



WORLD TRADE ORGANIZATION
ORGANISATION MONDIALE DU COMMERCE
ORGANIZACIÓN MUNDIAL DEL COMERCIO

Pascal LAMY
Directeur général

04 MAY 2010

Dear Sirs,

Thank you for your letter of April 15, 2010, drawing to my attention a Resolution of the European Parliament on Transparency and State of Play of the Anti Counterfeiting Trade Agreement (ACTA), and raising several questions about WTO intellectual property (IP) activities and ACTA. I note that a consolidated negotiating draft text of ACTA has since been publicly released, and is already the subject of active public discussion.

Your letter covers a range of substantial legal, policy and institutional questions; for reasons I explain below, it will not be possible for me to address all of these in detail, but I am pleased to have the opportunity to inform you on the work and procedures of the WTO in the field of IP.

Let me deal, firstly, with some of the specific requests you have made. You will appreciate that I and the WTO Secretariat are in no position to provide authoritative comments on ACTA or its negotiating process. The WTO as such has no role in the ACTA negotiations, and has not been given any mandate to participate in any way. ACTA is being pursued by a subset of WTO Members who have elected to negotiating among themselves certain standards on the enforcement of IP beyond the agreed level set out in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This is a matter between the negotiating parties. I would only note that this, in itself, is not precluded by TRIPS, which allows members to establish levels of protection more extensive than those it prescribes, provided they do not contravene the TRIPS Agreement (Article 1.1).

Similarly, we cannot provide any definitive analysis of the relationship of other legal instruments with WTO Agreements. In general, the clarification and resolution of legal issues within the WTO legal system are not undertaken by the WTO Secretariat itself. WTO agreements, including the TRIPS Agreement, can only be interpreted in an authoritative manner by WTO Members themselves – collectively through the competent WTO bodies - or by WTO dispute settlement bodies and the WTO Appellate Body. These well defined roles limit my capacity to offer a definitive answer to some of the specific questions you have raised relating to TRIPS norms and flexibilities.

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Jan Philipp Albrecht MEP
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cc:

Martin Glass, Chairperson, Council for TRIPS
Anthony Taubman, Director, Intellectual Property Division, WTO
Francis Gurry, Director General, WIPO

Equally, the WTO Secretariat, as such, cannot volunteer on its part to undertake an impact assessment on the relationship of ACTA with the TRIPS Agreement, nor to undertake a technical assessment of the need for new global norms and institutions as may be proposed under ACTA. As a Secretariat of an inter-governmental organisation, responsible to WTO Members, we are not mandated to undertake such work unless our Members direct us to. This is a basic institutional and legal matter concerning how the WTO functions as an organization, its established governance structures, and the legal and technical responsibilities of its different components.

Nonetheless, I am able to offer some general background on the TRIPS Agreement as it relates to IP enforcement, and the related work undertaken within the WTO on IP enforcement. Within the package of trade law agreements that constitute the WTO legal system, the TRIPS Agreement is the chief multilateral standard on measures for the enforcement of intellectual property. TRIPS builds upon the core multilateral conventions on IP administered by the World Intellectual Property Organization (WIPO). In line with a bilateral agreement between the organization, the WTO cooperates with WIPO on a range of practical capacity building activities and the management of collections of legal texts, and these activities include both technical assistance and management of legal texts relating to IP enforcement.

In the field of enforcement, TRIPS provides for measures at the national level which seek to balance the legitimate interests of IP right holders in ensuring effective enforcement of rights, with other legitimate interests. In brief compass, the TRIPS standards provide for enforcement procedures that are fair and equitable, and permit effective action and expeditious remedies. They require that enforcement measures be procedurally sound, with safeguards for the interests of right holders together with safeguards against barriers to legitimate trade and abuse of enforcement measures. TRIPS also identifies the need for international cooperation on IP enforcement, and establishes a network of contact points to facilitate this cooperation.

The TRIPS Agreement also provides for transparency mechanisms, including a requirement for the publication of laws, regulations, judicial and administrative rulings, and intergovernmental agreements relating to the subject matter of TRIPS. WTO Members are also obliged to notify their relevant laws and regulations to a WTO body, the TRIPS Council, which reviews national systems, through a peer review process involving all WTO Members. In the field of enforcement, this process has led to a detailed review of the IP enforcement measures of over 120 WTO Members.

This transparency and review process included the development a checklist of issues on enforcement (IP/C/5), an exercise launched by a Decision of the Council on 21 November 1995, which has yielded extensive information on the enforcement mechanisms of some 100 WTO Members. This mechanism serves not only as a means of promoting transparency and dialogue about national enforcement systems, but also as a means of objectively surveying the range of policy and legal choices on taken by a wide cross section of countries within the general framework established by TRIPS. This material – the notifications of laws, checklists on enforcement systems, and full reports of discussions by WTO Members concerning enforcement – is all publicly available on the WTO website.

This extensive review of national enforcement measures has been the principal work of the WTO on enforcement of IP undertaken since the TRIPS Agreement came into effect in 1995. The WTO is not undertaking any norm-setting activity or negotiations directly relating to enforcement of IP, and none is currently foreseen. At successive meetings between 2005 and 2007, several proposals

were tabled for the TRIPS Council to take up the question of enforcement (such as those of the European Union: see, for instance, WTO documents IP/C/W/448, 468 and 471). The Council did not reach any decision on these proposals. Most recently, several Members raised in the TRIPS Council the question of enforcement measures affecting pharmaceutical products in transit through the European Union.

The full minutes of the TRIPS Council, which are posted on the WTO website for public access, give a complete account of the discussions of that body touching on enforcement issues, including discussion of the proposals tabled by WTO Members and the most recent discussion of the transit question. Brief references can also be found in successive WTO Annual Reports.

Finally, you have mentioned certain institutional questions. We are not aware of any firm proposals that would entail a specific role for the WTO in the context of the conclusion or implementation of ACTA or any other similar instrument, and have not been approached to undertake such a role. In any event, any such role could not be assumed by the WTO without a decision by its entire Membership. Once again, any specific analysis on our part of possible institutional linkages would need to follow a direct request on the part of our Members.

I do appreciate that this response does not fully cover all the questions of interest to you, but I trust that it helps to clarify the nature and the role of the WTO, including the limitations we work within as a Secretariat, that it may facilitate discussion of the issues you have raised. I do welcome the willingness you have expressed to engage in further dialogue on these issues, and thank you again for drawing our attention to the recent deliberations of the European Parliament. I myself and my colleagues in the WTO Intellectual Property Division (Director of the Division, Mr. Antony Taubman (antony.taubman@wto.org)) would be pleased to assist you with access to any of the documentation I have mentioned in this letter, and any further queries you may have in this regard in the interest of full transparency.

Yours sincerely,

Pascal Lamy

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