## 1AC

### Disclosure

#### Interpretation: Debaters must disclose all constructive positions on open source with highlighting on the 2020-21 NDCA LD wiki after the round in which they read them.

#### Violation – screenshots in the doc prove- they negated against San Mateo SR but didn’t disclose OS on the wiki

Graphical user interface, application

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#### 1] Debate resource inequities—you’ll say people will steal cards, but that’s good—it’s the only way to truly level the playing field for students such as novices in under-privileged programs – it equals the playing field.

Overing 18 – Bob Overing, LD Scholar (“Holiday Disclosure Post #6 – 10 Things Edition” JANUARY 12, 2018. http://www.premierdebate.com/disclosure-post-6/)

**Open source improves on usual disclosure practices** in the obvious way – **you can read their evidence for better prep**aration – and in a number of smaller ways too. **It solves the analytics problem** I discussed above, **so round-altering uncarded arguments are available** (though this doesn’t really apply to Harvard-Westlake), **and it gives access to evidence from paywalled articles**. **Every season I coach debaters who lack access to major databases; for schools without robust online library offerings or teams without college coaches, this matters a lot**.

#### 2] Evidence ethics – open source is the only way to verify pre-round that cards aren’t miscut or highlighted or bracketed unethically. That’s a voter – maintaining ethical ev practices is key to being good academics and we should be able to verify you didn’t cheat

#### 3] Depth of clash – it allows debaters to have nuanced researched objections to their opponents evidence before the round at a much faster rate, which leads to higher quality ev comparison – outweighs cause thinking on your feet is NUQ but the best quality responses come from full access to a case.

#### Education is a voter- why schools fund debate and the terminal impact

#### Drop the debater – a] deter future abuse and b] set better norms for debate c] indicts the debater

#### Competing interps – [a] reasonability is arbitrary and encourages judge intervention since there’s no clear norm, [b] it creates a race to the top where we create the best possible norms for debate.

#### No RVIs – a] illogical, you don’t win for proving that you meet the burden of being fair, logic outweighs since it’s a prerequisite for evaluating any other argument, b] RVIs incentivize baiting theory and prepping it out which leads to maximally abusive practices c] you can’t win for having good disclosure practices

### 1AC – Adv – Pandemics

#### Only the plan can solve covid access – inequalities heighten the risk of mutations and uneven development.

Kumar 21 [Rajeesh; Associate Fellow at the Institute, currently working on a project titled “Emerging Powers and the Future of Global Governance: India and International Institutions.” He has PhD in International Organization from Jawaharlal Nehru University, New Delhi. Prior to joining MP-IDSA in 2016, he taught at JamiaMilliaIslamia, New Delhi (2010-11& 2015-16) and University of Calicut, Kerala (2007-08). His areas of research interest are International Organizations, India and Multilateralism, Global Governance, and International Humanitarian Law. He is the co-editor of two books;Eurozone Crisis and the Future of Europe: Political Economy of Further Integration and Governance (London: Palgrave Macmillan, 2014); and Islam, Islamist Movements and Democracy in the Middle East: Challenges, Opportunities and Responses (Delhi: Global Vision Publishing, 2013); “WTO TRIPS Waiver and COVID-19 Vaccine Equity,” IDSA Issue Briefs; <https://idsa.in/issuebrief/wto-trips-waiver-covid-vaccine-rkumar-120721>] Justin

