

International trade, health, and children's rights – the Philippines December 2004

Introduction

1. The Republic of the Philippines has taken bold measures to reduce the cost of medicines for the poorest and most vulnerable groups, including children. The most notable measures are the passing of the Generics Act 1988 and the importation of lower-cost medicines from India. Despite these important steps, the vast majority of the 82 million Filipinos cannot afford the ever-increasing costs of medicines.

2. The Philippines, as State party to the Convention on the Rights of the Child (CRC), must give primary consideration to the best interests of the child in all its decision-making (article 3). Also, the Philippines has an obligation to promote and protect the child's right to the enjoyment of the highest attainable standard of health under article 24 CRC and the child's inherent right to life, survival and development under article 6 CRC. Intrinsic to the right to health and the right to life is the child's right to "sustained and equal access" to comprehensive treatment and affordable medicines without discrimination, as interpreted by CRC General Comment No.3 (2003) on HIV/AIDS and CRC General Comment No. 4 (2003) on Adolescent Health.

3. These human rights obligations, and others, are at risk of being undermined by strict intellectual property (IP) rules in bilateral and regional trade agreements. The Philippines is currently negotiating a number of these agreements, notably with China, India and Japan, and is planning to enter into a Free Trade Agreement (FTA) with the United States.¹ A future US-Philippines FTA raises a number of concerns for the realization of the child's right to health and the child's right to life. IP standards in recent US trade agreements with developing countries have included very strict IP rules that dismantle the flexibilities countries can use to ensure access to affordable medicines. Therefore, it is important that the Philippines undertake a human rights impact assessment of these rules before beginning negotiations, in order to ensure that it does not undermine its obligations under the Convention on the Rights of the Child.

4. 3D -> Trade - Human Rights - Equitable Economy (3D) is a not-for-profit organization based in Geneva, Switzerland, working to ensure that trade rules are developed and applied in ways that promote an equitable economy. 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 compliance with international trade rules cannot justify non-compliance with human rights obligations.

5. This submission to the Committee on the Rights of the Child pre-session Working Group outlines 3D's main concerns relating to the impact of trade rules on access to affordable medicines in the Philippines. The final page of this submission sets out some specific issues we suggest Committee members might raise in its list of issues sent to the government of the Philippines.

¹ Philippine Institute for Development Studies (PIDS), *Exploring the Philippine FTA Policy Options*, Policy Notes, September 2004.

I. Access to affordable medicines in the Philippines

6. The Philippines has taken positive steps towards ensuring access to affordable medicines for children and other vulnerable groups. A landmark step was the Generics Act 1988 which aims to promote the production, dissemination, prescription and use of generic drugs.² This Generics Act is mentioned in the Philippines second country report to the Committee on the Rights of the Child as a means to “making quality drugs affordable.”³ Competition from generic drugs is a crucial way to ensure that the overall price of drugs, including the price of patent-protected drugs, falls.⁴

7. The government of the Philippines has also been using parallel importation of branded drugs from India to provide lower-priced medicines for public hospitals and pharmacies. The purpose of this parallel importation programme is to influence multinational pharmaceutical companies to reduce the cost of the drugs sold in the Philippines. This project was strongly opposed by a coalition of pharmaceutical companies which filed a case against the government in 2000. Despite this opposition, the Philippine International Trading Corporation (PITC) succeeded in imported low-cost drugs from India to an amount of 30 million Philippine Pesos [about 535, 000 USD] between 2002 and 2004 and is now planning to import lower-cost patented drugs from China.⁵

8. Notwithstanding these important steps, the cost of drugs in the Philippines remains one of the highest in Asia. Therefore, more measures need to be taken to ensure the realization of the child’s right to health and the child’s right to life.

II. The impact of intellectual property rules on public health and children’s rights in the Philippines

A. The TRIPS Agreement and access to medicines

9. Trade-related intellectual property (IP) rules can affect access to affordable medicines. Of greatest concern are patents, which grant exclusive rights over the manufacture, use or sale of an invention. Patent rights can keep prices of drugs artificially high if no measures are put in place to reduce them.

10. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) sets a standard of IP protection for all members of the WTO. The Philippines implemented the TRIPS Agreement in 1998.⁶ In order to reduce the adverse impacts of patent rules on prices, the TRIPS Agreement allows countries to use certain key flexibilities, such as compulsory licensing and parallel importation. The use of these flexibilities was reaffirmed by the Doha Declaration on TRIPS and Public Health of 2001 (Doha Declaration).⁷

11. Another mechanism available to reduce the cost of drugs is the WTO General Council Decision of 30th August 2003 (General Council Decision). The General Council Decision is a

² The Republic of the Philippines, *An Act to Promote, Require and Ensure the Production of an Adequate Supply, Distribution, Use and Acceptance of Drugs and Medicines Identified by their Generic Names*, Republic Act No. 6675, 25 July 1998.

