

NON-DISCLOSURE AGREEMENTS AND EQUITABLE ACCESS TO COVID-19 VACCINES

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I. INTRODUCTION

In May 2020, 140 world leaders and experts signed an open letter advocating for all COVID-19 diagnostics, treatments, and vaccines to be treated as “public goods,” and called for a “people’s vaccine” free of charge.¹ The open letter called for wealthy nations to fully fund the global and equitable manufacturing and distribution of vaccines and invited both transparent democratic governance and civil society involvement to keep all parties accountable to the agreement.²

A month earlier, in April 2020, the COVAX Global Vaccines Facility was launched to ensure equitable access to COVID-19 vaccines through the procurement and distribution of vaccines on behalf of its member States.³ The Director-General of the World Health Organization (WHO) urged countries to join COVAX to avoid an increase in the price of medical supplies and vaccines due to competition between States.⁴

Despite the calls for global cooperation, wealthy countries raced to secure vaccines for their own populations, causing many countries to fall significantly behind in both the procurement and administration

* This online annotation was written in the course of the author's tenure as a Staff Editor on the *N.Y.U. Journal of International Law & Politics*.

1. World Health Assembly Res. 73.1, COVID-19 Response ¶ 6 (May 19, 2020); UNAIDS, *Uniting Behind a People's Vaccine Against COVID-19*, (May 14, 2020), https://www.unaids.org/en/resources/presscentre/featurestories/2020/may/20200514_covid19-vaccine-open-letter (“We are calling on Health Ministers at the World Health Assembly to rally behind a people’s vaccine against this disease urgently.”).

2. UNAIDS, *supra* note 1.

3. UNICEF, *COVAX: Ensuring Global Equitable Access to COVID-19 Vaccines*, <https://www.unicef.org/supply/covax-ensuring-global-equitable-access-covid-19-vaccines> (last visited Nov. 21, 2021).

4. WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19 – 18 August 2020*, (Aug. 18, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—18-august-2020>.

of COVID-19 vaccines.⁵ By September 2020, a small group of wealthy nations making up only thirteen percent of the world's population secured more than half of the global COVID-19 vaccine supply.⁶ While the United States and the European Union managed to comfortably vaccinate over half of their adult population by May 2021, less than 1.5 percent of the African continent was fully vaccinated by July 2021.⁷

A key source of this disparity has been the lack of transparency in the vaccine procurement process. To date, very few COVID-19 vaccine procurement contracts have been revealed, and of the publicly revealed contracts, crucial terms like the price per dose or delivery schedules have been consistently redacted.⁸ Even COVAX received much criticism for failing to reveal the exact terms of the contracts with pharmaceutical companies.⁹

This lack of transparency violates international human rights standards because it limits the right to information and consequently, the right to health.

II. NON-DISCLOSURE AGREEMENTS (NDAs)

Governments around the world entered into bilateral deals with large pharmaceutical companies to procure COVID-19 vaccines.¹⁰ Wealthier countries like the United States entered into advanced

5. Kai Tabacek, *Small Group of Rich Nations Have Bought Up More Than Half the Future Supply of Leading COVID-19 Vaccine Contenders*, OXFAM INT'L (Sept. 17, 2020), <https://www.oxfam.org/en/press-releases/small-group-rich-nations-have-bought-more-half-future-supply-leading-covid-19>.

6. *Id.*

7. *COVID-19 Vaccine Tracker*, ECDC, <https://vaccinetracker.ecdc.europa.eu/public/extensions/COVID-19/vaccine-tracker.html#uptake-tab> (select "Adults 18+") (accessed July 30, 2021); *U.S. COVID-19 Vaccine Tracker: See Your State's Progress*, MAYO CLINIC, <https://www.mayoclinic.org/coronavirus-covid-19/vaccine-tracker> (accessed July 30, 2021); *COVID-19 Vaccination*, AFRICA CDC, <https://africacdc.org/covid-19-vaccination/> (select the "Administered" tab) (accessed July 30, 2021).

8. See TRANSPARENCY INT'L, FOR WHOSE BENEFIT? TRANSPARENCY IN THE DEVELOPMENT AND PROCUREMENT OF COVID-19 VACCINES 24 (May 2021), <http://ti-health.org/wp-content/uploads/2021/05/For-Whose-Benefit-Transparency-International.pdf> (providing a table of important terms in the COVID-19 vaccine contracts for the public interest and indicating that important terms like contract value, timetables for delivery, and price per dose have routinely been redacted).

