

International trade, health and children's rights – Thailand December 2005

Introduction

1. Thailand is often heralded as a success story for its achievements in relation to maternal, newborn and children's health.¹ Moreover, in the past decade Thailand has taken considerable measures to halt and reverse the spread of the HIV/AIDS epidemic thereby meeting Millennium Development Goal 6 in advance of the 2015 deadline.² For example, the prevalence rate of HIV infection in pregnant women has dramatically decreased from 2.3% in 1995 to 1.04% in 2004, and mother-to-child transmission of HIV has decreased from 25.5% to 8-9% in the same decade.³

2. Nevertheless, the HIV/AIDS epidemic remains a major threat to child and adolescent health, as recognized by the Thai government in its second State party report to the Committee on the Rights of the Child.⁴ Indeed, according to UNICEF, mother-to-child transmission of HIV/AIDS has already infected 30,000 children and has resulted in 7,500 cases of children living with AIDS. Moreover, they estimate that 13,000 children are born at risk of being infected with HIV/AIDS from mother-to-child transmission if mothers do not obtain treatment.⁵ In order to ensure access to affordable medicines and the continuation of such vital prevention programmes, competition from generic medicines is crucial to ensure that the overall price of life-saving drugs falls.⁶

3. Thailand, 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, Thailand 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.

4. However, Thailand's policies aiming to ensure access to affordable medicines and the realization of human rights are at risk of being undermined by strict intellectual property (IP) rules in bilateral and regional trade agreements. Since 2002, the Thai government has been involved in many bilateral and regional Free Trade Agreements (FTAs). So far, it has concluded FTAs with China, India, Bahrain, Australia, Peru and New Zealand. Negotiations are still under way with a number of other countries and trading blocks including Japan, the European Free Trade Association (EFTA – includes Switzerland, Norway, Iceland and Liechtenstein) and the United States (US).

¹ WHO, Regional Office for South-East Asia, *Improving Maternal, Newborn and Child Health in the South-East Asian Region*, New Delhi, 2005.

² UNDP, *Thailand's Response to the HIV/AIDS: Progress and Challenges, Thematic MDG Report*, 2004.

³ See Note 1 above.

⁴ Committee on the Rights of the Child, *Second periodic report of States parties due in 1999, Thailand*, CRC/C/83/Add.15, 31 May 2005, paragraph 346.

⁵ UNICEF, *At a Glance, Thailand*, 2005: <http://www.unicef.org/infobycountry/Thailand.html>

⁶ MSF, WHO and UNAIDS, *Surmounting Challenges: Procurement of Antiretroviral Medicines in Low- and Middle-Income Countries, the Experience of Médecins Sans Frontières*, 2003.

5. Of particular concern for children's rights are the proposed intellectual property (IP) rules in the US – Thailand FTA and the EFTA – Thailand FTA. IP standards in recent US and EFTA trade agreements with developing countries have included very strict IP rules that dismantle the policy flexibilities countries can use to ensure access to affordable medicines. Therefore, it is important that Thailand take into account and respect its human rights obligations, including under the Convention on the Rights of the Child in all aspects of trade negotiations. Moreover, the Thai government should undertake human rights impact assessments of proposed trade rules before concluding any trade agreement, in order to ensure that trade rules do not undermine its human rights obligations, including under the Convention on the Rights of the Child.

6. 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.

7. This submission to the Committee on the Rights of the Child outlines 3D's main concerns relating to the impact of international trade rules on access to affordable medicines, the child's right to health and the child's right to life in Thailand. The concerns raised in this country brief relate to the Committee on the Rights of the Child questions on child health care and the participatory rights of children outlined in the Committee on the Rights of the Child List of Issues of 1 November 2005.⁷

8. The final page of this submission sets out some specific issues we suggest members of the Committee on the Rights of the Child might raise with the government of Thailand.