According to Duke Global Health Innovation Center, which monitors COVID-19 vaccine purchases, rich nations representing just 14 per cent of the world population have bought up to 53 per cent of the most promising vaccines so far. As of 4 July 2021, the high-income countries (HICs) purchased more than half (6.16 billion) vaccine doses sold globally. At the same time, the low-income countries (LICs) received only 0.3 per cent of the vaccines produced. The low and middle-income countries (LMICs), which account for 81 per cent of the global adult population, purchased 33 per cent, and COVAX (COVID-19 Vaccines Global Access) has received 13 per cent.10 Many HICs bought enough doses to vaccinate their populations several times over. For instance, Canada procured 10.45 doses per person, while the UK, EU and the US procured 8.18, 6.89, and 4.60 doses per inhabitant, respectively.11 Consequently, there is a significant disparity between HICs and LICs in vaccine administration as well. As of 8 July 2021, 3.32 billion vaccine doses had been administered globally.12 Nonetheless, only one per cent of people in LICs have been given at least one dose. While in HICs almost one in four people have received the vaccine, in LICs, it is one in more than 500. The World Health Organization (WHO) notes that about 90 per cent of African countries will miss the September target to vaccinate at least 10 per cent of their populations as a third wave looms on the continent.13 South Africa, the most affected African country, for instance, has vaccinated less than two per cent of its population of about 59 million. This is in contrast with the US where almost 47.5 per cent of the population of more than 330 million has been fully vaccinated. In Sub-Saharan Africa, vaccine rollout remains the slowest in the world. According to the International Monetary Fund (IMF), at current rates, by the end of 2021, a massive global inequity will continue to exist, with Africa still experiencing meagre vaccination rates while other parts of the world move much closer to complete vaccination.14 This vaccine inequity is not only morally indefensible but also clinically counter-productive. If this situation prevails, LICs could be waiting until 2025 for vaccinating half of their people. Allowing most of the world’s population to go unvaccinated will also spawn new virus mutations, more contagious viruses leading to a steep rise in COVID-19 cases. Such a scenario could cause twice as many deaths as against distributing them globally, on a priority basis. Preventing this humanitarian catastrophe requires removing all barriers to the production and distribution of vaccines. TRIPS is one such barrier that prevents vaccine production in LMICs and hence its equitable distribution. TRIPS: Barrier to Equitable Health Care Access The opponents of the waiver proposal argue that IPR are not a significant barrier to equitable access to health care, and existing TRIPS flexibilities are sufficient to address the COVID-19 pandemic. However, history suggests the contrary. For instance, when South Africa passed the Medicines and Related Substances Act of 1997 to address the HIV/AIDS public health crisis, nearly 40 of world’s largest and influential pharma companies took the South African government to court over the violation of TRIPS. The Act, which invoked the compulsory licensing provision, allowed South Africa to produce affordable generic drugs.15 The Big Pharma also lobbied developed countries, particularly the US, to put bilateral trade sanctions against South Africa.16 Similarly, when Indian company Cipla decided to provide generic antiretrovirals (ARVs) to the African market at a lower cost, Big Pharma retaliated through patent litigations in Indian and international trade courts and branded Indian drug companies as thieves.17 Another instance was when Swiss company Roche initiated patent infringement proceedings against Cipla’s decision to launch a generic version of cancer drug, “erlotinib”. Though the Delhi High Court initially dismissed Roche's appeal by citing “public interest” and “affordability of medicines,” the continued to pressure the generic pharma companies over IPR. 18 Likewise, Pfizer’s aggressive patenting strategy prevented South Korea in developing pneumonia vaccines for children.19 A recent document by Médecins Sans Frontières (MSF), or Doctors Without Borders, highlights various instances of how IP hinders manufacturing and supply of diagnostics, medical equipment, treatments and vaccines during the COVID-19 pandemic. For instance, during the peak of the COVID-19 first wave in Europe, Roche rejected a request from the Netherlands to release the recipe of key chemical reagents needed to increase the production of diagnostic kits. Another example was patent holders threatening producers of 3D printing ventilators with patent infringement lawsuits in Italy.20 The MSF also found that patents pose a severe threat to access to affordable versions of newer vaccines.21 The opponents of the TRIPS waiver also argue that IP is the incentive for innovation and if it is undermined, future innovation will suffer. However, most of the COVID-19 medical innovations, particularly vaccines, are developed with public financing assistance. Governments spent billions of dollars for COVID-19 vaccine research. Notably, out of $6.1 billion in investment tracked up to July 2021, 98.12 per cent was public funding.22 The US and Germany are the largest investors in vaccine R&D with $2.2 billion and $1.5 billion funding. Private companies received 94.6 per cent of this funding; Moderna received the highest $956.3 million and Janssen $910.6 million. Moreover, governments also invested $50.9 billion for advance purchase agreements (APAs) as an incentive for vaccine development. A recent IMF working paper also notes that public research institutions were a key driver of the COVID-19 R&D effort—accounting for 70 per cent of all COVID-19 clinical trials globally.23 The argument is that vaccines are developed with the support of substantial public financing, hence there is a public right to the scientific achievements. Moreover, private companies reaped billions in profits from COVID-19 vaccines. One could argue that since the US, Germany and other HICs are spending money, their citizens are entitled to get vaccines first, hence vaccine nationalism is morally defensible. Nonetheless, it is not the case. The TRIPS Agreement includes several provisions which mandates promotion of technology transfer from developed countries to LDCs. For instance, Article 7 states that "the protection and enforcement of IP rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technical knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."24 Similarly, Article 66.2 also mandates the developed countries to transfer technologies to LDCs to enable them to create a sound and viable technological base. The LMICs opened their markets and amended domestic patent laws favouring developing countries’ products against this promise of technology transfer. Another argument against the proposed TRIPS waiver is that a waiver would not increase the manufacturing of COVID-19 vaccines. Indeed, one of the significant factors contributing to vaccine inequity is the lack of manufacturing capacity in the global south. Further, a TRIPS waiver will not automatically translate into improved manufacturing capacity. However, a waiver would be the first but essential step to increase manufacturing capacity worldwide. For instance, to export COVID-19 vaccine-related products, countries need to ensure that there are no IP restrictions at both ends – exporting and importing. The market for vaccine materials includes consumables, single-use reactors bags, filters, culture media, and vaccine ingredients. Export blockages on raw materials, equipment and finished products harm the overall output of the vaccine supply chain. If there is no TRIPS restriction, more governments and companies will invest in repurposing their facilities. Similarly, the arguments such as that no other manufacturers can carry out the complex manufacturing process of COVID-19 vaccines and generic manufacturing as that would jeopardise quality, have also been proven wrong in the past. For instance, in the early 1990s, when Indian company Shantha Biotechnics approached a Western firm for a technology transfer of Hepatitis B vaccine, the firm responded that “India cannot afford such high technology vaccines… And even if you can afford to buy the technology, your scientists cannot understand recombinant technology in the least.”25 Later, Shantha Biotechnics developed its own vaccine at $1 per dose, and the UNICEF (United Nations Children’s Emergency Fund) mass inoculation programme uses this vaccine against Hepatitis B. In 2009, Shantha sold over 120 million doses of vaccines globally. India also produces high-quality generic drugs for HIV/AIDS and cancer treatment and markets them across the globe. Now, a couple of Indian companies are in the last stage of producing mRNA (Messenger RNA) vaccines.26 Similarly, Bangladesh and Indonesia claimed that they could manufacture millions of COVID-19 vaccine doses a year if pharmaceutical companies share the know-how.27 Recently, Vietnam also said that the country could satisfy COVID-19 vaccine production requirements once it obtains vaccine patents.28 Countries like the United Arab Emirates (UAE), Turkey, Cuba, Brazil, Argentina and South Korea have the capacity to produce high-quality vaccines but lack technologies and know-how. However, Africa, Egypt, Morocco, Senegal, South Africa and Tunisia have limited manufacturing capacities, which could also produce COVID-19 vaccines after repurposing. Moreover, COVID-19 vaccine IPR runs across the entire value chain – vaccine development, production, use, etc. A mere patent waiver may not be enough to address the issues related to its production and distribution. What is more important here is to share the technical know-how and information such as trade secrets. Therefore, the existing TRIPS flexibilities, such as compulsory and voluntary licensing, are insufficient to address this crisis. Further, compulsory licensing and the domestic legal procedures it requires is cumbersome and not expedient in a public health crisis like the COVID-19 pandemic. India’s Role in Ensuring Vaccine Equity India's response to COVID-19 at the global level was primarily two-fold. First, its proactive engagements in the regional and international platforms. Second, its policies and programmes to provide therapeutics and vaccines to the world. Since the beginning of the COVID-19 pandemic, India has been advocating international cooperation and policy coordination in fighting it. For instance, in April 2020, India co-sponsored a UN resolution that called for fair and equitable access to essential medical supplies and future vaccines to COVID-19. Later, in October 2020, India also put pressure on developed countries with a joint WTO proposal for TRIPS waiver. India’s Vaccine Maitri initiative also aims vaccine equity. As of 29 May 2021, India has supplied 663.698 lakh doses of COVID-19 vaccines to 95 countries. It includes 107.15 lakh doses as a gift to more than 45 countries, 357.92 lakh doses by commercial sales, and 198.628 lakh doses to the COVAX facility.29 The COVAX initiative aims to ensure rapid and equitable access to COVID-19 vaccines for all countries, regardless of their income level. India has decided to supply 10 million doses of the vaccine to Africa and one million to the UN health workers under the COVAX facility. India has also removed the IPR of Covaxin that would help platforms like C-TAP once WHO and developed countries’ regulatory bodies approve the vaccine. If agreed, the waiver would benefit India in many ways. First, more vaccines will help the country to control the pandemic and its recurring waves. Second, it will be a boost to India's pharma industry, particularly the generic medicine industry. According to the Biotechnology Innovation Organization, 834 unique active compounds are involved in the current R&D of COVID-19 therapeutics, vaccines, and diagnostics. It means that thousands of new patents are awaited, and that will hinder India's ability to produce COVID-19 related medical products. Only through a waiver, this challenge can be addressed. Similarly, scientists note that mRNA is the future of vaccine technology. However, manufacturing mRNA vaccines involves complex processes and procedures. Only a very few Indian manufacturers have access to this technology; however, that too is limited. Once Indian companies have access to mRNA technology, it will help country’s generic medicine industry and boost India’s economy. Therefore, even if the WTO agrees on a waiver for a period shorter than proposed, India should accept it. In addition, mRNA vaccines can be produced in lesser time compared to the traditional vaccines. While traditional vaccines’ production takes four to five months, mRNA needs only six to eight weeks. Access to this technology will be vital for India in expediting the fight against COVID-19 and future pandemics. Finally, a waiver may strengthen India's diplomatic soft power. At present, what hinders India's Vaccine Maitri initiative is the scarcity of vaccines at home. On the other hand, China is increasing its standing in Africa, South America and the Pacific through vaccine diplomacy. The WHO approval of the Chinese vaccines and lack of access to vaccines by most developing countries, opens up huge space for China to do its vaccine diplomacy. Here, India should convince its Quad partners, particularly Australia and Japan, who oppose the waiver that vaccine production in developing countries through TRIPS waiver will enable the grouping to deliver its pledged billion doses of COVID-19 vaccine in the Indo-Pacific region. In short, the proposed waiver, if agreed, will help India in addressing the public health crisis by producing more vaccines and distributing them at home; economically, by boosting its generic pharmaceutical industry, and diplomatically, providing vaccines to the developing and least-developed countries. Therefore, India should use all available means and methods, from trade-offs to pressurising, to make the waiver happen.

#### Current vaccination rates aren’t enough to meet targets – expansion of vaccine nationalism and imperialist exploitation.

Jimenez 9/22 [Darcy; 9/22/21; Healthcare Reporter; “Big pharma fuelling human rights crisis over Covid-19 vaccine inequity, says Amnesty,” Pharmaceutical Technology, <https://www.pharmaceutical-technology.com/features/big-pharma-human-rights-crisis-vaccine-covid-19-inequity-amnesty/>] Justin

