

TRIPS Council
8 and 9 June 2009

Intervention by Brazil

Madam
~~Mr.~~ Chair,

My delegation has once more asked for the floor to bring the issue of seizures of generic drugs in transit through Europe to the attention of the TRIPS Council.

We see with grave concern the recent seizure at Frankfurt airport of a consignment of generic drugs going to Vanuatu.

As we have stated before we believe that the seizure of goods in transit on grounds that they might be violating IP rights conferred by a patent registered in the country of transit is a serious violation of WTO disciplines.

The decision to impede the transit of cargos of generic medicines violates the freedom of transit, a right enshrined in GATT Article V. Only very exceptional circumstances warrant restrictions on that freedom. Brazil is not aware of any such circumstances in the concrete cases that we have brought to the attention of the Council.

Our inquiries led to the identification of more than a dozen seizures of consignments of generic drugs in transit through the Dutch territory in the last year. The medicines were directed to at least 7 different developing countries in South America and Africa. Now, we face a new seizure on German territory.

It is clear that the Losartan case, contrary to EC assertions, was not a “minor, exceptional and inconsequential” incident. In fact, it seems like the tip of an iceberg.

We want once more to recall that trade in generic medicines is perfectly legal from the intellectual property point of view. Generic must not be mistaken with counterfeit or pirated. Generic medicines are not substandard or illegal.

Last session, in their response to Brazil and India, the European Communities affirmed their commitment to “facilitating access to medicines for countries in need”. Unfortunately that doesn’t seem to be in line with the concrete actions. The dozen consignments of generic drugs in transit through the Dutch territory and the recent seizure at Frankfurt airport of a consignment of amoxicillin seem to be a move to the opposite direction of the objective of “facilitating access to medicines for countries in need”.

The Communities claimed to be “one of the main promoters of the Doha Declaration and the TRIPS flexibilities”. Rather than TRIPS flexibilities, however, the EC has actively promoted TRIPS-plus standards in non-specialized multilateral agencies such as the World Health Organization (through the IMPACT initiative) and the World Customs Organization (within the GT Secure) as well as in plurilateral stances such as ACTA or in bilateral agreements (“Economic Partnership Agreements”).

In an attempt to justify the seizure of generic medicines in transit, the EU claimed that their customs actions have “saved lives in final destination countries – often developing countries”. This is a blatant attempt to confound the issue. EC customs authorities’ apprehensions have actually hampered the access of the developing world to affordable life-saving generic medicines. In none of the cases mentioned was there any issue with the quality of the drugs. EC customs authorities did not worry about quality – their sole concern was the EC patents.

In fact, this also calls into question EC statistics about seizures of fake medicines. The “losartan” and other episodes suggest that EC numbers may lack accuracy as EC customs authorities may mistake legitimate generic medicines for fake products.

Furthermore, the Communities defend the compatibility of the EC Regulation 1383/2003 with the WTO disciplines and, in particular, with the TRIPS Agreement. They make use of the argument that TRIPS is only a minimum-standards agreement and, for that reason, the EC Regulation 1383/2003, which authorizes ex officio seizure of goods in transit, would be TRIPS-compliant. However, let me recall that the mere seizure of goods in transit – any good; be it a medicine or not – on grounds that they

may be violating IP rights registered in the country of transit is, in itself, a violation of GATT Article V and other GATT obligations.

As far as the TRIPS Agreement is concerned, a merely perfunctory examination will lead us to the simple and straightforward conclusion that the TRIPS Agreement does not allow the detention of goods in transit. The seizure of goods in transit on grounds that they may be violating IP rights in the country of transit violates the principle of territoriality, a keystone of the international IP system. Furthermore, it runs counter the objectives and purposes of the TRIPS Agreement. It offends Articles 7 and 8 of the Agreement. Article 7 states that the “enforcement of intellectual property rights” must be done “in a manner conducive to social and economic welfare”. Article 8 upholds Members’ rights to “protect public health and nutrition”.

Finally, under the point of “what has happened in the Indian case”, the Communities argue that the consignment of losartan returned to India because that was the free and autonomous will of the Indian manufacturer. According to information we have received, the Indian manufacturer was given only two options: either to take the cargo back, or face the costs of litigation in the Netherlands. A third option - allowing the consignment to follow its path to Brazil - was not given to the Indian manufacturer. We would like to ask for further clarification on that.

The losartan episode and other seizure episodes are a major source of concern for developing countries because they essentially imperil the public health dimension of the TRIPS Agreement.

In light of the above, I reiterate the request for clarification on the following questions:

- (a) How the European authorities’ actions can be reconciled with WTO disciplines?
- (b) Whether EC Council Regulation 1383/2003 requires or justifies such actions from the customs authorities of the Communities; and, above all,
- (c) How will the Communities ensure that such actions will not reoccur”.

Mr Chair,

Brazil is fully committed to intellectual property protection. It is a founding-Member of the Paris Convention, and Brazilian legislation provides fair and adequate protection to IP rights holders. Brazil also believes that a functioning and effective IP international system can only be built on the solid basis of a fair balance between private and public interests. This is the very foundation of the TRIPS Agreement. The protection of intellectual property cannot supersede the protection of more fundamental values, such as the protection of life and the right to promote public health.

Thank you.