I. Access to affordable medicines in Thailand

9. The Constitution of Thailand of 1997, section 82, stipulates that the State must provide health services and care for every person as a constitutional right.⁸ Thailand has taken positive steps towards ensuring access to comprehensive treatment, including for mothers, children and other vulnerable groups. For example, the Thai Ministry of Public Health (MOPH) policy on prevention of mother-to-child transmission of HIV/AIDS, established in 1997, has been successful in reducing the transmission rates by coupling counselling, HIV testing and replacement feeding with the provision of antiretroviral drugs to pregnant women.⁹ Furthermore, the MOPH committed to the goal of universal access to care and allocated 25 million US dollars in the 2004 fiscal year to scale up access to HIV/AIDS treatment to 50,000 people living with HIV/AIDS.¹⁰

10. In order to meet the demands of the HIV/AIDS treatment programme, the Thai government had to find ways in which to reduce the cost of medicines. One of these methods was to ensure that the Thai Government Pharmaceutical Organisation (GPO) could produce generic medicines. The result is that the GPO produces generic antiretroviral drugs at a price 25 times cheaper than the branded patented product.¹¹ In view of this, it is crucial that Thailand retain policy flexibility in order to reduce the cost of medicines and meet the needs of all of society, including the most vulnerable groups such as children and adolescents.

⁷ Committee on the Rights of the Child, *List of issues to be taken up in connection with the consideration of the second periodic report of Thailand*, CRC/C/THA/Q/2, 1 November 2005, see Part I questions A. 2 (b) and B. 1, and Part IV questions 2, 9 and 10.

⁸ Committee on the Rights of the Child, *Second periodic report of States parties due in 1999, Thailand*, CRC/C/83/Add.15, 31 May 2005, paragraph 340.

⁹ See Note 1 above.

¹⁰ UNAIDS/WHO, *Thailand Epidemiological Fact Sheet*, 2004 Update, 2004.

¹¹ Nathan Ford, "Patents, access to medicines and the role of non-governmental organisations," Vol.1, No.2, *Journal of Generic Medicines*, January 2004, pages 137-145, at p. 141.

II. The impact of intellectual property rules on public health and children's rights in Thailand

A. The TRIPS Agreement and access to medicines

11. 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. Thailand, as a member of the World Trade Organization (WTO), was obliged to comply with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which requires twenty years of patent protection.

12. In order to reduce the adverse impacts of patent rules on prices, the TRIPS Agreement allows countries to use certain key flexibilities, such as the granting of compulsory licenses in order to make cheaper generic versions of patented medicines or the parallel importation of patented medicines that are sold more cheaply in other countries. A country's ability to freely interpret and use these flexibilities was reaffirmed by the WTO Doha Declaration on TRIPS and Public Health of 2001.¹² The Doha Declaration expressly states that the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, access to medicines for all."

13. Another mechanism adopted by the WTO Member States is the WTO General Council Decision of 30th August 2003. This is a temporary waiver to the TRIPS Agreement that allows WTO Member States to export generic drugs under compulsory licence to countries that cannot make pharmaceuticals themselves. This mechanism was criticised by health advocates due to its complexity and cumbersome nature.¹³ Nevertheless, the WTO General Council incorporated it into a permanent amendment to the TRIPS Agreement on 6 December 2005.¹⁴ Until final ratification of this amendment by 1 December 2007, WTO Members can still make use of the 30 August 2003 Decision as it stands.

14. It is important to encourage the government of Thailand to make use of all the flexibilities and mechanisms at its disposal to respect its human rights obligations and ensure access to affordable medicines for the poor and most vulnerable. Thailand should also undertake a human rights impact assessment of the use of the 30 August 2003 mechanism to see if it is sufficiently adequate to reduce the cost of medicines and respect human rights. If this is not the case, Thailand should be encouraged to ask the WTO TRIPS Council to review the mechanism.

B. TRIPS-plus conditions in trade agreements

15. Thailand has concluded and is currently negotiating a vast number of Free Trade Agreements (FTAs) with a number of countries and trading blocks, ranging from Australia, Japan, Peru, the United States (US) and the European Free Trade Association (EFTA). The IP rules requested by the US and EFTA in their FTA negotiations with Thailand risk having the most damaging effect on access to affordable medicines in Thailand. These strict IP rules (termed TRIPS-plus rules) requested by the US and EFTA countries are often based on the rules achieved in previous trade agreements.

¹² 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.

¹³ *Joint Statement by NGOs on TRIPS and Public Health*, *WTO Members should reject bad deal on medicines*, 3 December 2005, <http://www.cptech.org/ip/wto/p6/ngos12032005.html>

¹⁴ See WTO, *Implementation of Paragraph 11 of General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on TRIPS and Public Health, Proposal of a Decision on an Amendment to the TRIPS Agreement*, IP/C/41, 6 December 2005.