Major Western Covid-19 vaccine manufacturers are “causing human rights harms” by prioritising wealthy countries and refusing to share intellectual property (IP) and technology, Amnesty International have said in a report published today. The human rights group has accused six companies – Pfizer, BioNTech, Moderna, AstraZeneca, Johnson & Johnson and Novavax – of neglecting their responsibility to respect human rights by failing to fairly allocate vaccine doses across the globe. In the 64-page report, the organisation also cites unfair prices and a lack of transparency regarding contracts, pricing and technology as contributing factors to the desperate vaccine inequity seen in poorer countries. “Despite receiving billions of dollars in government funding and advance orders which effectively removed risks normally associated with the development of medicines, vaccine developers have monopolised intellectual property, blocked technology transfers, and lobbied aggressively against measures that would expand the global manufacturing of these vaccines,” it said. “Some companies – Pfizer, BioNTech and Moderna – have so far delivered almost exclusively to rich countries, putting profit before access to health for all.” According to the report, 98% of all Pfizer-BioNTech vaccine deliveries had been allocated to high- and upper-middle-income countries at the beginning of September. Amnesty said this is also the case for 88% of jabs from Moderna, which is yet to deliver a single dose to a low-income country. Vaccine hoarding and inequality While almost six billion Covid-19 vaccine doses have been administered worldwide so far – and wealthier countries have begun vaccinating children and offering additional booster jabs – a measly 0.3% of shots have been distributed to the world’s poorest nations. Around 55% of people in rich countries are fully vaccinated against coronavirus, compared to fewer than 1% in lower-income nations, Amnesty highlighted. The report acknowledged that rich states have hoarded supplies of Covid-19 vaccines, but said that vaccine makers have “played a decisive role in limiting global vaccine production and obstructing fair access to a life-saving health product” by refusing to take measures that would boost global vaccine supply. Since the start of the pandemic, several initiatives have been launched to tackle vaccine scarcity by sharing knowledge and technology. To date, the companies mentioned in Amnesty’s report have refused to take part in these schemes and remain opposed to the temporary waiver of vaccine IP proposed at the World Trade Organization (WTO) by India and South Africa last year. Biopharma trade associations have argued that waiving vaccine IP would undermine innovation in drug development. In April, Biotechnology Innovation Organization president and CEO Michelle McMurry-Heath argued in a guest editorial for The Economist that the WTO proposal “destroys the incentive for companies to take risks to find solutions for the next health emergency”. 100 days to act Alongside the publication of its report, Amnesty has launched a global campaign giving countries and pharmaceutical companies 100 days – until the end of the year – to meet the World Health Organization’s target of vaccinating 40% of the population of low and lower-middle income countries. The group is urging countries to “redistribute hundreds of millions of excess vaccine doses currently sitting idle”, and wants vaccine makers to ensure that at least 50% of doses produced are delivered to low and lower-middle income countries. Amnesty International’s secretary general Agnès Callamard said: “Vaccinating the world is our only pathway out of this crisis. Now should be time to hail these companies – who created vaccines so quickly – as heroes. “But instead – and to their shame – big pharma’s intentional blocking of knowledge transfer and their wheeling and dealing in favour of wealthy states has brewed an utterly devastating vaccine scarcity for so many others. “Their actions are plunging parts of Latin America, Africa and Asia into renewed crises, pushing weakened health systems to the very brink and causing tens of thousands of preventable deaths every week. In many low-income countries not even health workers or at-risk people have received the vaccine. “Against the backdrop of these gross inequalities, BioNTech, Moderna and Pfizer are set to make $130bn combined by the end of 2022. “Profits should never come before lives.”

#### Yes scale-up for COVID.

---AT: IP already waived

Erfani et al. 8/3 [Parsa Erfani, Agnes Binagwaho, Mohamed Juldeh Jalloh, Muhammad Yunus, Paul Farmer, Vanessa Kerry; 8/3/21; Harvard Medical School, Boston, USA 2 University of Global Health Equity, Rwanda 3 Sierra Leone 4 Yunus Centre, Bangladesh 5 Global Health and Social Medicine, Harvard Medical School, Boston, USA 6 Division of Global Health Equity, Brigham and Women’s Hospital, USA 7 Partners In Health, USA 8 Seed Global Health, USA 9 Program in Global Public Policy and Social Change, Harvard Medical School, Boston, USA 10 Division of Pulmonary and Critical Care Medicine, Massachusetts General Hospital, USA; “*Intellectual property waiver for covid-19 vaccines will advance global health equity*,” BMJ, <https://www.bmj.com/content/bmj/374/bmj.n1837.full.pdf>] Justin

What effect would a waiver have? Contrary to detractors’ concerns about the possible effect of a temporary TRIPS waiver, global health analyses suggest that it will be vital to equitable and effective action against covid-19. LMIC’s manufacturing capabilities have been underestimated, even though several LMICs have the scientific and manufacturing capacity to produce complex covid-19 vaccines. India, Egypt, and Thailand are already manufacturing viral vector or mRNA-based covid-19 vaccines,8 -10 and vaccine production lines could be established within months in some other LMICs,11 offering substantial benefit in a pandemic that will last years.11 Companies in India and China have already developed complex pneumococcal and hepatitis B recombinant vaccines, challenging existing vaccine monopolies.12 The World Health Organization launched an mRNA technology transfer hub in April 2021 to provide the logistical, training, and know-how support needed for manufacturers in LMICs to repurpose or expand existing manufacturing capacity to produce covid-19 vaccines and to help navigate accessing IP rights for the technology.13 Twenty five respondents from LMICs expressed interest, and South Africa was selected as the first hub, with plans to start producing the vaccine through the Biovac Institute in the coming months.14 Removing IP barriers through the waiver will facilitate these efforts, more rapidly enable future hubs, engage a greater number of manufacturers, and ultimately yield more doses faster. Moreover, as the waiver facilitates vaccine production, demand for raw materials and active ingredients will increase. Coupled with pre-emptive planning to anticipate and expand raw material production, the waiver—which encompasses the IP of all covid-19 vaccine-related technology— can offer a path to overcome bottlenecks and expand production of necessary vaccine materials. Current licensing mechanisms inadequate Voluntary licences have not and will not keep pace with public health demand. Since companies determine the terms of voluntary licences, they are often granted to LMICs that can afford them, leaving out poorer regions.10 For example, in South Asia, AstraZeneca has voluntarily licensed its vaccine to the Serum Institute of India, even though the region has multiple capable vaccine manufacturers.9 Many covid-19 vaccine developers have not taken steps towards licensing their technologies, simply because there is limited financial incentive to do so.11 To date, none have shared IP protected vaccine information with the WHO Covid-19 Technology Access Pool (C-TAP) established last year.15 Relying on the moral compass of companies that answer to shareholders to voluntarily license their technologies will have limited effect on vaccine equity. Their market is driven by profit margins, not public health. Compulsory licensing by LMICs will also be insufficient in rapidly expanding vaccine production, as each patent licence must be negotiated separately by each country and for each product based on its own merit. From 1995 to 2016, 108 compulsory licences were attempted and only 53 were approved.6 The case-by-case approach is slow and not suitable for a global crisis that requires swift action. In addition, TRIPS requires compulsory licences to be used predominantly for domestic supply, limiting exports of the licensed goods to nearby low income countries without production capacity.5 Although a “special” compulsory licence system was agreed in the Doha declaration to allow for expeditious exportation and importation (formalised as the article 31bis amendment to TRIPS in 2017), the provision is limited by cumbersome logistical procedures and has been rarely used.16 Governments may also be hesitant to pursue compulsory licences as high income countries have previously bullied them for doing so. Since India first used compulsory licensing for sorafenib tosylate in 2012 (reducing the cancer drug’s price by 97%), the US has consistently pressured the country not to use further compulsory licences.17 During this pandemic, Gilead sued the Russian government for issuing a compulsory licence for remdesivir.18 Furthermore, while compulsory licences are primarily for patents, covid-19 vaccines often have other types of IP, including trade secrets, that are integral for production.19 The emergency TRIPS waiver removes all IP as a barrier to starting production (not just patents) and negates the prolonged time, inconsistency, frequent failure, and political pressure that accompany voluntary licensing and compulsory licensing efforts. It also provides an expeditious path for new suppliers to import and export vaccines to countries in need without bureaucratic limitations. Finally, there is no compelling evidence that the proposed TRIPS waiver would dismantle the IP system and its innovation incentives. The waiver is restricted to covid-19 related goods and is time limited, helping to protect future innovation. It would, however, reduce profit margins on current covid-19 vaccines. With substantial earnings in the first quarter of 2021, many drug companies have already recouped their research and development costs for covid-19 vaccines.20 However, they have not been the sole investors in vaccine development, and they should not be the only ones to profit. Most vaccines received a substantial portion of their direct funding from governments and not-for-profit organisations—and for some, such as Moderna and Novavax, nearly all.21 Decades of publicly funded research have laid the groundwork for current innovations in the background technologies used for vaccines.22 Given that companies were granted upfront risk protection for covid-19 vaccine research and development, a waiver that advances global public health but reduces vaccine profits in a global crisis is reasonable. Knowledge transfer An IP waiver for covid-19 vaccines is integral to boosting vaccine supply, breaking vaccine monopolies, and making vaccines more affordable in LMICs. It is, however, only a first, but necessary, step. Originator companies must transfer vaccine technology and share know-how with C-TAP, transfer hubs, or individual manufacturers to help suppliers begin production.23 In addition, governments must leverage domestic law, private sector incentives, and contract terms with pharmaceutical companies to compel companies to cooperate with such transfers.24 If necessary, governments can require technology transfers in exchange for continuing enterprise in a country or avoiding penalties. Politicians and leaders are at a critical juncture: they will either take the necessary steps to make vaccine technology available to scale production, stimulate global collaboration, and create a path to equity or they will protect a hierarchical system based on an economic bottom line. The former will not only build a vaccination trajectory that puts equal value on the lives of the rich and the poor, but will also help stem the pandemic’s relentless momentum and quell the emergence of variants. We are in the middle of one of the largest vaccination efforts in human history. We cannot rely on companies to thread the needle of corporate social and moral responsibility with shareholder and stock value returns nor expect impacted governments to endure lengthy bureaucratic licensing processes in this time of crisis. It will be a legacy of apathy and unnecessary death. As the human impact of the proposed IP waiver becomes clear, consensus behind it is growing. Countries that previously opposed the waiver—such as the US and Brazil—now support written text based negotiations.7 Opposing countries must stop blocking the waiver, engage in transparent text negotiations, and commit to reaching consensus swiftly. The longer states stall, the more people die needlessly. Covid-19 has repeatedly shown that people without access to resources such as strong health systems, health workers, medicines, and vaccines will preferentially fall ill and die. For too long, this cycle has been “other people’s” problem. It is not. It is our problem.

