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COUNCIL UPDATE – ITEM 3
SPECIAL RAPPORTEUR ON THE RIGHT TO HEALTH
HUMAN RIGHTS COUNCIL, 11TH SESSION
3 AND 4 JUNE 2009

Overview

On 2 and 3 June 2009, the Human Rights Council (the Council) held an interactive dialogue with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr Anand Grover. Among the issues addressed were the effects of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and Free Trade Agreements (FTAs) on the right to health and access to medicines, the need to consider the *Doha Declaration on Public Health*, the need for technical assistance to developing countries or least developed countries (LDCs) in realising the right to health, and the need for medicine to be more affordable in developing countries and LDCs.

Mr Grover presented his report annual report to the Council, which was his first report since his appointment in June 2008. States raised many questions, but unfortunately the Council was running behind schedule and Mr Grover was forced to confine his responses to five minutes. He informed that he will provide written answers to all other questions raised. The practice of allowing special procedures mandate holders only a very limited time to large amounts of substantive questions is not new, and it would be desirable if the Council could reverse this regrettable trend.

Item 3 - Special Rapporteur on the right to health

Presentation by the Special Rapporteur

Before presenting his annual report and a mission reports drafted by his predecessor,[1] the Special Rapporteur made some introductory comments and affirmed that community input was an important element of his work, as it offers a broader perspective to various important issues in relation to the right to health. He emphasised the importance of supporting civil society organisations in that regard.

[1] A/HRC/11/12 (annual report), Add.1 (summary of communications), Add.2 (mission to Glaxo Smith Kline).

Mr Grover emphasised the following main points in his annual report. First, he presented some figures regarding access to medicine such as the fact that nearly 2 billion people lack access to essential medicines. Mr Grover highlighted that improved access to medicine could save 10 million lives a year. He then put forth his main argument, 'intellectual property (IP) rights have an impact on the enjoyment of the right to health as it directly affects the affordability of medicines.' He explained that patents create monopolies, limiting competition and thus allow patentees to establish high prices. To underscore the importance of generic medicine he gave an example of HIV medicines and explained that thanks to generic medicine coming from India, South Africa, Brazil and Thailand, prices were reduced to a fraction of the price for the original drug.

Another major element was the TRIPS and TRIPS flexibilities.[2] However, Mr Grover noted that many countries lack awareness about TRIPS flexibilities, and many countries have limited technical capacities to implement them. Additionally, he pointed out that developed countries and multinational pharmaceutical corporations usually try to influence the implementation of TRIPS flexibilities in developing countries or LDCs and sometimes even pressure them when to renounce on using such flexibilities. In this regard, Mr Grover highlighted the recent uncertainty regarding the supply of generic medicines. He added that countries currently producing generic medicines have become 'TRIPS compliant' and consequently had to introduce product patents. The near global reach of these patents, according to Mr Grover, prevents a significant reduction in the price of medicines.

Mr Grover also referred to the impact of FTAs, bilateral investment treaties (BITs), and other trade agreements on access to medicines. He argued these agreements were usually negotiated with 'little transparency or participation from the public' and generally establish 'TRIPS-plus' provisions, introducing an even better protection of patents, and thus furthering the market power of pharmaceutical companies even more. In conclusion, Mr Grover insisted that both TRIPS and FTAs have had an adverse impact on prices and the availability of medicines. He recommended developing countries and LDCs to 'review their laws and policies with a view to making full use of TRIPS flexibilities.'

The Special Rapporteur also presented the report of his predecessor, Mr Paul Hunt, on his mission to Glaxo Smith Kline (GSK), a leading pharmaceutical company. He elaborated that not only States have an obligation to ensure affordability of medicines, but non-state actors such as pharmaceutical companies also carry some obligations. In regard to GSK, Mr Hunt commended positive steps taken by GSK in reducing significant price of some of its drugs in LDCs. However, he also pointed out that some prices remain beyond the reach of large segments of the population.

Mr Grover informed the Council that report on his recent mission to Poland will be presented in the Council's June session in 2010.

Interactive dialogue

Unsurprisingly, States' views on the reports presented where mixed. Generally, developing countries including Cuba, Egypt, Djibouti, India, Pakistan and the Philippines received Mr Grover's views favourably, while economically advanced countries with obvious stakes in intellectual property rights on medicines, including the US and Switzerland, where more sceptical.

A number of States[3] welcomed Mr Grover's conclusions and recommendations encouraging developing countries to make better use of **TRIPS flexibilities** and they shared the Special Rapporteur's appeal to use international cooperation to transfer technology to developing countries to enable them to ensure access to medication for their people. Pakistan (on behalf of the OIC) insisted there is a need to create an enabling environment supporting the use of TRIPS flexibilities. India referred to the *Doha Declaration on Public Health*, which confirms that States do

[2] In his presentation, in his report, Mr Grover clarified that TRIPS came into force in 1995 with the World Trade Organisation (WTO) and establishes a minimum global standard for all major intellectual property rights. However, there are flexibilities provided in TRIPS to every WTO member to achieve public health needs and promote access to medicines for all.

