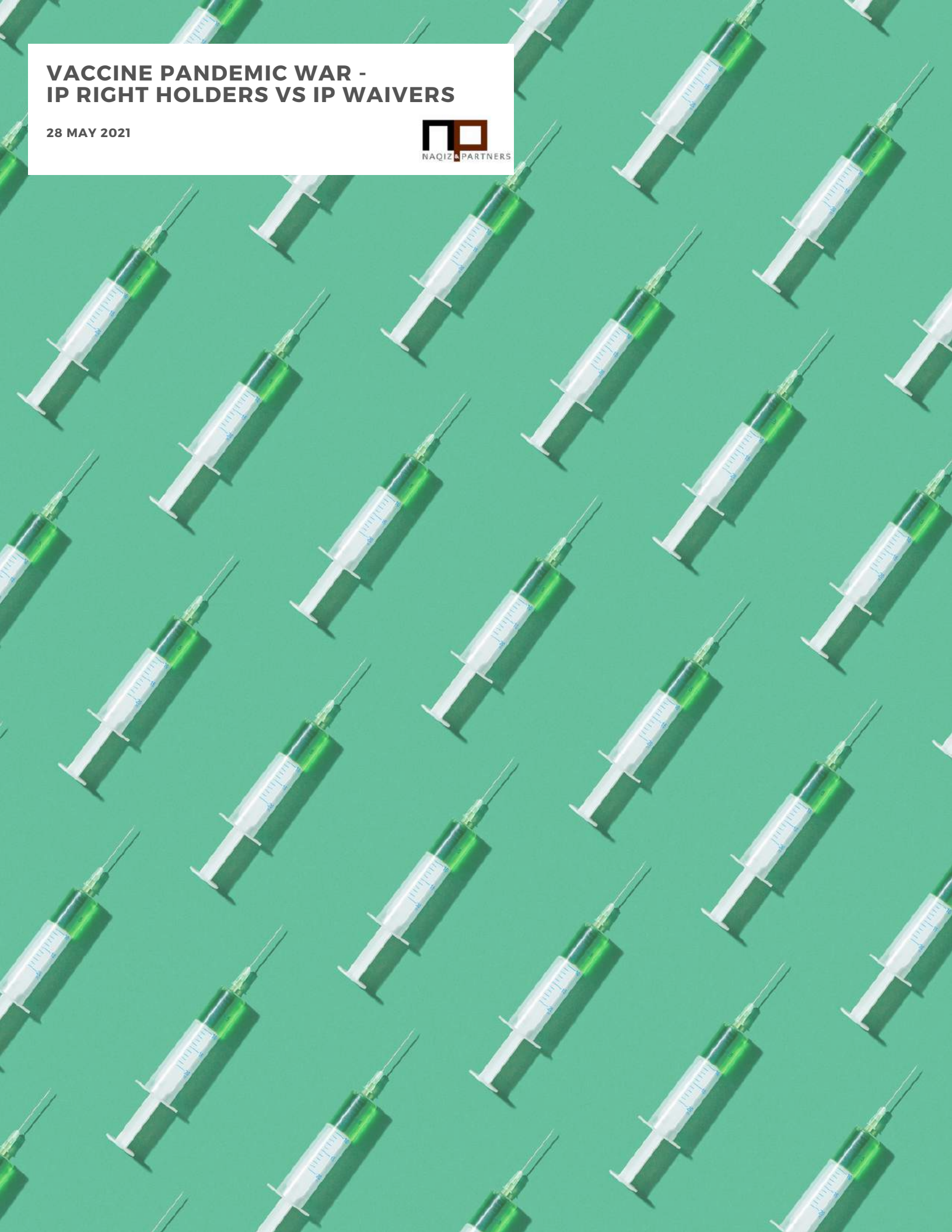


VACCINE PANDEMIC WAR - IP RIGHT HOLDERS VS IP WAIVERS

28 MAY 2021



CLIENT ALERT: VACCINE PANDEMIC WAR - IP RIGHT HOLDERS VS IP WAIVERS



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A Moral Failure?

It has been more than a year since COVID-19 dawned upon humanity and put our adaptability and survival ability to test. When viable vaccines were introduced one-by-one in late 2020, we thought that we have finally caught a glimpse of the end of a very long tunnel and soon humanity will prevail against COVID-19. Recent events however suggest otherwise.

Vaccination progress in most countries have appeared to be slow. Delays are mainly caused by hurdles such as vaccine production constraints, delay in delivery, limited supply, poor or lack of adequate medical resources, amongst others, as well as gap between nations' wealth. With little thought to equitable distribution, rich nations snapped up large quantities of vaccine much to the prejudice of poorer nations or developing countries. Canada, for example, pre-ordered enough supply to vaccinate each of its citizens six times; while in the UK and US, enough supply for four vaccines per person. Majority of the developing world are instead offered vaccine options that are either untested or expensive. Dr Tedros Adhanom Ghebreyesus, Director-General of the World Health Organisation ("**WHO**"), described this as the "brink of a catastrophic moral failure", and many dubbed the event as a "vaccine apartheid".