#### That escalates security threats – extinction.

---AT: Cooperation Thesis

RECNA et al. 21 [Research Center for Nuclear Weapon Abolition; Nagasaki, Japan; “Pandemic Futures and Nuclear Weapon Risks: The Nagasaki 75th Anniversary pandemic-nuclear nexus scenarios final report,” Journal for Peace and Nuclear Disarmament; 5/28/21; <https://www.tandfonline.com/doi/full/10.1080/25751654.2021.1890867>] Justin

The Challenge: Multiple Existential Threats The relationship between pandemics and war is as long as human history. Past pandemics have set the scene for wars by weakening societies, undermining resilience, and exacerbating civil and inter-state conflict. Other disease outbreaks have erupted during wars, in part due to the appalling public health and battlefield conditions resulting from war, in turn sowing the seeds for new conflicts. In the post-Cold War era, pandemics have spread with unprecedented speed due to increased mobility created by globalization, especially between urbanized areas. Although there are positive signs that scientific advances and rapid innovation can help us manage pandemics, it is likely that deadly infectious viruses will be a challenge for years to come. The COVID-19 is the most demonic pandemic threat in modern history. It has erupted at a juncture of other existential global threats, most importantly, accelerating climate change and resurgent nuclear threat-making. The most important issue, therefore, is how the coronavirus (and future pandemics) will increase or decrease the risks associated with these twin threats, climate change effects, and the next use of nuclear weapons in war.5 Today, the nine nuclear weapons arsenals not only can annihilate hundreds of cities, but also cause nuclear winter and mass starvation of a billion or more people, if not the entire human species. Concurrently, climate change is enveloping the planet with more frequent and intense storms, accelerating sea level rise, and advancing rapid ecological change, expressed in unprecedented forest fires across the world. Already stretched to a breaking point in many countries, the current pandemic may overcome resilience to the point of near or actual collapse of social, economic, and political order. In this extraordinary moment, it is timely to reflect on the existence and possible uses of weapons of mass destruction under pandemic conditions – most importantly, nuclear weapons, but also chemical and biological weapons. Moments of extreme crisis and vulnerability can prompt aggressive and counterintuitive actions that in turn may destabilize already precariously balanced threat systems, underpinned by conventional and nuclear weapons, as well as the threat of weaponized chemical and biological technologies. Consequently, the risk of the use of weapons of mass destruction (WMD), especially nuclear weapons, increases at such times, possibly sharply. The COVID-19 pandemic is clearly driving massive, rapid, and unpredictable changes that will redefine every aspect of the human condition, including WMD – just as the world wars of the first half of the 20th century led to a revolution in international affairs and entirely new ways of organizing societies, economies, and international relations, in part based on nuclear weapons and their threatened use. In a world reshaped by pandemics, nuclear weapons – as well as correlated non-nuclear WMD, nuclear alliances, “deterrence” doctrines, operational and declaratory policies, nuclear extended deterrence, organizational practices, and the **existential risks** posed by retaining these capabilities – are all up for redefinition. A pandemic has potential to destabilize a nuclear-prone conflict by incapacitating the supreme nuclear commander or commanders who have to issue nuclear strike orders, creating uncertainty as to who is in charge, how to handle nuclear mistakes (such as errors, accidents, technological failures, and entanglement with conventional operations gone awry), and opening a brief opportunity for a first strike at a time when the COVID-infected state may not be able to retaliate efficiently – or at all – due to leadership confusion. In some nuclear-laden conflicts, a state might use a pandemic as a cover for political or military provocations in the belief that the adversary is distracted and partly disabled by the pandemic, increasing the risk of war in a nuclear-prone conflict. At the same time, a pandemic may lead nuclear armed states to increase the isolation and sanctions against a nuclear adversary, making it even harder to stop the spread of the disease, in turn creating a pandemic reservoir and transmission risk back to the nuclear armed state or its allies. In principle, the common threat of the pandemic might induce nuclear-armed states to reduce the tension in a nuclear-prone conflict and thereby the risk of nuclear war. It may cause nuclear adversaries or their umbrella states to seek to resolve conflicts in a cooperative and collaborative manner by creating habits of communication, engagement, and mutual learning that come into play in the nuclear-military sphere. For example, militaries may cooperate to control pandemic transmission, including by working together against criminal-terrorist non-state actors that are trafficking people or by joining forces to ensure that a new pathogen is not developed as a bioweapon. To date, however, the COVID-19 pandemic has increased the isolation of some nuclear-armed states and provided a textbook case of the failure of states to cooperate to overcome the pandemic. Borders have slammed shut, trade shut down, and budgets blown out, creating enormous pressure to focus on immediate domestic priorities. Foreign policies have become markedly more nationalistic. Dependence on nuclear weapons may increase as states seek to buttress a global re-spatialization6 of all dimensions of human interaction at all levels to manage pandemics. The effect of nuclear threats on leaders may make it less likely – or even impossible – to achieve the kind of concert at a global level needed to respond to and administer an effective vaccine, making it harder and even impossible to revert to pre-pandemic international relations. The result is that some states may proliferate their own nuclear weapons, further reinforcing the spiral of conflicts contained by nuclear threat, with cascading effects on the risk of nuclear war.

### 1AC – Plan

#### Plan text: The member nations of the World Trade Organization ought to reduce intellectual property protections for medicines during pandemics

#### Enforcement through limited IP waivers solve – patent term extensions are normal means and solves innovation and scale-up.

Young and Potts-Szeliga 21 [Roberta; Counsel in Seyfarth’s Litigation department and Intellectual Property and Patent Litigation practice groups in Los Angeles; Jamaica Potts-Szeliga; Partner in Seyfarth’s Litigation department and Intellectual Property and Patent Litigation practice groups in Washington, DC. She also provides advice on FDA regulatory issues and is part of the firm’s Health Care, Life Sciences, and Pharmaceuticals team; “A Third Option: Limited IP Waiver Could Solve Our Pandemic Vaccine Problems,” IP Watch Dog; 7/21/21; <https://www.ipwatchdog.com/2021/07/21/third-option-limited-ip-waiver-solve-pandemic-vaccine-problems/id=135732/>] Justin

Limited Waiver Approach This article suggests a third option, between voluntary vaccine donation and the full IP waiver proposal, that may offer a way forward. The third proposed solution is incentivized limited IP waivers that could encourage (or require) private companies to engage in licensing agreements with nations to share some, but not all, of the knowledge and designs covering the COVID-19 vaccines to the developing world. The limited IP waivers could cover the minimum necessary portions of the technology to produce basic COVID-19 vaccines. The waivers could be limited in time to the duration of the pandemic, or another term agreed to by the WTO. The term could also be defined as ending when widespread vaccination and immunity goals are achieved. The incentive for pharmaceutical companies to support such limited IP waivers could be provided in the form of patent term extensions for the technology covered by the limited IP waivers. Extensions of patent term are already known and widely used. In the U.S., patent term adjustments are automatically added on to the patent lifespan to account for any delays by the USPTO in the patent prosecution process. In some cases, these mechanisms may extend the patent term for years. Patent term extensions also are available for regulatory delays (35 U.S.C. § 156). In particular, patents covering, inter alia, drug products approved by the United States Food & Drug Administration may be eligible for up to five years of additional patent term to give back time required to complete the regulatory review process. Both patent term adjustments and patent term extensions arise from activities beyond the control of the pharmaceutical companies. A pandemic patent term extension fashioned after such known extensions could be made used to compensate for the current pressing global health needs. This third proposal may be achievable at the WTO. Hurdles remain and it could be months or years before the WTO reaches an agreement on any waiver of IP protections, and years before countries build factories, gather materials, and gain the expertise to produce the vaccines. A steep hurdle is that mRNA is a new technology, with no machines or experts for hire. Nonetheless, the third solution offers hope to find a middle ground that may begin to be implemented before the end of the current pandemic and be in place for the future. The patent term extension could be provided for countries with patent offices and could be adapted based on laws and conditions in each country. Pandemic-related patent term extensions could be given for a period of time that the compulsory license is in force. With current pandemic projections of six months to two years for sufficient distribution, providing a patent term extension is reasonable and in line with the time period of many patent term extensions. Given that most pharmaceutical patents are prosecuted in multiple countries, this provides an incentive to participate in a limited waiver program. Let’s Not Repeat Past Mistakes It’s been a century since the last pandemic devastated the globe and the only certainty is that this will not be the last pandemic. Solutions created today lay a foundation for mitigation of the next pandemic. It’s been said that those who refuse to learn from history are doomed to repeat it, a thought too painful to contemplate with a pandemic. The industrial nations of the world have technology that others are literally dying to obtain—a high price to pay. Incentivized limited IP waivers may offer a compromise to bridge the gap between maintaining IP rights (and thus relying on charity alone) and arbitrary compulsory licensing that could deter the technological investment to create life-saving solutions in the future.