16. The following TRIPS-plus rules proposed in recent US FTAs dismantle the flexibilities that were reaffirmed by the WTO Doha Declaration on TRIPS and Public Health and risk harming the realization of the child's right to health and the child's right to life:

- **Extension of the patent term:** this would extend the monopoly period of patent owners beyond the twenty years required by the TRIPS Agreement.
- **Limitations on compulsory licenses:** this would affect Thailand's ability to obtain generic medicines.
- **Limitations on parallel imports of patented drugs:** this would affect Thailand's ability to import patented medicines that are sold more cheaply in other countries.
- **Data exclusivity:** for up to five years granted to patent owners of drugs even if they are not patented in the country. This would limit Thailand's generic manufacturers from obtaining the data needed to make generic versions of medicines.
- **Marketing authorization conditions:** these provisions would undermine the possibility for generic medicines to be sold on the market if the patent owner does not consent, thereby undermining compulsory licensing.

EFTA's previous FTA demands also include TRIPS-plus rules. Most notable is a request for ten years of data exclusivity. If such a rule is included in the EFTA- Thailand FTA this could further undermine Thailand's ability to obtain lower cost generic medicines and comply with its human rights obligations, including under the Convention on the Rights of the Child.

17. Civil society groups have responded with concern to the proliferation of TRIPS-plus rules in FTAs and their impact on human rights. In March 2005 a coalition of Thai groups called FTA-Watch submitted a request to the 84th Session of the UN Human Rights Committee urging the Committee in their consideration of the State report of Thailand to raise concerns about the effect of TRIPS-plus rules in FTAs on the right to life.¹⁵ Furthermore, In June 2005 a coalition of seventeen NGOs from EFTA countries and a coalition of sixteen NGOs from Thailand submitted two letters of request to the UN Special Rapporteur on the Right to Health, urging him to intervene in Thailand's FTA negotiations with the US and EFTA.¹⁶ Both the submission to the Human Rights Committee and the letters to the Special Rapporteur urged parties to respect their international human rights obligations in all aspects of the trade negotiations and to undertake human rights impact assessments of proposed trade rules before making any new commitments in a trade agreement.

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

18. A further issue of concern is the lack of transparency of trade negotiations. The US-Thailand FTA in particular has been criticized by Thai public-interest civil society groups for being secretive and opaque. Although the government of Thailand has held a number of consultations and briefing sessions with selected Thai civil society groups, this has not been sufficient to ensure comprehensive public participation in the trade negotiations.¹⁷ It is therefore important to remind Thailand that trade negotiations should be open and transparent in order to ensure that the trade

¹⁵ FTA Watch, *Thailand's Free Trade Agreements and Human Rights Obligations, Submission to the 84th Session of the UN Human Rights Committee*, March 2005, http://www.ftawatch.org/autopage1/show_page.php?t=22&s_id=3&d_id=3

¹⁶ Déclaration de Berne, *Request for an urgent appeal to stop EFTA Member States (Switzerland, Norway, Iceland and Liechtenstein, from imposing TRIPS-plus rules in a free trade agreement (FTA) with Thailand*, Lausanne 20 June 2005, <http://www.evb.ch/fr/p3647.html>

See also FTA Watch, *Request for an urgent appeal on the impact of strict intellectual property rules in free trade agreements (FTAs) on access to affordable medicines in Thailand*, June 2005.

¹⁷ See Note 13 above.

rules negotiated do not adversely impact on human rights, including children's rights. Indeed, Thailand should respect its 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.

Conclusion

19. Thailand has taken measures to ensure access to affordable medicines. However, these measures risk being undermined by strict IP rules in trade agreements, in particular the rules being requested in Thailand's FTA negotiations with the US and EFTA. It is therefore imperative that Thailand undertake an impact assessment of the human rights effects of trade rules, including strict IP rules on access to affordable medicines, before making any commitments in trade agreements that would undermine human rights.

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Thailand: issues of concern on trade, health and children's rights

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 Thailand 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 Thailand should undertake human rights impact assessments of trade rules, including intellectual property rules, before negotiating any 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 Thailand 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 Thailand should systematically consider the best interests of the child when planning and negotiating trade agreements and when implementing trade rules 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 Thailand ensured the respect for the views of the child and ensured access to information on the impact of proposed trade rules on children's health, when planning and negotiating trade agreements?

Recommendation: The government of Thailand 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.