9. Jenny Lei Ravelo, *Is COVAX Part of the Problem Or the Solution?*, DEVEX (Mar. 11, 2021), <https://www.devex.com/news/is-covax-part-of-the-problem-or-the-solution-99334>.

10. Matt Apuzzo & Selam Gebrekidan, *Governments Sign Secret Vaccine Deals. Here's What They Hide*, N.Y. TIMES (Jan. 28, 2021), <https://www.nytimes.com/2021/01/28/world/europe/vaccine-secret-contracts-prices.html>.

purchase agreements, securing early doses of the COVID-19 vaccine in return for contributing to their research and development.¹¹ Meanwhile, over 190 countries have relied on COVAX to secure all or some of the necessary vaccines on the country's behalf.¹²

However, these bilateral contracts between countries and pharmaceutical companies have remained largely confidential.¹³ A study by Transparency International on transparency issues related to COVID-19 vaccines found that only thirteen COVID-19 vaccine procurement contracts were publicly available, out of the 182 contracts studied.¹⁴ Of the thirteen publicly available contracts, two were unofficially leaked, and ten were so heavily redacted that they “[could] not be described as adhering to CGD’s Principle of ‘Full Contract Publication.’”¹⁵ These redactions are the result of the non-disclosure agreements (NDA) that pharmaceutical companies required governments to sign to procure the vaccines.¹⁶

NDA's are common practice in pharmaceutical contracts.¹⁷ With the continuous stream of new drugs and medical technology, many countries resort to individual negotiations with pharmaceutical companies to update their healthcare within a limited budget.¹⁸ These financial or performance agreements may involve discounts based on the price per drug or based on the use or performance of the drugs or technologies.¹⁹

However, the level of redactions required by the NDA's on COVID-19 vaccine procurement contracts are unprecedented. When comparing prior vaccine contracts with COVID-19 vaccine contracts between the same country and pharmaceutical company, the COVID-

11. *Id.*

12. UNICEF, *supra* note 3.

13. *See* TRANSPARENCY INT'L, *supra* note 8 (finding that only thirteen of the 182 COVID-19 vaccine procurement contracts analyzed in the study were publicly available. Of the thirteen revealed contracts, two were unofficially leaked).

14. *Id.* at 17.

15. *Id.* at 20.

16. *See* Apuzzo & Gebrekidan, *supra* note 10 (“But the details of [the vaccine] deals largely remain secret, with governments and public health organizations acquiescing to drug company demands for secrecy”).

17. Roberto F. Iunes et al., *Confidentiality Agreements: A Challenge in Market Regulation*, INT'L J. FOR EQUITY IN HEALTH 2 (June 3, 2019), <https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-019-0916-3>.

18. *Id.*

19. *Id.*

19 vaccine contracts have nearly fifty times as many redactions.²⁰ The extensive redactions in the COVID-19 vaccine contracts hide crucial terms like price per dose, delivery schedules, and indemnity clauses, thereby protecting pharmaceutical companies from nearly any liability.²¹ Some countries have had to establish no-fault compensation funds, which require the government to compensate victims of vaccine-related injuries in order to procure vaccines.²² While some liability protection may be warranted, the lack of transparency makes it difficult to check the reasonableness of the terms and media reports of extensive indemnity clauses raise fears of unjust demands by pharmaceutical companies.²³

A. *Consequences of the NDAs in COVID-19 Vaccine Contracts*

The NDAs allow pharmaceutical companies to hold an unfair advantage over the price of vaccines.²⁴ For example, AstraZeneca sold vaccines to South Africa at 2.5 times the price per dose that European governments paid.²⁵ Khairy Jamaluddin, one of the leaders of Malaysia's Special Vaccine Supply Access Guarantee Committee, hinted that Malaysia reached a better deal with Pfizer after Belgium's price per dose

20. See TRANSPARENCY INT'L, *supra* note 8, at 21 (comparing the number of redactions between the UK-AstraZeneca COVID-19 contract and other comparable vaccine contracts).