### 1AC – Framing

#### The standard is maximizing expected well-being – to clarify, saving lives. Calc indicts don’t link—my framework evaluates offense—pandemics is bad because as far as we know, it would cause suffering.

#### 1] Death outweighs—

#### A] Agents can’t act if they fear for their bodily security—my framework constrains every NC and K

#### B] It’s the worst form of evil:

Paterson 3 – Department of Philosophy, Providence College, Rhode Island (Craig, “A Life Not Worth Living?”, Studies in Christian Ethics.

Contrary to those accounts, I would argue that it is death per se that is really the objective evil for us, not because it deprives us of a prospective future of overall good judged better than the alter- native of non-being. It cannot be about harm to a former person who has ceased to exist, for no person actually suffers from the sub-sequent non-participation. Rather, death in itself is an evil to us because it ontologically destroys the current existent subject — it is the ultimate in metaphysical lightening strikes.80 The evil of death is truly an ontological evil borne by the person who already exists, independently of calculations about better or worse possible lives. Such an evil need not be consciously experienced in order to be an evil for the kind of being a human person is. Death is an evil because of the change in kind it brings about, a change that is destructive of the type of entity that we essentially are. Anything, whether caused naturally or caused by human intervention (intentional or unintentional) that drastically interferes in the process of maintaining the person in existence is an objective evil for the person. What is crucially at stake here, and is dialectically supportive of the self-evidency of the basic good of human life, is that death is a radical interference with the current life process of the kind of being that we are. In consequence, death itself can be credibly thought of as a ‘primitive evil’ for all persons, regardless of the extent to which they are currently or prospectively capable of participating in a full array of the goods of life.81  In conclusion, concerning willed human actions, it is justifiable to state that any intentional rejection of human life itself cannot therefore be warranted since it is an expression of an ultimate disvalue for the subject, namely, the destruction of the present person; a radical ontological good that we cannot begin to weigh objectively against the travails of life in a rational manner. To deal with the sources of disvalue (pain, suffering, etc.) we should not seek to irrationally destroy the person, the very source and condition of all human possibility.82

#### 2] No intent-foresight distinction for states.

Enoch 07 Enoch, D [The Faculty of Law, The Hebrew Unviersity, Mount Scopus Campus, Jersusalem]. (2007). INTENDING, FORESEEING, AND THE STATE. Legal Theory, 13(02). doi:10.1017/s1352325207070048 https://www.cambridge.org/core/journals/legal-theory/article/intending-foreseeing-and-the-state/76B18896B94D5490ED0512D8E8DC54B2

The general difficulty of the intending-foreseeing distinction here stemmed, you will recall, from the feeling that attempting to pick and choose among the foreseen consequences of one’s actions those one is more and those one is less responsible for looks more like the preparation of a defense than like a genuine attempt to determine what is to be done. Hiding behind the intending-foreseeing distinction seems like an attempt to evade responsibility, and so thinking about the distinction in terms of responsibility serves 39. Anderson & Pildes, supra note 38. I will use this text as my example of an expressive theory here. 40. See id. at 1554, 1564. 41. For a general critique, see Mathew D. Adler, Expressive Theories of Law: A Skeptical Overview, 148 U. PA. L. REV. 1363 (1999–2000). 42. As Adler repeatedly notes, the understanding of expression Anderson & Pildes work with is amazingly broad, so that “To express an attitude through action is to act on the reasons the attitude gives us”; Anderson & Pildes, supra note 38, at 1510. If this is so, it seems that expression drops out of the picture and everything done with it can be done directly in terms of reasons. 43. This may be true of what Anderson and Pildes have in mind when they say that “expressive norms regulate actions by regulating the acceptable justifications for doing them”; id. at 1511. http://journals.cambridge.org Downloaded: 03 Aug 2014 IP address: 134.153.184.170 Intending, Foreseeing, and the State 91 to reduce even further the plausibility of attributing to it intrinsic moral significance. This consideration—however weighty in general—seems to me very weighty when applied to state action and to the decisions of state officials. For perhaps it may be argued that individuals are not required to undertake a global perspective, one that equally takes into account all foreseen consequences of their actions. Perhaps, in other words, individuals are entitled to (roughly) settle for having a good will, and beyond that let chips fall where they may. But this is precisely what stateswomen and statesmen—and certainly states—are not entitled to settle for.44 In making policy decisions, it is precisely the global (or at least statewide, or nationwide, or something of this sort) perspective that must be undertaken. Perhaps, for instance, an individual doctor is entitled to give her patient a scarce drug without thinking about tomorrow’s patients (I say “perhaps” because I am genuinely not sure about this), but surely when a state committee tries to formulate rules for the allocation of scarce medical drugs and treatments, it cannot hide behind the intending-foreseeing distinction, arguing that if it allows45 the doctor to give the drug to today’s patient, the death of tomorrow’s patient is merely foreseen and not intended. When making a policy-decision, this is clearly unacceptable. Or think about it this way (I follow Daryl Levinson here):46 perhaps restrictions on the responsibility of individuals are justified because individuals are autonomous, because much of the value in their lives comes from personal pursuits and relationships that are possible only if their responsibility for what goes on in the (more impersonal) world is restricted. But none of this is true of states and governments. They have no special relationships and pursuits, no personal interests, no autonomous lives to lead in anything like the sense in which these ideas are plausible when applied to individuals persons. So there is no reason to restrict the responsibility of states in anything like the way the responsibility of individuals is arguably restricted.47 States and state officials have much more comprehensive responsibilities than individuals do. Hiding behind the intending-foreseeing distinction thus more clearly constitutes an evasion of responsibility in the case of the former. So the evading-responsibility worry has much more force against the intending-foreseeing distinction when applied to state action than elsewhere.

#### 3] Only consequentialism explains degrees of wrongness—if I break a promise to meet up for lunch, that is not as bad as breaking a promise to take a dying person to the hospital. Only the consequences of breaking the promise explain why the second one is much worse than the first which is the most intuitive.

#### Outweighs- A] Parsimony- metaphysics relies on long chains of questionable claims that make conclusions less likely. B] Hijacks- intuitions are inevitable since even every framework must take some unjustified assumption as a starting point.

#### Impact calc –

#### 1] Extinction outweighs: A] Reversibility- it forecloses the alternative because we can’t improve society if we are all dead B] Structural violence- death causes suffering because people can’t get access to resources and basic necessities C] Objectivity- body count is the most objective way to calculate impacts because comparing suffering is unethical D] Uncertainty- if we’re unsure about which interpretation of the world is true, we should preserve the world to keep debating about it

#### 2] Calc indicts fail: A] Ethics- it would indict everything since they use events to understand how their ethics have worked B] Reciprocity- they are NIBs that create a 2:1 skew where I have to answer them to access offense while they only have to win one C] Internalism- asking why we value pain and pleasure is nonsensical cuz the answer is intrinsic since we just do, which means we still prefer hedonism despite shortcomings.

### Underview

#### 1] Aff gets 1AR theory since the neg can be infinitely abusive and I can’t check back. It’s drop the debater since the 1ar is too short to win both theory and substance. No RVI or 2NR paradigm issues or theory since they’d dump on it for 6 minutes and my 3-minute 2AR is spread too thin. Competing interps since reasonability is arbitrary and bites judge intervention.

**3] Reject skep/permissibility – it’s an abhorrent view of the world that makes the debate space horrible which ow on accessibility – making args in favor of an alternate ethic solves.**

#### 4] Permissibility and presumption affirm.

**A] Freeze- otherwise we would not be able to justify morally neutral actions since there isn’t a prohibition and we would have to prove an obligation.**

**B] Trivialism- statements are true until proven false, if I told you my name you’d believe me.**

#### C] Negation Theory- Negating requires a complete absence of an existing obligation

Negate: to deny the existence of

That’s Dictionary.com- “Negate” https://www.dictionary.com/browse/negate.

