

Tricky to trade amid pandemic

September 21, 2020 @ 12:02am



The United Nations has come up with several resolutions to resolve the issue of affordability and accessibility to Covid-19 vaccines. - NSTP file pic, for illustration purposes only

LETTERS: The United Nations has come up with several resolutions to resolve the issue of affordability and accessibility to Covid-19 vaccines. Of fundamental importance is the UN Sustainable Development Goal 3, which aims to "ensure healthy lives and promote wellbeing for all at all ages".

Sustainable Development Goal 3 also supports the use of Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreements and the Doha Declaration on the TRIPS Agreement and Public Health, which affirms the right of developing countries to use the full provisions of TRIPS on flexibilities to protect public health and, in particular, provide access to medicine for all.

Even with these provisions, why then are there still concerns? One of the reasons may be the insufficiency of the provisions themselves. For example, the TRIPS agreement, which Malaysia is party to, provides for what is known as the compulsory licensing of patents.

This is when governments can force companies to license technologies vital to the handling of a crisis with a reasonable price. Malaysia has previously used provisions to enable the import of an affordable version of the Hepatitis C medication sofosbuvir, which has been

acclaimed by international organisations.

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However, even if a country can effectively force the licensing of a patent, the licence cannot be effectively used if the country does not have the manufacturing capacity to produce the patented technologies.

Other developed countries cannot simply export compulsorily licensed technologies to less-developed countries since compulsory licensing is caught by other TRIPS provisions, which disallow the export of technologies beyond the borders of the compulsory licensee.

This means that countries facing a crisis still cannot effectively gain affordable access to patented technologies if they cannot manufacture them themselves.

The World Trade Organisation has tried to remedy this situation by inking an amendment to TRIPS in Article 31bis, which allows compulsorily licensed pharmaceuticals to be exported to countries in need or countries without sufficient manufacturing capacity.

However, the current pandemic has shown that face masks, respirators and other ancillary technologies that countries may not have the capacity to manufacture are also vital to handling a pandemic.

Despite that, the exception in Article 31bis still only applies to medicine. There were face mask and respirator shortages around the world, even in first world countries such as Italy. Pandemics have the potential to completely overwhelm the healthcare services in a country and often technologies other than medicine are vital in handling such a crisis.

It is unfortunate then that licensed technologies other than medicine cannot be exported to countries that need them the most. It is more unfortunate that Malaysia has yet to incorporate Article 31bis into its domestic legislation despite its inherent benefit.

Next, it is possible that countries are unwilling to take advantage of certain emergency treaty provisions for fear of coming into dispute with rights-holders who could argue that they do not fulfil the conditions of those provisions.

Australia, in 2018, won a lengthy international dispute with several countries on its controversial act that required tobacco products to be packaged plainly to reduce their appeal. This dispute arose even despite the exception in the General Agreement on Tariffs and Trade, which allows countries to take measures necessary to protect human life.

Similarly, while Malaysia has signed free trade agreements with many countries, the emergency provisions are simply too broad, taking the form of general exceptions, and do not place specific obligations to cooperate on public health issues.

While broad treaty agreements are often a staple of international agreements, in times of crisis, they often serve to engender prevarication and delays as countries trifle over the meanings of terms, fearful of taking advantage of potentially life-saving provisions in case they happen to bring countries into dispute with rights-holders.

Finally, such treaties may simply not do enough to encourage international cooperation. International treaties have often been inked based on humanitarian concerns and international cooperation. However, countries are unfortunately motivated primarily by national self-interest above all else.

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