initiate proceedings before goods are released. This indicates the acceptable level of inconvenience to the importer. The *total* time that goods are held pursuant to the PREA is only slightly longer than the period provided for in this *single* step. As such, the restriction on application does not inconvenience the importer at the level necessary to be found ‘unreasonable’ within the meaning of art 41.2. Further, the restriction requires importers to evaluate their prospects of success before challenging a seizure. It thus ensures that challenges are meritorious, thereby reducing costs. This is congruent with the requirement that TRIPS Part III should not create obligations ‘with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of the law in general.’¹⁰⁰

⁹⁸ PR, *China – IP Rights* [7.219].

⁹⁹ See TRIPS art 28.1(b).

¹⁰⁰ TRIPS art 41.5 second sentence.

13.1.2: The PREA provides for prompt notification consistent with TRIPS art 58(b)

69. The PREA provides that right holders will be notified of the *ex officio* seizure of IPR-infringing goods after the trader decides whether or not to contest the seizure. This timeframe allows for ‘prompt’ notification consistent with TRIPS art 58(b).

70. The ordinary meaning of ‘prompt’ implies action done with immediacy or without delay.¹⁰¹ It can be contrasted with a requirement for ‘immediate’ notification — the standard adopted by the WCO in its ‘TRIPS-plus’ model customs laws.¹⁰² ‘Prompt notification’ is an open-ended requirement — it states no specific timeframe — and Ipland is entitled, within limits, to ‘determine the appropriate method of implementing’ this provision.¹⁰³

71. Since IPR enforcement must balance rights and obligations¹⁰⁴ and may be effected differently as required by domestic legal systems, Members have flexibility in meeting open-textured standards such as ‘reasonable’ and ‘prompt’.¹⁰⁵ This is especially the case in the context of IPR border enforcement measures, in light of the significant financial costs involved: TRIPS art 41.5.¹⁰⁶ Given this flexibility, the fact that the interests of the right holder are not prejudiced by any delay in notification, and the arguments above that the PREA does not inconvenience the importer at the level necessary to be found ‘unreasonable’, the Panel should find that the PREA provides for ‘prompt’ notification of the right holder, consistent with TRIPS art 58(b).

13.2: The transit restrictions are consistent with GATT art V

72. The transit restrictions on CFPR are not inconsistent with GATT art V. The same reasoning applies as above in paras 49–50.

13.3: The transit restrictions are justifiable under GATT art XX(d)

73. Even if the transit restrictions on CFPR are inconsistent with GATT art V, they are justified under GATT art XX(d). The same reasoning applies as above in paras 51–57.

¹⁰¹ *Oxford English Dictionary*.

¹⁰² *WCO Model Provisions* art 10(3).

¹⁰³ TRIPS art 1.1 third sentence.

¹⁰⁴ TRIPS art 7.

¹⁰⁵ Frankel (2005) 393–4.

¹⁰⁶ PR, *China – IP Rights* [7.513].

VIII REQUEST FOR FINDINGS

Ipland requests the Panel to find that there are legal impediments to its jurisdiction to hear Freeland's substantive complaints. In the alternative, Freeland requests the Panel to find that:

1. The LPEA is consistent with TRIPS art 27.1 and 28.1 and in any case complies with the TRIPS art 31(b) exception. The LPEA is also consistent with GATT art III:4, or in the alternative, can be justified under the GATT art XX(b) exception.

2. The transit restrictions and seizure of Revitall are consistent with TRIPS art 1.1, 41.1, 41.2, 51 and 53. They are also consistent with GATT art V, or in the alternative, can be justified under the GATT art XX(d) exception.

3. The transit restrictions and seizure of CFPR are consistent with TRIPS art 1.1, 41.1, 41.2, 51, 53 and 58. They are also consistent with GATT art V, or in the alternative, can be justified under the GATT art XX(d) exception.

Therefore, Ipland requests the Panel to make no recommendation to the Dispute Settlement Body, as Ipland is in full conformity with its obligations under the WTO Agreements.