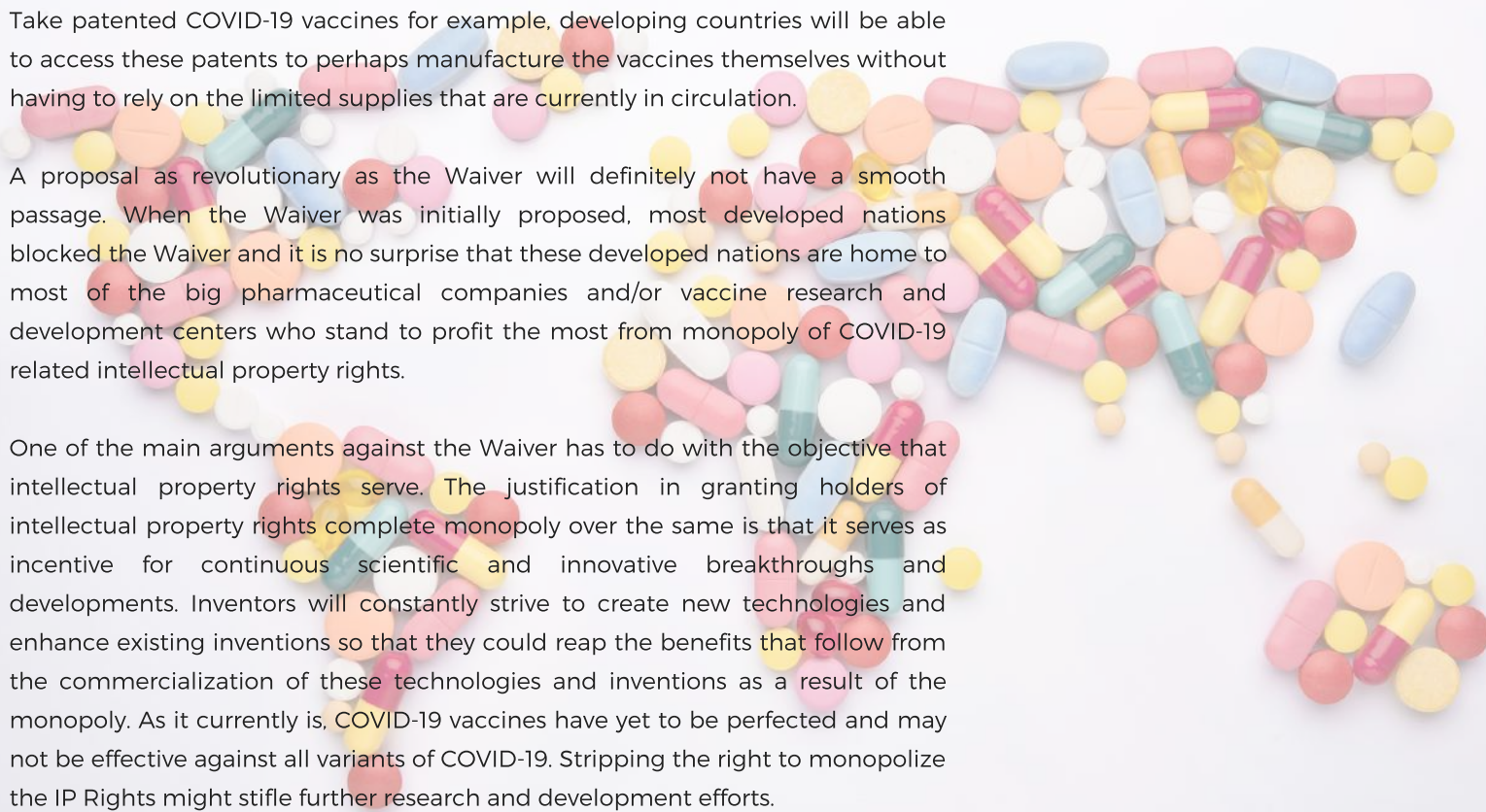
Perhaps with some foresight of the "me first" approach that many developed countries would adopt, South Africa and India came before the World Trade Organisation ("**WTO**") in October 2020 with a proposal - to waive the implementation, application and enforcement of the sections concerning copyright, patent, industrial design and trade secrets under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS Agreement**") in relation to prevention, containment or treatment of COVID-19 until majority of the world's population has developed immunity. For the purpose of this article, the proposal put forth by South Africa and India will be referred to as the "**Waiver**" moving forward.



The Waiver

The Waiver essentially calls for the member states of the TRIPS Agreement to temporarily put on hold their respective laws on copyright, patent, industrial design and trade secrets (collectively, the "IP Rights"), specifically when technologies and/or inventions concerning the prevention, containment or treatment of COVID-19 are involved, which would of course include COVID-19 vaccines, its manufacturing processes, related know-how and trade secrets.

Laws concerning intellectual property rights accord ownerships in intellectual properties to its creators, inventors, authors or proprietors, as the case may be, and allow monopoly over the intellectual properties. The Waiver, if passed, would effectively lift that monopoly from the hands of the holders of IP Rights concerning COVID-19 related technologies and/or inventions, albeit for a finite period of time. Third parties, in one way or another, will have access to these IP Rights and will be able to utilize them without interruption by their owners.