[3] Cuba, Egypt, Djibouti, India, Pakistan and the Philippines.

have the ability within TRIPS to establish their own policy, protect the right to health and promote access to medicine for all. In this regard, Action Canada for Population and Development echoed the concern that developing countries, while trying to implement TRIPS flexibilities, have experienced pressure from developed countries and multinational pharmaceutical corporations. Luxemburg insisted that all parties concerned should respect flexibilities provided by TRIPS and BITs or FTAs should be concluded in full respect of these flexibilities. Some States[4] took a more fundamental position, and encouraged developing countries not to sign FTAs. Cuba stated that such agreements 'would jeopardize the capacity of developing countries to guarantee the right to health including the access to medicine.'

In his concluding remarks, Mr Grover insisted that new FTAs should not undermine the existing flexibilities within the TRIPS agreement. He went further, saying the current system of TRIPS flexibility is dysfunctional, as proven by the fact that only Rwanda is currently making use of the system to further its health policy.

Many States[5] referred to the importance encouraged developing countries to fully use the transitional periods negotiated in the context of their entry to the World Trade Organisation, (WTO) and their accession to TRIPS. Both Djibouti and Nigeria asked the Special Rapporteur what kind of technical assistance could be provided to LDCs to better understand and use these opportunities to ensure access to medicines. In response, Mr Grover suggested an interdisciplinary format composed of WTO and WHO experts who could advice developing countries.

On the other hand, the USA and Switzerland were quite **critical** of Mr Grover's report. The USA strongly disagreed with Mr Grover on the idea that intellectual protection has had an adverse impact on access to medicines and argued on the contrary that it has a positive effect. Switzerland underlined that the interest of countries manufacturing these medicines should be taken into account. It expressed its concern about recommendations made by the Special Rapporteur, which could result in a general weakening of the current intellectual property regime, and argued that this would affect access to medicines in the long-term. Moreover, Switzerland argued that insufficient market incentives are the main factors explaining the lack of research and non-development of medicine. In response to these comments, Mr Grover argued that his recommendations did not try to weaken the TRIPS but remained within the flexibilities that TRIPS already provides. He also argued that the data available for the past ten years does not support the claim by the US and Switzerland. Instead, he argued that the US patenting system is favouring 'incremental innovation' instead of new actually groundbreaking new 'chemical entities'. He concluded that it therefore perpetuates high profits for pharmaceutical industry even though they are producing drugs only slightly different from old drugs. However, despite this apparently fundamentally opposed viewpoints, Mr Grover added he would like to hold a dialogue with the US and Switzerland.

Many States[6] reacted to Mr Grover's mention about the tendency of **'evergreening' of existing patents**. Egypt and India deplored the fact that pharmaceutical companies continued to use this policy, whereas the Philippines underscored it was important to ensure sufficient standards are established to eliminate 'patents with dubious utility and limiting the evergreening tactics.' In this regard, the Czech Republic (on behalf of the EU) questioned the Special Rapporteur whether there has been any further development to prevent the possible 'evergreening' of existing patents. In response, Mr Grover referred to 'the experience of compulsory licensing in Thailand.'

A number of States[7] mentioned the **role of non-state actors**, specifically pharmaceutical companies, regarding the access to and affordability of medicine. The UK informed on the publication of a policy paper in 2005, in consultation with GSK, called 'Increasing access to essential medicines in developing countries.' The paper provides a framework for good practices in the pharmaceutical industry and sets out a number of ways in which companies could align business activities with contributions to increase access to medicines to the poor. The UK

[4] Cuba, Egypt, India, Pakistan

[5] Djibouti and United Arab Emirates (on behalf of the Arab Group)

[6] Egypt, The Philippines, India, The Czech Republic(on behalf of the European Union)

[7] Russian Federation, UK, Indonesia

insisted that states and pharmaceutical companies should work together to increase access to medicine for the poor.

Further information

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- Web site of the Office of the High Commissioner for Human Rights (OHCHR) on the 11th session of the Human Rights Council: http://www2.ohchr.org/english/bodies/hrcouncil/11session. For direct access to reports considered, check http://www2.ohchr.org/english/bodies/hrcouncil/11session/reports.htm.
- To access oral statements made during the session, more informal documents and draft resolutions are available on the 'OHCHR extranet' at http://portal.ohchr.org/portal/page/portal/HRCExtranet. Username: 'hrc extranet' Password: '1session'.

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The Council Monitor forms part of the Human Rights Monitor Series produced by ISHR. It provides you with information about all the key developments at the Human Rights Council, including Daily Updates during the session of the Council, an Overview of the session, briefings and updates on the major issues of concern in the transition from the Commission on Human Rights to the Council and other key reports. It is currently an online publication that can be found at www.ishr.ch.

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