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Free Trade Agreements (FTAs) and Human Rights: a Serious Challenge for Latin America and the Caribbean

Why human rights are useful tools to prevent intellectual property rules in Free Trade Agreements (FTAs) from violating access to affordable medicines for the poor in Latin America and the Caribbean

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Across the Latin American and Caribbean region, a growing number of countries have embarked on a treacherous journey. An ever-expanding web of Free Trade Agreements (FTAs) is quickly shrinking the policy space necessary for governments to make economic decisions that respect development commitments and human rights obligations.

In particular, a series of recent FTAs negotiated with the United States (US) have set a dangerous precedent for the region. Indeed, strict intellectual property rules in the US-Chile FTA, US-DR-CAFTA¹ and the recent US-Peru FTA signed on 7 December 2005 have placed governments in an extremely difficult position - the intellectual property rules included in these FTAs threaten to undermine human rights obligations, including the obligation to ensure access to affordable medicines for all inherent in the right to life and right to health.² Even as many other governments continue their negotiations, controversy over the implementation of US-DR-CAFTA, initially planned for 1 January 2006, and delay in the ratification of the agreement in Costa Rica has fuelled a call for the reconsideration of existing agreements. Moreover, delays in the finalization of the US-Andean FTA negotiations with Ecuador and Colombia provide a last-minute opportunity to influence the outcome of these negotiations. Human rights rules and mechanisms can provide tools for advocates and policy-makers helping them protect valuable policy space from further erosion by trade agreements.

Human rights and FTAs: the example of access to medicines

Trade-related intellectual property rules risk having an adverse effect on the cost of medicines in Latin America and the Caribbean. FTA rules in particular, such as those included in the US-Chile FTA, US-DR-CAFTA and the US-Peru FTA, go beyond the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). They also severely restrict the policy flexibilities reaffirmed by the WTO Doha Declaration on TRIPS and Public Health in the areas of compulsory licensing and parallel importation. Of particular concern are the so-called "TRIPS-plus" rules found in these agreements, such as extension of the patent term for "unreasonable delays," five year data exclusivity protection for pharmaceutical clinical test data even if the patent term has expired, and marketing authorization requirements for generic medicines that require the consent of the patent owner. The potentially adverse effects of these TRIPS-plus rules on the cost of medicines is further compounded by the fact that enforcement of FTAs will be left to arbitration tribunals instead of national courts bound by constitutional safeguards.

When evaluating the intellectual property provisions included in FTAs, it is important to bear in mind that all countries in Latin America and the Caribbean are also parties to at least one human rights treaty, whether international or regional. International treaties such as the Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social and Cultural Rights

(ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), or regional treaties such as the Protocol of San Salvador,³ are equally binding as trade agreements. State parties to these treaties are bound to take measures that *respect, protect and fulfil* human rights and avoid measures that would go back on their human rights commitments. Also, human rights law requires that State policies do not undermine the ability of other countries to comply with their human rights obligations.⁴

For example, the right to life and right to health, enshrined in these treaties, oblige States to take measures to ensure access to affordable medicines for all. The right to life as interpreted by the Human Rights Committee requires states to adopt positive measures to “eliminate [...] epidemics” which includes the provision of medicines.⁵ The right to health, as interpreted by the Committee on Economic, Social and Cultural Rights, includes the obligation to take measures to ensure economic accessibility of essential drugs.⁶ Accordingly, States are required to *respect* the right to health by refraining from impeding access to affordable medicines. States must *protect* the right to health by adopt measures that will ensure that third parties do not threaten access to affordable medicines. Lastly, the obligation to *fulfil* the right to health requires States to implement national policies and legislative measures that ensures access to affordable medicines for all without discrimination.

Human rights also support calls for greater transparency of FTA negotiations and public participation in trade decision-making. Indeed, States have an obligation to ensure freedom to seek, receive and impart information under the right to freedom of information.⁷ Moreover, the right to participate in public affairs includes participation in all aspects of the “formulation and implementation of policy at the international, national, regional and local levels.”⁸ This can be interpreted as requiring States to ensure access to information relating to FTA negotiations and public participation in the formulation and implementation of trade-related intellectual property rules in FTAs.