³ The Republic of the Philippines, *Second Country Report on the Implementation of the CRC, 1995-2000*, CRC/C/65/Add.30, at paragraph 191(c).

⁴ MSF, WHO and UNAIDS, *Surmounting Challenges: Procurement of Antiretroviral Medicines in Low- and Middle-Income Countries, the Experience of Médecins Sans Frontières*, 2003

⁵ “PITC working to lower prices of medicines,” *Manilla Bulletin*, 30 September 2004.

⁶ WTO Council for Trade-Related Aspects of Intellectual Property Rights, *Review of Legislation: Philippines*, IP/Q/PHL/1, IP/Q2/PHL/1, IP/Q3/PHL/1, IP/Q4/PHL/1, 18 February 2004.

⁷ WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 and WTO, the Doha Ministerial Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, 14 November 2001.

temporary waiver to the TRIPS Agreement that allows States with insufficient drug manufacturing capacity to fully benefit from compulsory licensing. Although the Philippines has national drug manufacturing capacity, it may not always be sufficient to meet national needs. It should be encouraged to implement this mechanism to ensure that it has all the tools at its disposal to fulfil its human rights obligations, including those under the Convention on the Rights of the Child.

12. It is important to encourage the government of the Philippines to make use of all the flexibilities reaffirmed by the Doha Declaration and the mechanisms at its disposal to ensure access to affordable medicines for the poor and most vulnerable.

B. TRIPS-plus conditions in trade agreements

13. The Philippines is currently negotiating a number of trade agreements, either bilaterally or as a member of the Association of South East Asian Nations (ASEAN). The Philippines has also signed a Trade and Investment Framework Agreement (TIFA) with the United States in 1989 which could be used as a basis for negotiating a future US-Philippines Free Trade Agreement (FTA). If negotiations do take place, there is a high risk that the IP provisions could go beyond what is required by the TRIPS Agreement (termed TRIPS-plus rules). The following TRIPS-plus rules proposed in other United States' FTAs risk dismantling the flexibilities reaffirmed by the Doha Declaration:

- **Extension of the patent term** beyond the twenty year period required by the TRIPS Agreement.
- **Limitations on exports of drugs made under compulsory license**, contrary to the WTO General Council Decision.
- **Limitations on parallel imports of patented drugs**, contrary to the spirit of the Doha Declaration.
- **Exclusivity over test data** for up to five years granted to patent owners of drugs not yet marketed or registered in the country. Such exclusivity undermines compulsory licensing under the TRIPS Agreement and the General Council Decision.
- **Marketing authorization rules** requiring generic drug manufacturers to obtain the consent of patent owners in order to use test data for marketing approval. Since generic manufacturers cannot afford to re-do these tests, these rules nullify compulsory licensing flexibilities under the TRIPS Agreement and General Council Decision.

14. It is therefore crucial to encourage the Philippines to undertake a human rights impact assessment of IP rules before beginning negotiations for a trade agreement.

III. Trade negotiation procedures: limited access to information and participation

15. A further issue of concern is the lack of transparency of trade negotiations. Recent trade negotiations for bilateral and regional trade agreements, of which the US-Thailand Free Trade Agreement, have been criticized by civil society for being secretive and opaque.⁸ It is therefore important to remind the Philippines that if it enters into negotiations for a trade agreement that could impact on children's rights, it must respect the obligations to respect the views of the child under article 12 CRC, ensure access to information on the child's physical health according to article 17 CRC and ensure the child's freedom to seek, receive, and impart information according to article 13(1) CRC.

⁸ FTA Watch, *FTA Watch Special*, ref.04/2004, 28 June 2004.

Conclusion

16. The Philippines has taken measures to ensure access to affordable medicines, particularly through the Generics Act 1988 and the parallel importation of medicines from India. However, these measures risk being undermined by restrictive IP rules in a future trade agreement with the United States. It is therefore imperative that the Philippines undertake an impact assessment of the human rights effect of strict IP rules on access to affordable medicines before negotiating or implementing any new trade rules.

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The Philippines: issues of concern on trade and health

Right to life, survival and development (article 6), right to the highest attainable standard of health (article 24 CRC) and obligation to review the treatment provided to the child (article 25 CRC)

Question: Has the government of the Philippines assessed the possible impacts on children's rights, particularly the child's right to life, survival and development and the child's right to health, of the strict intellectual property rules proposed in free trade agreements?

Recommendation: The government of the Philippines should undertake human rights impact assessments before negotiating trade agreements, in order to ensure that they do not undermine the State's obligations under articles 6, 24 and 25.

Best interests of the child (article 3 CRC)

Question: Has the government of the Philippines considered the best interests of the child under article 3(1) CRC when planning to negotiate trade agreements, particularly in relation to intellectual property rules?

Recommendation: The government of the Philippines should systematically consider the best interests of the child when planning and 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), and access to information on children's physical health (article 17 CRC)

Question: Has the government of the Philippines 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 planning and negotiating trade agreements?

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