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Urgent need for access to AIDS drugs without tripping over TRIPS

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THE recent remark by Malaysian AIDS Council president, Datuk Paduka Marina Mahathir that only one per cent of the nation's 34,000 HIV/AIDS patients can afford anti-retroviral drugs is most disturbing (Sunday Sun, Oct. 29).

Some five months ago, the Ministry is on record as having said that it would continue to press for a lower price. But this clearly is not going to be easy given the pharmaceutical industry's stance.

Major drug companies have long argued that they alone should have the patent right to manufacture and sell the drugs they invented.

Meanwhile, as at December 1999, of the total 33,233 HIV cases reported to the Ministry of Health, there were 2,685 deaths.

Under the present circumstances, it is crucial that the call for "the government to look beyond the aspect of negotiating the reduction of the price of these drugs by demanding compulsory licensing and parallel importing" be given a hearing. Many developing countries, placed in the same predicament, are moving in the same direction.

What does this mean? Compulsory licensing is understood to mean that a government or a court of law may grant a licence to a third party to use a patent, without the patent holder's consent, under specified conditions. For example, in cases of national emergency, or to remedy anti-competitive practices or even for general interest involving public health needs such as in an AIDS epidemic.

This means that expensive drugs could be made more affordable and available to a larger population, with the patent holder given adequate compensation.

Compulsory licensing is as old as patent laws themselves are. The Paris Convention for the Protection of Industrial Property of March 20, 1883, contains provisions for compulsory licensing, viz., "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."

It is therefore a judicial or administrative procedure laid down by law. In order to make use of it the World Trade Organisation (WTO) members need to translate it into national legislation.

Viewed from one standpoint, compulsory licensing can be regarded as a legal tool to remedy negative effects of patent monopolies.

Interestingly enough, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, and in particular Article 31, permits developing countries to issue, in accordance with the provisions laid down, compulsory licenses for drugs, including those appearing on the list of essential drugs of the World Health Organisation (WHO).

Parallel import, on the other hand, means that a country can import the same product from a cheaper market, where there are price differences, to be sold in the country.

In other words, the imports of goods already put on the market in another country with the patent holder's authorisation.

In this way too developing countries can substantially lower drug price.

For example, according to one survey, the price of the anti-AIDS drug AZT from various parallel importers varies from as high as US\$124.95 to as low as US\$53.50 per pack containing 40 capsules of 250mgs.

The TRIPS Agreement too explicitly states that if a country allows

parallel imports, those practices cannot be challenged under the Agreement.

For this purpose, Brazil has asked world health authorities to set up a database of prices of all anti-AIDS drugs, in order to offset a "pricey" drug trend. Drugs made in countries like Brazil, India and Thailand, whose laws disregard many drug patents, and some others, make generic versions of the most important - and most expensive - AIDS drugs and sell them at a cheaper price. The database would allow poor countries to shop for the best deal worldwide, and make it easier to import high-quality cheaper versions.

The use of these two mechanisms seems reasonable given the fact that a greater number of people can benefit from them.

Moreover as mentioned by the Minister of Health, earlier in July, "although western countries champion human rights, they are still hesitant to reduce the price of drug cocktails that will help reduce AIDS in developing countries" If this is the case, then the Government should grant a compulsory license to a manufacturer or importer to produce them. We as a nation must begin to fend for ourselves.

Still this is not going to be easy based on the experiences of countries such as South Africa and Thailand. Some countries with vested interests can make it difficult for these mechanisms to be implemented. The US foreign policy, for example, has been noted to have led a global campaign against countries wanting to implement such provisions.

At stake were not only local interpretations of patent law and WTO rules on trade in Intellectual Property, but international power relations between developing countries and the pharmaceutical industry.