So interpreted, human rights rules oblige governments to take into account their human rights obligations when drafting, negotiating and implementing FTAs and must ensure that third parties – such as the pharmaceutical industry – do not adversely influence trade negotiations. Furthermore, even States, like the US, which have signed but not ratified human rights treaties, are bound by a good faith legal obligation to refrain from acts that could defeat the object and purpose of human rights.⁹ Hence, the UN Special Rapporteur on the Right to Health, Paul Hunt, in relation to the US-Peru FTA requested that “in accordance with its human rights responsibility of international cooperation, the United States should not apply pressure on Peru to enter into commitments that either are inconsistent with Peru’s constitutional and international human rights obligations, or by their nature are WTO-plus.”¹⁰

Using human rights rules mechanisms to counter the adverse effects of FTAs

A number of human rights bodies have raised concerns about the impact of intellectual property rules in FTAs on access to affordable medicines and the realization of human rights. These include the United Nations (UN) Special Rapporteur on the Right to Health, and UN human rights treaty bodies (treaty bodies) such as the Committee on the Rights of the Child which monitors the implementation of the Convention on the Rights of the Child. These bodies have the ability to make authoritative recommendations to State parties to international human rights treaties requiring them to take measures to comply with their human rights obligations. These recommendations can be used by advocates and policy-makers in protecting the right to health from strict intellectual property rules in FTAs.

In 2004, the UN Special Rapporteur on the Right to Health was invited by the government of Peru to report on the situation of the right to health in the country. In a press release during his country mission to Peru in July 2004 he recommended that in relation to the US-Peru FTA “before any agreement is finalised, assessments must identify the likely impact of the draft agreement on the enjoyment of the right to health, including access to essential medicines, especially for those living in poverty.”¹¹ These recommendations for a human rights impact assessment were reiterated in his report to the Commission on Human Rights in February 2005.¹² In the light of these recommendations, the Ministry of Health of Peru undertook an impact assessment of the effect of proposed FTA rules on the cost of medicines in Peru, concluding that an extra 700 to 900 thousand

people would be excluded from treatment.¹³ This was followed by an assessment from the Intellectual Property Office of Peru which also raised concerns about the effect of intellectual property rules on the cost of medicines.¹⁴ Despite these impact assessments, the final text of the US-Peru FTA contains TRIPS-plus rules and lacks appropriate safeguards to protect the right to health.

During the same period, the UN treaty bodies made a series of recommendations to a broad group of States on the issue of intellectual property, access to medicines and the enjoyment of human rights, in response to concerns raised by NGOs.¹⁵ In the Latin American and Caribbean region, such recommendations were made to the government of Ecuador, El Salvador, Nicaragua and Peru.¹⁶ In June 2004, for example, the Committee on Economic, Social and Cultural Rights raised concerns with Ecuador about the proposed US-Andean FTA. The Committee called on Ecuador to take into account its human rights obligations in “all aspects of its negotiations with [...] regional trade agreements to ensure that economic, social and cultural rights, particularly of the most disadvantaged and marginalized groups, are not undermined.”¹⁷ This recommendation was used by Ecuadorian civil society in September 2004 in order to stem adoption of a draft Presidential decree that aimed to incorporate proposed data exclusivity rules into national law before finalization of the US-Andean FTA negotiations.¹⁸ As the FTA negotiations between Ecuador and the US are still under way at the time of writing, it is not possible to assess whether the recommendations of the UN treaty body have been effective in stemming the inclusion of harmful intellectual property rules in the final agreement.