21. Apuzzo & Gebrekidan, *supra* note 10.

22. See Geo Quinot, *Covid-19 Vaccine Procurement in South Africa: What We Know, What We Don't Know and What We Should Know*, CORRUPTION WATCH 5 (Feb. 16, 2021), <https://www.corruptionwatch.org.za/wp-content/uploads/2021/02/COVID19-Vaccine-Procurement-Quinot-for-CW-210216.pdf> (delineating what is known about the no-fault compensation fund South Africa was required to establish to procure vaccines from Johnson & Johnson and Pfizer). See also Aisha Abdool Karim & Joan van Dyk, *How South Africa's COVID Vaccine Injury Fund Will Work*, BHEKISISA (Apr. 20, 2021), <https://bhekisisa.org/health-news-south-africa/2021-04-20-how-sas-covid-vaccine-injury-fund-will-work/> (explaining the details of South Africa's no-fault compensation fund, including the reason for the fund, which is a response to demands for protection by pharmaceutical companies).

23. See Madlen Davies & Rosa Furneaux, *Vaccine Contract Forces a Government to Pay if Pfizer Makes Mistakes*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Mar. 10, 2021), <https://www.thebureauinvestigates.com/stories/2021-03-10/vaccine-contract-forces-dominican-republic-government-to-pay-if-pfizer-makes-mistakes> (finding that Pfizer went beyond most indemnity clauses to require the Dominican Republic to protect the company from any legal action among other terms).

24. Iunes et al., *supra* note 17.

25. Helen Sullivan, *South Africa Paying More than Double EU Price for Oxford Vaccine*, GUARDIAN (Jan. 21, 2021), <https://www.theguardian.com/world/2021/jan/22/south-africa-paying-more-than-double-eu-price-for-oxford-astrazeneca-vaccine>.

with Pfizer was publicly revealed.²⁶ Many pharmaceutical companies have defended these price differentials, pointing to differences in the number of doses ordered, delivery and manufacturing costs, and countries' prior contributions to research and development of the vaccines.²⁷ However, countries that participated in vaccine clinical trials were not given any prioritization.²⁸

By conditioning desperately needed vaccines on the signing of NDA agreements, pharmaceutical companies force governments to violate both international standards of transparency and their own domestic law on transparency in public procurements, in order to protect the lives of their citizens.²⁹ In Latin America, between September 2020 and February 2021, thirteen countries changed their domestic law to cut back on transparency requirements in order to allow their governments to quickly procure vaccines for their respective populations.³⁰

In addition, some pharmaceutical companies were accused of imposing unacceptable conditions on the vaccines. For example, several Latin American countries alleged that Pfizer requested them to put up sovereign assets, like the State's federal bank reserves and military bases, as collateral for indemnity terms.³¹ Deliberating over such demands has both delayed contracts and led some deals to fail, putting countless lives at risk.³²

26. Annabelle Lee, *Explaining Non-disclosure Agreements in Covid-19 Vaccine Procurement*, YAHOO (Dec. 28, 2020), <https://malaysia.news.yahoo.com/explaining-non-disclosure-agreements-covid-031300265.html>.

27. Sullivan, *supra* note 25; Jason Beaubien, *Price Check: Nations Pay Wildly Different Prices for Vaccines*, NPR (Feb. 19, 2021), <https://www.npr.org/sections/goatsandsoda/2021/02/19/969529969/price-check-nations-pay-wildly-different-prices-for-vaccines>.

28. Sullivan, *supra* note 25.

29. Bernadette E. Tamayo, *Drug Firms Demand Non-disclosure Agreements for Vaccines – Sotto*, MANILA TIMES (Jan. 21, 2021), <https://www.manilatimes.net/2021/01/21/latest-stories/breakingnews/drug-firms-demand-non-disclosure-agreements-for-vaccines-sotto/830231>. See e.g., Prithvi Man Shrestha, *Nepal Signs Non-disclosure Agreement to Buy Chinese Covid-19 Vaccines But Legal Questions Remain*, KATHMANDU POST (June 6, 2021), <https://kathmandupost.com/national/2021/06/06/nepal-signs-non-disclosure-agreement-to-buy-chinese-covid-19-vaccines-but-legal-questions-remain>.