Take patented COVID-19 vaccines for example, developing countries will be able to access these patents to perhaps manufacture the vaccines themselves without having to rely on the limited supplies that are currently in circulation.

A proposal as revolutionary as the Waiver will definitely not have a smooth passage. When the Waiver was initially proposed, most developed nations blocked the Waiver and it is no surprise that these developed nations are home to most of the big pharmaceutical companies and/or vaccine research and development centers who stand to profit the most from monopoly of COVID-19 related intellectual property rights.

One of the main arguments against the Waiver has to do with the objective that intellectual property rights serve. The justification in granting holders of intellectual property rights complete monopoly over the same is that it serves as incentive for continuous scientific and innovative breakthroughs and developments. Inventors will constantly strive to create new technologies and enhance existing inventions so that they could reap the benefits that follow from the commercialization of these technologies and inventions as a result of the monopoly. As it currently is, COVID-19 vaccines have yet to be perfected and may not be effective against all variants of COVID-19. Stripping the right to monopolize the IP Rights might stifle further research and development efforts.

Some also argued that simply waiving the COVID-19 related IP Rights would not achieve the global scaling up of COVID-19 vaccine production. Even if developing nations are given full unhindered access to the specifications of patented COVID-19 vaccines, they still lack the technical know-how and information needed to manufacture the vaccines, which are typically protected as trade secrets by the vaccine manufacturing companies and not found in the patent specifications. A complete technology transfer from the vaccine manufacturing companies would be necessary before developing countries can start producing vaccines on their own. Time consumption aside, forming a dedicated technology transfer team diverts vaccine manufacturing companies' precious resources away from their manufacturing processes, which would inevitably delay their own vaccine productions.

There are also concerns that developing nations lack the infrastructure and capacity needed to manufacture COVID-19 vaccines. Due to complexity in the processes, highly specialized manufacturers are needed to make the vaccines. After equipping developing nations with the "how", they may still not have the "what" that is needed to start their own vaccine production.

To counter the arguments, proponents of the Waiver have pointed out that most (if not all) pharmaceutical companies have already received their financial incentives upfront through various government funding, grants and/or subsidies. On top of that, the proposed Waiver is time-limited – it is until the majority of the world's population has developed immunity against COVID-19. Pharmaceutical companies will still be able to profit from future follow-up sales once the Waiver is lifted.

While the experts do agree that it takes highly specialized manufacturers to produce the COVID-19 vaccines, there are some that are relatively easier to manufacture, such as the Pfizer and Moderna vaccines, which involve manipulation of mRNA instead of isolating and replicating parts of the virus itself. Developing countries should have the necessary technical requirements and capacity to manufacture these vaccines themselves. Although it still takes time and effort off pharmaceutical companies who have the know-how to conduct the technology transfer, once the hurdle is overcome, global vaccine production rate will scale up significantly. Instead of putting all the eggs in the basket of the wealthier nations, having more vaccine manufacturing facilities around the world prevents the unwanted scenario of shortage in the already limited vaccine supply should there be a halt in vaccine production if the COVID-19 situation were to get out of control in these vaccine manufacturing countries.

Meeting in the Middle

While both pro- and anti-Waiver camps have certainly raised valid reasonings and concerns, it would be important to remember that the common enemy here is COVID-19. Instead of posing as deadlocks in the global vaccination progress, it would be good if some form of middle ground can be achieved between the parties with regards to the Waiver.

It would definitely be beneficial for the developing countries to have access to COVID-19 related IP Rights. To address concerns on lack of incentives to further vaccine research and development however, perhaps member states of the TRIPS Agreement can agree to some form of royalties as equitable remuneration payable by the developing countries to the respective IP Rights holders. This way, it allows IP Rights holders to get paid and at the same time ensuring developing countries getting access to COVID-19 IP Rights at a reasonable price.

Since pharmaceutical companies are concerned that having to divert their resources into technology transfer might slow down production progress, they could explore the possibility of establishing a joint dedicated technology transfer team by pooling resources together. This way, instead of having each pharmaceutical company establish a complete technology transfer team on their own, a dedicated technology transfer team put together by resources from several companies can be formed, thereby minimizing the impact on production progress of each company. The technology transfer team formed can then be dedicated to conducting technology transfer as well as giving technical assistance and support to developing countries for the duration of the Waiver.

The bottom line is that no one is safe, unless everyone is safe. Instead of having both camps of the people criticizing each other's approach, it would be better if differences can be put aside to come up with an IP Rights waiver comprising framework palatable for everybody. In order for any proposal to be passed, all 164 member states of the TRIPS Agreement will have to reach some form of consensus. It is helpful that the United States, one of the countries who was initially against the Waiver, has recently reversed their stance and announced their support and decision to explore an acceptable IP Rights waiver. As the number of pro-Waiver countries increases, so does the likelihood of member states reaching consensus on something and hopefully global shots in arms can be achieved before COVID-19 variations / mutations go out of hands.



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