Human rights bodies have also given support to calls for greater transparency and accountability of decision-makers in relation to FTAs. For example, the Special Rapporteur on the Right to Health in a press release of 13 July 2005 reiterated that the US-Peru FTA negotiations must be “open, transparent and subject to public scrutiny” and that “before concluding the FTA, the Government of Peru should decide what complementary measures are needed and are feasible to ensure that the right to health of Peruvians, particularly the poorest, is protected.”¹⁹ In line with these recommendations, civil society in Peru was very active in providing input to policy-makers on the effects of the FTA on economic, social and cultural rights. Now that Peru has signed the US-Peru FTA it is necessary that the ratification processes abide by these requirements of transparency and public participation and that before ratification the government undertake measures to protect the poorest members of society from the adverse effects of the agreement.

In sum, human rights tools have clearly demonstrated their effectiveness as tools for promoting more development-oriented and human rights consistent trade policies that are transparent and participatory. It is therefore crucial that advocates and policy-makers use these tools in order to prevent intellectual property rules in FTAs from undermining the human rights of the poor in Latin America and the Caribbean.

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1The United States – Dominican Republic – Central American Free Trade Agreement (US-DR-CAFTA) is an agreement between the United States on the one hand and the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua on the other hand.

2 See the right to life, article 6 ICCPR and article 6 CRC. The right to an adequate standard of physical and mental health, article 12 ICESCR and article 24 CRC.

3 See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador.

4 See 2(1) ICESCR, as interpreted by CESCR General Comment No.3 (1990), The nature of State party obligations, 14 December 1990, and article 4 CRC, as interpreted by CRC General Comment No.5 (2003), General measures of implementation, 27 November 2003.

5 Article 6 ICCPR as interpreted by Human Rights Committee General Comment No. 6 (1982), *The right to life*, 1982, and article 6 CRC, as interpreted by Committee on the Rights of the Child, General Comment No.3 (2003), *HIV/AIDS and the rights of the child*, 15 April 2003, and CRC, General Comment No. 4 (2003) *Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2003

6 As interpreted by Committee on Economic, Social and Cultural Rights, General Comment No.14 (2000), *The right to the highest attainable standard of health*, 11 August 2000

7 See article 19 ICCPR, article 12 ICESCR, and article 13 and 17 CRC

8 See article 25 ICCPR, as interpreted by Human Rights Committee General Comment No. 25(1996), *The right to participate in public affairs*, 12 July 1996.

9 See article 18, Vienna Convention on the Law of Treaties 1969.

10 CHR, Report submitted by the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Mission to Peru, E/C.4/2005/51/Add.3, 4 February 2005.

11 UN Press Release, *US-Peru Trade Negotiations : Special Rapporteur on Right to Health Reminds Parties of Human Rights Obligations*, 5 July 2004.

12 Ibid, note 9 supra.

13 Ministerio de Salud de Perú, *Evaluación de los potenciales efectos sobre acceso a medicamentos del Tratado de Libre Comercio que se negocia con Estados Unidos de América*, Abril de 2005.

14 Indecopi, *Incidencia de los derechos de propiedad intelectual en el gasto de las familias en el marco del TLC*, Mayo de 2005.

15 See the country briefings of 3D -> Trade – Human Rights – Equitable Economy on IP, access to medicines and human rights in Botswana, Denmark, Ecuador, El Salvador, Italy, and the Republic of the Philippines, Thailand and Uganda at: <http://www.3dthree.org/en/page.php?IDpage=23&IDcat=5>

16 See a Compilation of UN treaty body recommendations on IP, access to medicines and human rights at:

http://www.3dthree.org/pdf_3D/TreatyBodyIPrefs_en.pdf

17 CESCR, Ecuador, Concluding Observations, E/C.12/1/Add.100, 7 June 2004.

18 Centro de Derechos Económicos y Sociales - Ecuador, *Medicamentos Genéricos y Derechos Humanos*, DESC Para la Acción, Boletín 1, Septiembre de 2004

19 UN Press Release, *US-Peru Free Trade Pact Negotiations: Special Rapporteur on Right to Health Reminds Parties of Human Rights Obligations*, 13 July 2005.