

BOTSWANA

Outline of a Forthcoming report on **International trade, health, and children's rights**

May 2004

Summary

1. Botswana has made progress, over the last thirty years, towards ensuring that children enjoy their rights to life, survival, development and health.¹ This progress has been set back by the onset of HIV/AIDS: whilst AIDS will have a major impact on all population groups, the single most affected group will be children below the age of five years. AIDS thus constitutes the greatest challenge to child survival.²

2. Access to health care and to affordable medicines for children are therefore essential if Botswana is to comply with its Convention on the Rights of the Child (CRC) obligations to promote and protect children's highest attainable standard of health (Article 24 of the CRC) and to promote and protect the inherent right to life, survival and development of the child (Article 6 of the CRC).

3. In this respect, it is imperative that the government of Botswana ensure that any new trade-related obligations it assumes do not prevent Botswana from taking the steps necessary to fulfil its human rights obligations, particularly those relating to the health and survival of children, under the Convention on the Rights of the Child. The negotiations towards a Free Trade Agreement between the United States and the five member countries of the Southern African Customs Union (SACU - Botswana, Lesotho, Namibia, South Africa and Swaziland) give particular cause for concern.

4. 3D → Trade - Human Rights - Equitable Economy is a not-for-profit organisation based in Geneva, Switzerland, working to ensure that trade rules are developed and applied in ways that promote an equitable economy.³ We believe that human rights mechanisms such as the Committee on the Rights of the Child can help attain this objective by reminding States that existing and proposed international trade-related policies cannot justify non-compliance with human rights obligations.

5. 3D submits this briefing to the Committee on the Rights of the Child in advance of its pre-session Working Group, as an initial indication of some of the main children's rights concerns that arise in the context of the negotiations towards a US-SACU Free Trade Agreement. Given

¹ Botswana, *Initial report to the United Nations Committee for the Convention on the Rights of the Child*, CRC/C/51/Add.9, 2001, at paragraph 236 <<http://www.unhchr.ch/html/menu2/6/crc/doc/report/srf-botswana.pdf>> [hereinafter Botswana Initial Report.]

² Botswana Initial Report at paragraph 129.

³ For information on 3D's work in general, or on 3D's project on the impact of trade-related intellectual property rules on access to medicines and human rights, please visit www.3dthree.org or contact Davinia Ovett, Programme Coordinator, 3D → Trade - Human Rights - Equitable Economy, dovett@3dthree.org

the urgency of this matter and the difficulty in obtaining information, we will submit a fuller report on specific areas of concern mentioned, in advance of the Committee's 37th Session, in September 2004.

Impacts on Children's Rights of the US-SACU Free Trade Agreement

6. Negotiations towards a Free Trade Agreement (FTA, or Agreement) between the United States and the five SACU member countries were launched in June 2003. The scope of these negotiations is broad, ranging from tariffs on industrial and agricultural goods, rules of origin, customs procedures, services, investment, intellectual property, government procurement, labour and the environment. The negotiations are reportedly due to conclude by late 2004, and the Agreement could be signed as early as the end of this year.

7. The content and process of the US-SACU FTA negotiations are opaque, and civil society groups are unclear even as to the dates on which different parts of the Agreement are due to be discussed. It is thus difficult for there to be public debate on the proposed content of the Agreement, or for civil society groups to make an input.

8. However, it is apparent that four of the negotiating areas give cause for concern in relation to children's right to life, survival, development and health (Articles 4, 6 and 24 of the CRC). These four areas are: (1) intellectual Property, (2) services, (3) investment and (4) government procurement.⁴ In addition, there are grounds for concern that overall, the FTA negotiations are paying little heed to the best interests of the child (Article 3 CRC).

Intellectual Property

9. The concern that Botswana may agree, in the US-SACU FTA, to Intellectual Property (IP) provisions that make it harder to access medicines are similar to those set out in a briefing regarding El Salvador, that 3D submitted to the members of Committee on the Rights of the Child in February 2004, in advance of the Committee's 36th session.⁵ The main concern of the US-SACU FTA is that it could force SACU members into adopting extremely restrictive intellectual property provisions that could put an end to competition from generic medicines producers and to countries' ability to make use of existing multilaterally-agreed safeguards against patent owners' abuse of their dominant positions.⁶

10. Such provisions would severely curtail access in Botswana to essential medicines used in the prevention and treatment of a range of health conditions, including but not limited to HIV/AIDS.⁷

11. Access to affordable medicines is a fundamental element of the child's right to the enjoyment of the highest attainable standard of health under article 24 CRC, as interpreted by the CRC General Comment No.3 (2003) on HIV/AIDS and General Comment No. 4 (2003) on Adolescent health. As such, Botswana should ensure that it not adopt or implement intellectual

⁴ Treatment Action Campaign & AIDS Law Project, email of 6 February 2004, <<http://lists.essential.org/pipermail/ip-health/2004-February/005904.html>>

⁵ The briefing on El Salvador is available on 3D's website at <www.3dthree.org/en/page.php?IDpage=23&IDcat=5>

⁶ See Médecins sans Frontières, *Access to Medicines at Risk Across the Globe: What to Watch Out for in Free Trade Agreements with the United States*, May 2004.