#### 5] Evaluate the debate after the 2AR – otherwise it gives debaters an unfair time skew and is arbitrary.

#### 6] Ought is an obligation – outweighs because entry 1.

Merriam Webster ["Ought." Merriam-Webster.com. Merriam-Webster, n.d. Web. 27 Dec. 2018. [https://www.merriam-webster.com/dictionary/ought //](https://www.merriam-webster.com/dictionary/ought%20//) ABML]Top of Form

Ought [auxiliary verb](https://www.merriam-webster.com/dictionary/auxiliary%20verb) \ˈȯt  \ Definition of ought  (Entry 1 of 4) —used to express obligation ought to pay our debts, advisability ought to take care of yourself, natural expectation ought to be here by now, or logical consequence the result ought to be infinity ought [verb](https://www.merriam-webster.com/dictionary/verb) \ˈȯ(ḵ)t  \ Definition of ought (Entry 2 of 4) [transitive verb](https://www.merriam-webster.com/dictionary/transitive) 1chiefly Scotland : [POSSESS](https://www.merriam-webster.com/dictionary/possess) 2chiefly Scotland : [OWE](https://www.merriam-webster.com/dictionary/owe) ought  [noun](https://www.merriam-webster.com/dictionary/noun) \ˈȯt  \ Definition of ought (Entry 3 of 4) : moral obligation : [DUTY](https://www.merriam-webster.com/dictionary/duty) ought \ˈȯt,  ˈät\ Definition of ought (Entry 4 of 4) archaic spelling of [AUGHT](https://www.merriam-webster.com/dictionary/aught)

#### 7] Use comparative worlds – A] topic ed – forces the neg to research the topic instead of low quality rez flaw args – the only benefit to debate is making us better arguers not perfect logicians, B] reciprocity – truth-testing allows the neg to disprove any part of the aff, but the aff has to defend every part, which gives the neg too much ground, C] inclusion – truth testing says rez is only thing that’s relevant which excludes ks – either only the rez matters so we can’t punish slurs, or people should get dropped for making debate unsafe which proves other things matter

#### Independently strategic patenting harms innovation incentives during pandemics – encourages reproduction of generics and decrease breakthroughs.