30. Ivan Ruiz et al., *Latin American Governments Gave Legal and Tax Benefits to Pharmaceutical Companies in Vaccine Purchases*, RED PALTA <https://www.redpalta.org/post/benefits-to-pharmaceutical-companies-in-the-purchase-of-vaccines/> (last visited Nov. 22, 2021).

31. Madlen Davies et al., *'Held to Ransom': Pfizer Demands Governments Gamble with State Assets to Secure Vaccine Deal*, BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 23, 2021), <https://www.thebureauinvestigates.com/stories/2021-02-23/held-to-ransom-pfizer-demands-governments-gamble-with-state-assets-to-secure-vaccine-deal>.

32. *Id.*

Pharmaceutical companies have also been able to mostly avoid liability for vaccine related injuries. While no-fault compensation funds—which shift the monetary burden onto the government to compensate for abnormal side effects caused by the vaccine—may be acceptable considering the unprecedented speed that the COVID-19 vaccines were developed and approved,³³ pharmaceutical companies both avoid liability for nearly any injury or fault and avoid any checks or pressure from the public by hiding no-fault provisions under NDAs.³⁴

Exact delivery dates are also consistently redacted, giving pharmaceutical companies the space to announce significant delays in vaccine deliveries without liability.³⁵ While delays in vaccine delivery literally cost lives, nearly every vaccine maker experienced significant delays delivering vaccines.³⁶ In March 2021, despite contracting to sell 180 million doses to the European Union, AstraZeneca announced that by the end of June, it would only be able to deliver around seventy million doses.³⁷ In response, the European Commission filed a lawsuit against AstraZeneca, asking the court to require AstraZeneca to deliver 300 million doses by September with daily penalties of ten million euros a day.³⁸ However, as the vaccination rate in the European Union surpassed seventy percent, the urgency of the situation subsided and the European Union has since reached a settlement with AstraZeneca.³⁹

33. OECD, *Enhancing Public Trust in COVID-19 Vaccination: The Role of Governments* 3 (May 10, 2021), <https://www.oecd.org/coronavirus/policy-responses/enhancing-public-trust-in-covid-19-vaccination-the-role-of-governments-eae0ec5a/>; Ludwig Burger & Pushkala Ariupaka, *AstraZeneca to be Exempt From Coronavirus Vaccine Liability Claims in Most Countries*, REUTERS (July 30, 2020), <https://www.reuters.com/article/us-astrazeneca-results-vaccine-liability-idINKCN24V2EN>; Rachel Gilmore, *Coronavirus Vaccine Makers are Shielded From Liability. Here's Why Officials Say that's Normal*, GLOB. NEWS (Dec. 14, 2020), <https://globalnews.ca/news/7521148/coronavirus-vaccine-safety-liability-government-anand-pfizer/>.

34. MacKenzie Sigalos, *You Can't Sue Pfizer or Moderna if You Have Severe Covid Vaccine Side Effects. The Government Likely Won't Compensate You for Damages Either*, CNBC (Dec. 17, 2020), <https://www.cnn.com/2020/12/16/covid-vaccine-side-effects-compensation-lawsuit.html>.

35. Apuzzo & Gebrekidan, *supra* note 10.

36. *Id.*

37. Francesco Guarascio & Giselda Vagnoni, *EU Sues AstraZeneca Over Breach of COVID-19 Vaccine Supply Contract*, REUTERS (Apr. 26, 2021), <https://www.reuters.com/world/europe/eu-sues-astrazeneca-over-delayed-deliveries-covid-19-vaccine-2021-04-26/>.

38. Monika Pronczuk, *AstraZeneca Settles with the E.U. Over Delays in Vaccine Deliveries*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/2021/09/03/world/astrazeneca-settles-with-the-eu-over-delays-in-vaccine-deliveries.html>.

39. *Id.*

B. *Response from Civil Society*

While many civil society organizations have demanded transparency to keep companies accountable,⁴⁰ these calls have not been heeded. Even the Coalition for Epidemic Preparedness Innovations (CEPI), one of the leading bodies of COVAX that pledged its commitment to transparency and human rights standards, failed to disclose any of its contracts and instead merely claimed that the agreements with pharmaceutical companies had strong provisions on equitable access.⁴¹ After much criticism,⁴² CEPI published an overview of the equitable access provisions in the agreements and appointed civil society representatives from ten organizations in seven countries to contribute to and ensure equitable distribution through COVAX.⁴³ However, COVAX has yet to provide unredacted copies of contracts.⁴⁴