⁷ See Treatment Action Campaign (TAC) & AIDS Law Project (ALP) *Memorandum on the United States/Southern African Customs Union Free Trade Agreement Negotiations*, 3 February 2004, <www.tac.org.za/newsletter/2004/ns20_02_2004.htm#SACU> It is also worth noting that, by seeking to impose stringent 'TRIPS-plus' IP provisions on SACU members, the US Trade Representative would be violating negotiating objectives in the US Trade Act of 2002, which require "respect [for] the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001" as well as Executive Order 13155, which deals specifically with access to "HIV/AIDS pharmaceuticals or medical technologies."

property provisions that may adversely impact on its ability to ensure that all its people, particularly pregnant women and children and members of other vulnerable groups.

Services

12. A number of the US negotiating objectives have the potential to undermine the financing and provision of health care services in SACU countries, both in the public and private health sectors, as well as the rights of people living with HIV/AIDS. If translated into binding commitments, many of these objectives have the potential to limit the ability of the government of Botswana to discharge its obligations, primarily in respect of the right of access to health care services.⁸

13. Indeed, in its Article 24, the CRC provides that States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Investment and Government Procurement

14. The US-SACU Agreements' chapter on investment could provide a back door for a pharmaceutical company, for example, to sue a SACU member state for failing to amend its legislation in line with the chapter on intellectual property. Finally, rules on government procurement may unfairly preclude necessary and urgent action, such as procurement of essential medicines for dealing with a health emergency, such as a cholera outbreak,⁹ or an AIDS epidemic of the magnitude of the one Botswana is currently experiencing.

Conclusion

In itself, the opaqueness of the US-SACU FTA negotiation process, as well as lack of public participation in it, is inconsistent with the obligation to give prime consideration to the best interests of the child under article 3 (1) CRC, the obligation to respect the views of the child under article 12 CRC, the obligation to ensure the child's freedom to seek, receive and impart information under article 13(1) CRC and the obligation to ensure access of the child to information on his or her physical health under article 17 CRC. It is also inconsistent with the general human rights obligation that allows participation of individuals and groups in decisions that affect them.

This is particularly alarming given that there are strong indications that several proposed provisions of the draft US-SACU FTA would undermine Botswana's ability to protect the life, survival, development and health of children.

Botswana – Right to health and the CRC

Issues of concern

Right to the highest attainable standard of health (Article 24 CRC)

Question: Has the government of Botswana assessed the possible impacts on children's rights, and particular their right to health, of proposed provisions of the US-SACU Free Trade Agreement (FTA)?

Recommendation: The government of Botswana should undertake assessments to ensure that any trade agreement it enters into will not make it harder for it to fulfil its obligation to ensure access to health care or to affordable medicines, as required by Article 24 CRC.

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Botswana – Right to health and the CRC

Issues of concern (continued)

Best interests of the child (Article 3 CRC)

Question: Has the government of Botswana considered the best interests of the child under Article 3(1) CRC when negotiating the US-SACU FTA, particularly its intellectual property provisions and the chapters relating to services, investment and government procurement?

Recommendation: The government of Botswana should systematically consider the best interests of the child when negotiating trade agreements and when implementing trade-related obligations into national law.

Respect for the views of the child (Article 12 CRC), Obligation to receive and impart information (Article 13(1) CRC), Access to information on children's physical health (Article 17 CRC)

Question: Has the government of Botswana ensured the respect for the views of the child under article 12 CRC, fulfilled its obligation to receive and impart information to the child under article 13(1) and ensured access to information on the children's health under article 17 CRC, when negotiating the US-SACU FTA?

Recommendation: the government of Botswana should make its negotiating positions public, consult widely and encourage participation of civil society groups representing children's interests whilst negotiating or implementing trade policy.

Technical Assistance (Article 4 CRC)

Question: Has Botswana requested technical assistance under article 4 CRC to ensure that its trade-related obligations are developed and implemented in ways that help it ensure the realisation of the rights set out in the CRC, for instance to carry out a human rights assessment of new or proposed trade obligations?

Recommendation: The government of Botswana should seek technical assistance from UNICEF and the Office of the High Commissioner for Human Rights (OHCHR), to ensure that any new or proposed trade-obligations are developed and implemented in a way that promotes the best interests of the child and is consistent with other obligations under the CRC.

Making the principles and provisions of the Convention widely known (Article 42 CRC)

Question: Are Botswana's trade officials aware of the principles and provisions of the CRC?

Recommendation: The government of Botswana should ensure that the principles and provisions of the CRC are widely known to its trade officials, in particular those responsible for negotiating the US-SACU FTA.