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As the COVID-19 pandemic is sweeping through the world, thousands of people urgently need access to affordable medicines. Based on past experience of treatments for other life-threatening diseases, there is a fear that access to any vaccines and treatment that may be developed in the future will be affected by patents, leading to unaffordably high prices. However, the problem of high drug prices is not new. It had been inflating healthcare budgets and posing a serious risk to the affordability and accessibility of medicines for society well before the pandemic.Footnote3 This problem is further exacerbated by the fact that, despite the alleged surge in investments into pharmaceutical R&D, current statistics indicate that the number of new breakthrough medicines is decreasing.Footnote4 On the other hand, the number of drugs that contain modifications of existing medicines is growing, demonstrating that pharmaceutical companies have been increasingly focusing their research on incremental drug development, rather than on breakthrough innovation.Footnote5 Various reasons for high drug prices and the growing focus on incremental innovation are put forward by pharmaceutical companies, including the complexity of drug discovery and development, as well as the expensive and lengthy regulatory procedures involved.Footnote6 While these reasons play an important role in this regard, some practices by pharmaceutical companies substantially contribute to this problem.Footnote7 In particular, pharmaceutical companies have been increasingly engaging in strategic patenting to delay or even block generic competition.Footnote8 These practices attracted the attention of the European Commission, which discussed them more than a decade ago in its 2009 Pharmaceutical Sector Inquiry Report.Footnote9 The Commission identified a series of patent strategies which it described as aiming “to extend the breadth and duration of [originators’] patent protection”Footnote10 and “to delay or block the market entry of generic medicine”.Footnote11 Such findings have fuelled debates as to whether these strategies may be deemed unlawful and violate EU competition rules, while also being justifiable business practices under patent law. Until today, no agreement has been reached either on the legality of these practices, or on an efficient legal tool to assess them. As a result, despite there being solid evidence that such strategies may block generic competition, allowing originators to maintain artificially high drug prices and preventing patients from accessing cheaper generics, they remain outside the ambit of the Commission’s activities. Instead, the Commission has been focusing on more straightforward patent-related practices, such as reverse payment agreements. This article argues that strategic patenting by pharmaceutical companies requires a long-overdue intervention by competition authorities. It aims to attract their attention to the harmful effects of strategic patenting. Specifically, it will contest the argument traditionally put forward by originator pharmaceutical companies that the intervention of competition law into patenting practices will reduce their incentives to innovate. The paper will argue to the contrary that, along with a more immediate negative effect in the form of high drug prices that is widely explored in the literature,Footnote12 strategic patenting also affects dynamic competition by stifling innovation. Importantly, it will be explained that the assessment of the effect of this practice should focus not only on innovation by originators, but should also take a wider market perspective by assessing its effect on follow-on innovation by generic companies. The latter argument is often overlooked. The paper will outline the current approach to strategic patenting that considers this practice lawful, and will provide arguments for the intervention of competition law. This, in turn, will open the possibility for competition authorities to investigate this practice in order to prevent its harmful effect on innovation and consumer welfare. Moreover, while patent law may provide certain mechanisms to deal with strategic patenting, such as raising the bar for patentability of pharmaceutical follow-on inventions,Footnote13 these tools may not be effective in all cases. Therefore, as will be explained further, competition law may be a more suitable tool to address the negative effects of strategic patenting.Footnote14 The article will be organised as follows. It will first discuss the complex structure of the pharmaceutical industry, focusing on its key players for the purpose of this article: originators and generic companies. It will further explore patenting practices employed by pharmaceutical companies and will define the notion of strategic patenting. The article will then argue that the latter strategy is against the rationale of patent and competition laws, as it stifles competition by impairing incentives to innovate of both originators and generic companies. Finally, it will discuss the current approach to strategic patenting that considers this practice lawful, and will argue that it should be subject to scrutiny under the rules of competition law, to address its negative effects. Pharmaceutical Innovation and Generic Competition in the Pharmaceutical Industry The pharmaceutical industry is unique in its complexity. It is characterised by heavy state regulation and, sometimes, by the competing interests of the pharmaceutical business and society. It also involves multiple actors, including originators,Footnote15 marketing authorisation bodies, generic companies,Footnote16 doctors, pharmacies and patients. Each of them plays their part in the lengthy and complicated process of transforming a chemical compound into an effective and affordable medicine, which is then prescribed, dispensed and consumed. In these complex relationships, the two key players have crucial roles. On the one hand, originators play an important role in developing new and improved medicines for the benefit of society. On the other hand, generic companies benefit society by supplying cheaper equivalents of the originators’ medicines, which leads to the reduction of drug prices and facilitates access to affordable medicines. When the interests of these two players are kept in balance, benefits are maximised for society, which receives innovative and improved medicines, as well as timely access to generic drugs. However, if the balance swings towards one of the players, then society loses out, as there will be insufficient access to either innovative or affordable medicines. Therefore, both pharmaceutical innovation and generic competition must be duly incentivised and protected. Moreover, these two elements of the pharmaceutical industry are constantly interacting and have a profound impact on each other. In particular, pharmaceutical innovation is the backbone of the pharmaceutical industry, in which originators play an important role. The process of drug development is long and complicated, requires significant investments, and bears considerable commercial risks.Footnote17 It is also highly regulated, including, among other things, the requirement for originators to obtain a special authorisation from a designated state authority to market a drug. Such marketing authorisations are granted to the originators only if they can prove that the drug is safe and effective, which typically requires lengthy and expensive clinical trials.Footnote18 In order to protect these significant efforts and investments, pharmaceutical companies rely heavily on the exclusivity granted by intellectual property rights, and in particular, patents.Footnote19 Patents provide a 20-year monopoly right, during which a pharmaceutical company enjoys market exclusivity and can charge a monopoly price for its products. Originators argue that strong patent protection is essential in order to recoup investments, as well as to incentivise them to engage in further innovation.Footnote20 Once such patent protection expires, however, other companies may develop generics of a branded drug, and start competing with the originator for the market. This is called generic competition. Generic drugs are bioequivalent versions of a branded drug that has lost its patent protection.Footnote21 It is estimated that the generic entry typically leads to, on average, an 80 per cent market share loss and a 20–30 per cent reduction of a drug price, with further price decreases with each additional generic entrant, leading, in some instances, to a fall in price of up to 90 per cent.Footnote22 A representative example of the effect of generic competition on the originators’ drug prices is the significant decrease in price and dramatic loss of profits by Eli Lilly. The expiration of a patent protecting its blockbusterFootnote23 antidepressant Prozac in 2001 resulted in a loss of almost 70 per cent of its market and $2.4 billion in annual U.S. sales.Footnote24 This effect of generic competition is beneficial for society, as it reduces the financial pressure on healthcare budgets and increases the accessibility of drugs. Patenting Practices by Pharmaceutical Companies As was mentioned above, generic competition is prevented during the life of a patent protecting an active compound of a drug (a so-called “basic” or “primary” patent).Footnote25 Such a basic patent covers an active ingredient itself and, therefore, provides the strongest protection for the product. Therefore, generic competition normally starts only after the basic patent expires, or if a generic company succeeds in invalidating it. While in the past pharmaceutical companies mainly protected their products with a single patent covering an active compound,Footnote26 they now increasingly seek additional patent protection on various aspects of a drugFootnote27 in order to protect their market position.Footnote28 Such additional patents are often called secondary patents.Footnote29 A pharmaceutical company may want to obtain secondary patents, which protect such aspects of a drug as, for example, its process of manufacture, formulation and/or specific form, etc. Therefore, even after the basic patent protecting an active compound expires, a drug may still be protected by other secondary patents. This may result in the extension of the scope and length of the protection of a product, especially if secondary patents have a later expiration date than a basic patent.Footnote30 This, in particular, may occur if, for example, the process of producing an active compound disclosed in the basic patent is sufficient only for reproducing this compound in a laboratory, but it is unsuitable for producing it on a large commercial scale.Footnote31 If the originator was able to secure a secondary patent that protects such a large scale manufacturing process, it would prevent generics from using this process for producing their generic versions of a drug; otherwise they would risk infringing this secondary patent.Footnote32 However, a unique feature of pharmaceuticals is that an active ingredient can be manufactured using different methods and processes, can exist in different forms or can be used in different formulations. Therefore, when a basic patent on an active ingredient expires, other companies can develop alternative methods of production, forms or formulations of this active compound and start competing with the originator company.Footnote33 While such patenting strategies by originators are lawful in principle, some of them may be problematic. In particular, in anticipation of the loss of patent protection, originators may engage in strategic patenting which artificially prevents generic competition and results in an extension of their market monopoly.Footnote34 Defining Strategic Patenting In its Sector Inquiry Report, the European Commission explained that the drug development process consists of three main stages: (i) the R&D stage, which ends with the launch of a drug on the market; (ii) the period between the launch and the patent expiry; and (iii) the period after the patent expiration, when generics can enter the market.Footnote35 During the second stage, i.e. after the launch of a drug, originators seek to maximise their income from the product in order to recoup their R&D investments and earn profits before the commencement of generic competition.Footnote36 It is also during this stage that pharmaceutical companies seek to prolong their market exclusivity. In recent years, pharmaceutical companies have been increasingly relying on the strategic use of the patent system to combat the pressure of generic competition. Such practices are often called “life cycle management” by originators and proponents of the practice. For example, as Burdon and Sloper explained, “[a] key element of any life cycle management strategy … is to extend patent protection beyond the basic patent term for as long as possible, by filing secondary patents which are effective to keep generics off the market”.Footnote37 However, critics have characterised the practice as “evergreening”,Footnote38 as it essentially evergreens the patent protection and the exclusivity of a product.Footnote39 For instance, Bansal et al. explain that evergreening “refers to different ways wherein patent owners take undue advantage of the law and associated regulatory processes to extend their IP monopoly, particularly over highly lucrative ‘blockbuster’ drugs, by filing disguised/artful patents on an already patent-protected invention shortly before expiry of the ‘parent’ patent”.Footnote40 During its investigation into the pharmaceutical industry, the European Commission found that the number of patents granted and pending applications significantly increases with the value of a drug, i.e. “blockbuster medicines can even be protected by up to nearly 100 INNFootnote41-specific EPO patented bundles and applications …, which in one particular case led to 1,300 patents and applications across all the EU Member States”.Footnote42 The Commission also found that the ratio of primary to secondary patents is 1:7, where the latter “mostly concern formulations, processes and non-formulation products…, such as salts, polymorphic forms, particles, solvates and hydrates”.Footnote43 As a result, the Commission concluded that the practice of “maximising patent coverage in such a way is the creation of a web of patents”, which affects the generics’ ability to “develop a generic version of the medicine in form of a salt, crystalline or amorphous form”, because it “would inevitably infringe a patent (for example, a patent for the relevant salt, crystalline or amorphous form of the medicine)”.Footnote44 Each of such patents would typically have a later expiration date, which effectively extends a period of market exclusivity beyond the expiration of a basic patent.Footnote45 In addition, most of these patents that protect such follow-on modifications are so-called “sleeping” patents, i.e. patents which a company has no intention of commercialising.Footnote46 Moreover, such modifications may provide little or no therapeutic benefits to the patient compared to the original drug.Footnote47 Nevertheless, such patents allow originators to secure the most efficient, broadest and longest possible protection for their successful products.Footnote48 The denser the web of secondary patents, the more difficult it is for generics to develop their generic equivalents, even if they know that only a few patents of a large portfolio would, in fact, be valid and infringed by their products.Footnote49 Despite such knowledge, it is impossible to be certain before introducing a generic whether this will be the case and, thus, whether the generic company will be subject to injunctions preventing the sale of their generic products.Footnote50 Such practice, therefore, provides an appreciable competitive advantage for originators by creating a significant legal and commercial uncertainty for generics in relation to the possibility of their market entry.Footnote51 This paper argues that such a strategic use of the patent system by pharmaceutical companies is against the shared goal of patent and competition laws of facilitating innovation for the benefit of society. As will be explained further, in addition to a more immediate negative effect in the form of high drug prices, strategic patenting may also impair innovation by reducing originators’ incentives to innovate, and affecting generics’ ability to develop alternative generic products. Strategic patenting, therefore, may enable originators to avoid competitive pressures by preventing generic competition without a need to engage in genuine innovation. Strategic Patenting Contradicts the Rationale of the Patent System and Competition Law In the competitive markets, the success of a company is based on its business performance.Footnote52 In order to compete on performance by “offering better quality and a wider choice of new and improved goods and services”Footnote53 firms must innovate. Realising the importance of protecting innovation, which is considered to be the main driver of economic growth,Footnote54 states have put in place various mechanisms to ensure a suitable environment for its advancement. These include granting the property rights to the results of innovation in the form of patents, as well as implementing competition law rules to stimulate dynamic competition.Footnote55 Specifically, one of the main justifications for the patent system is the encouragement of innovationFootnote56 that serves as an engine for economic growth and development.Footnote57 The patent system pursues this aim by offering the patent owners a period of exclusive rights as a reward for their innovative efforts and an incentive to engage in further innovation.Footnote58 Therefore, intellectual property rules, and patents in particular, are seen as an essential element of undistorted competition on the internal market.Footnote59 These exclusive rights are considered to be a necessary incentive to invest in R&D and innovation, particularly in such sectors as pharmaceuticals, where the R&D costs are high, but the costs of copying the R&D results are marginal.Footnote60 At the same time, the “innovation theory”, embodied in the EU competition law rules and policy, is designed to stimulate innovation by fostering competition on the markets.Footnote61 The competition law rules keep markets innovative by maintaining effective competition through preventing the foreclosure of markets and maintaining access to them.Footnote62 The rationale is that firms react to pressures of competition by continuously seeking to innovate.Footnote63 Therefore, patent and competition laws complement each other, as on the one hand, existing competition creates pressures on firms, forcing them to innovate, the so-called “stick”, while on the other hand, patent law provides a “carrot” in the form of the exclusive right, thus inducing innovators to innovate.Footnote64 These two bodies of laws are seen as “complementary efforts to promote an efficient marketplace and long-run, dynamic competition through innovation”.Footnote65 As the European Commission noted “both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof”.Footnote66 These two bodies of laws, therefore, have the same fundamental goal of enhancing innovation for the benefit of consumer welfare. Importantly, patent and competition laws are designed to stimulate not only innovation of “pioneer” innovators, but they are also aimed at facilitating follow-on innovation.Footnote67 Patent law contains provisions that require inventors to disclose information about their inventions, as well as providing exceptions such as experimental use and compulsory licensing, which allow third parties to access the inventions still under patent protection.Footnote68 Therefore, along with pioneer innovators, the rationale of incentives to innovate in patent law also applies to follow-on innovators, balancing the interests of these two types of inventors.Footnote69 Similarly, competition law aims at stimulating all types of innovation, including follow-on innovation. On the other hand, EU competition law proscribes practices that reduce incentives to innovate both for “pioneer” and follow-on innovators. This is enshrined in Art. 102(b) TFEU, which prohibits abuses that consist of, inter alia, limiting technological development. For example, in AstraZeneca the General Court considered that the company’s practice of misusing the patent system had the potential of reducing its incentives to innovate and was anticompetitive.Footnote70 In MagillFootnote71 and Microsoft,Footnote72 the courts found that the IP rights owners abused their dominant positions by blocking innovation of their potential competitors. More recently, several decisions by the European Commission also emphasised the importance of protecting innovation. In January 2018, the Commission fined QualcommFootnote73 €997 million for abusing its market dominance in LTEFootnote74 baseband chipsets.Footnote75 The Commission considered that the exclusivity payments that Qualcomm paid to Apple denied rivals the possibility to compete on the merits, and deprived European consumers of genuine choice and innovation.Footnote76 Furthermore, in July 2018, the Commission found in Google Android that Google abused its dominant position, and fined the company €4.34 billion for anticompetitive restrictions it had imposed on mobile device manufacturers and network operators to strengthen its dominant position in general internet search.Footnote77 The Commission considered that Google’s restrictive practices denied other companies the chance to compete on the merits and innovate.Footnote78 Finally, in 2017 the Commission issued its decision, in which it took the view that Amazon abused its dominant positions on the markets for the retail distribution of e-books by inserting the so-called “parity clauses” in the agreements with its e-book suppliers.Footnote79 It concluded that these clauses had the potential of reducing the incentives to innovate both by e-book suppliers and retailers.Footnote80 These decisions demonstrate that the European Commission recognises the fundamental importance of protecting innovation. They confirm that strategies that are capable of stifling innovation and reducing the incentives to innovate may constitute an abuse of dominance under Art. 102 TFEU. It is argued in this article that, along with the practices condemned by the Commission in the decisions discussed above, strategic patenting can also harm innovation by impairing incentives to innovate of both originators and generic companies, and therefore should raise competition law concerns. Strategic Patenting Impairs Originators’ Incentives to Innovate While originator companies typically argue that the competition law intervention into their patenting practices will reduce their incentives to innovate,Footnote81 this article asserts that strategic patenting itself reduces originators’ incentives. Thus, in a properly functioning system, when a patent protecting a product is close to expiration the originator would be encouraged to innovate further in order to introduce a new product on the market and maintain its competitive position. However, by engaging in strategic patenting, the originator’s incentive to innovate diminishes as it enjoys its monopoly position by merely procuring numerous secondary patents that shield its current product from generic competition. Therefore, when companies engage in such strategic patenting, they are merely protecting themselves from the competitive pressures that competition law aims to establish. Maintaining that this practice is lawful, originators argue that strong patent protection is essential for recouping their investments, as well as for incentivising them to engage in further innovation.Footnote82 Such a position may find some support in the arguments put forward by Joseph Schumpeter and his followers, who claimed that since monopoly increases the reward of the innovator, monopolists are more prone to innovation.Footnote83 However, as Lowe noted:Footnote84 the empirical evidence of the past few decades has worked against Schumpeter and in favor of Kenneth Arrow, who contends that in favoring monopolies Schumpeter underestimated the incentives for innovation that competition can offer. Monopolists tend to want to keep their monopolies by resorting to any measures that can keep new entrants out. Firms under competitive pressure from actual or potential competition, on the other hand, are less complacent and know that inventing a new product is their best strategy for maintaining and increasing their market share. In the same vein, the Commission emphasises the importance of competition for the incentives to innovate, stating that: “[r]ivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains.”Footnote85 Evidence from the pharmaceutical industry confirms that strategic patenting reduces incentives to engage in genuine and meritorious innovation. In many cases, strategically accumulated secondary patents are of marginal quality and are typically the result of routine research activities.Footnote86 For example, in Perindopril the European Commission revealed that most of the secondary patents, procured as part of the originator company’s anti-generic strategy, were seen by the company as “blocking” or “paper”, some of which it considered involved “zero inventive step”Footnote87 and a purely editorial task.Footnote88 Moreover, these follow-on pharmaceutical inventions are specifically timed around the expiration of the basic patent and can be developed on demand.Footnote89 In AstraZeneca the Commission noted that the company designed to “[f]ile a patent-cloud of mixtures, uses, formulations, new indications, and chemistry” in relation to its blockbuster product omeprazole to slow down generic entry at a specifically defined time, close to the expiration of the basic patent.Footnote90 The main aim of these patents is to increase uncertainty for generic companies as to the possibility of their market entry.Footnote91 Therefore, while many of these secondary patents may be trivial and potentially invalid, the originator pursues them to protect its current successful product from generic competition.Footnote92 Even if a company continues to engage in innovation in parallel to pursuing strategic patenting, it still protects itself from the pressures of competition, which would have forced the company to innovate faster and would thus provide consumers with better products and/or access to cheaper generic versions earlier. As Ullrich argues:Footnote93 A slowdown in the transition of the new medicines from the protected status of a proprietary medicine to the status of generic products manufactured and distributed in open competition does not simply mean a loss of static efficiency, namely a loss of consumer well-being due to a slowdown in the reduction of process. Rather, such a slowdown also involves the risk of a loss of dynamic efficiency in that it extends the duration of a monopoly rent situation, thus reducing the pressure to innovate more quickly. Following the rationale of the General Court’s statement in AstraZeneca, the practice of the originator that extends its market monopoly by relying on the patent system “potentially reduces the incentive to engage in innovation, since it enables the company in a dominant position to maintain its exclusivity beyond the period envisaged by the legislator”.Footnote94 Such practices, according to the Court, act “contrary to the public interest”.Footnote95 Therefore, the practice of strategic patenting that protects originators’ monopolies from competitive pressures and significantly reduces their incentives to engage in genuine innovation is contrary to the rationale of the patent system, has a significant negative effect on competition and should raise competition law concerns. Strategic Patenting Impairs Follow-on Innovation of Generic Companies Strategic patenting also has a chilling effect on follow-on innovation by generic competitors in the form of developing alternative versions of an off-patent compound. As was discussed earlier, the expiry of a basic patent that protects an active compound facilitates generic competition. This is because even if the product is still protected by process, specific form or formulation patents, generic companies may develop alternative ways of producing or formulating the product and start competing with the originator. In the absence of strategically accumulated patents by the originator, generic companies are typically open to innovating to launch alternative generic products as soon as the basic patent expires. However, by pursuing strategic patenting, originators may discourage generics from engaging in follow-on innovation because of the uncertainty about the patent protection and a fear of infringing on one of the numerous patents.Footnote96 In its Sector Inquiry Report, the Commission cited the following quote from one of the originators: The entire point of the patenting strategy adopted by many originators is to remove legal certainty. The strategy is to file as many patents as possible on all areas of the drug and create a “minefield” for the generics to navigate. All generics know that very few patents in that larger group will be valid and infringed by the product they propose to make, but it is impossible to be certain prior to launch that your product will not infringe and you will not be the subject of an interim injunction.Footnote97 Therefore, as a result of creating an impenetrable ring of patent protection by the originator,Footnote98 generic competitors may be prevented from developing alternative generic versions of an off-patent compound. One of the examples revealed by the Commission during its Pharmaceutical Sector Inquiry was the filing by an originator company of “more than 30 patent families translating into several hundreds of patents in the Member States in relation to one product”, many of which were filed after the introduction of the product.Footnote99 This affected the intentions of several generic companies that planned to develop and bring their generic versions of the original product to the market.Footnote100 As a result, in addition to the already high barriers to entry into the pharmaceutical market due to patents that protect an existing product and the need to obtain a marketing authorisation, strategic patenting raises these entry barriers further, making it very difficult for generic companies to overcome them. This strategy, therefore, “may without further enforcement action by originator companies, … delay generic entry until the patent situation is clearer or even discourage more risk-sensitive generic companies from entering altogether”.Footnote101 Consequently, the fact that actual or potential competitors of originators would not be able to develop alternative generic products means that no one could enter the market and challenge originators’ monopoly positions. This results in a weakening of competition in the relevant market and a strengthening of the originator’s already dominant position. As Maggiolino put it, “patent accumulation … may work as a pre-emptive entry-deterrence strategy to protect monopoly power and … lower consumer welfare by allowing dominant firms to keep on charging over-competitive prices”.Footnote102 Therefore, when an array of accumulated secondary patents “blocks monopolists’ rivals from producing follow-on innovations, this strategy prevents the whole