III. INTERNATIONAL HUMAN RIGHTS STANDARDS

A. *Transparency and Right to Access Information*

The right to access information is a fundamental right recognized under international human rights standards. Article 19 of the Universal Declaration of Human Rights,⁴⁵ Article 19 of the International

40. MSF ACCESS CAMPAIGN, Open Letter to Gavi Board Members: Inclusion of Civil Society in COVAX Facility and COVAX AMC Governance is Essential, (July 29, 2020), <https://msfaccess.org/open-letter-gavi-board-members-inclusion-civil-society-covax-facility-and-covax-amc-governance>.

41. Ann Danaiya Usher, *CEPI Criticized for Lack of Transparency*, 397 LANCET 265–6 (Jan. 23, 2021), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)00143-4/fulltext?hss_channel=tw-27013292](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00143-4/fulltext?hss_channel=tw-27013292).

42. Alexander Phelan et al., *Legal Agreements: Barriers and Enablers to Global Equitable COVID-19 Vaccine Access*, 396 LANCET 800–2 (Sept. 7, 2020), [https://www.thelancet.com/article/S0140-6736\(20\)31873-0/fulltext](https://www.thelancet.com/article/S0140-6736(20)31873-0/fulltext).

43. *COVAX Welcomes Appointment of Civil Society Representatives*, GAVI (Oct. 30, 2020), <https://www.gavi.org/news/media-room/covax-welcomes-appointment-civil-society-representatives>.

44. *Response to Joint Letter from Human Rights Watch, Public Citizen, MSF Access Campaign and Amnesty International*, HUM. RTS. WATCH (Mar. 25, 2021), https://www.hrw.org/sites/default/files/media_2021/04/COVAX%20Response%20March%202025_0.pdf.

45. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948) (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”).

Covenant on Civil and Political Rights (ICCPR),⁴⁶ and Article 13 of the American Convention on Human Rights,⁴⁷ all include the freedom to “seek, receive and impart information.” This right applies to information that is held by public bodies and other entities carrying out public functions.⁴⁸ The ICCPR⁴⁹ and the American Convention on Human Rights⁵⁰ recognize the importance of this right to information, allowing the right to be restricted only in very limited circumstances.

People have the right to know how governments are spending public money.⁵¹ Both the knowledge itself, and the bargaining power that governments gain when they enter negotiations with pharmaceutical companies knowing how much other governments have paid for vaccines, are for the public benefit. Transparency surrounding vaccine contracts may also prevent corruption and ensure fair and timely

46. G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, art. 19(2) (Dec. 16, 1966) [hereinafter *ICCPR*] (“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”).

47. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 13(1) (“Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”).

48. Human Rights Committee, *International Covenant on Civil and Political Rights*, ¶ 18, U.N. Doc. CCPR/C/GC/34, (Sept. 12, 2011), <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

49. ICCPR, *supra* note 43, at art. 19 3(a)-(b) (“For respect of the rights or reputations of others; For the protection of national security or of public order (ordre public), or of public health or morals.”).

50. The Inter-American Human Rights Obligations resolution details a three-part proportionality test a State must pass to determine the appropriateness of limiting any access to information: “(i) [Limiting access to information must] pursue one of the legitimate objectives that justify them; (ii) demonstrate that disclosure of information effectively threatens to cause substantial harm to that legitimate objective; and (iii) demonstrate that the harm to the objective outweighs the public’s interest in having the information.” See I.A.C.H.R. Res. 1/2021, COVID-19 Vaccines and Inter-American Human Rights Obligations, <https://www.oas.org/en/iachr/decisions/pdf/Resolucion-1-21-en.pdf>.

51. “Whoever Finds the Vaccine Must Share It” *Strengthening Human Rights and Transparency Around COVID-19 Vaccines*, HUM. RTS. WATCH (Oct. 29, 2020), <https://www.hrw.org/report/2020/10/29/whoever-finds-vaccine-must-share-it/strengthening-human-rights-and-transparency>; Charles Kenny, *Release COVID-19 Vaccine Contracts*, CTR. GLOB. DEV. (Feb. 10, 2021), <https://www.cgdev.org/blog/release-covid-19-vaccine-contracts>.

allocation and distribution of vaccines, because pharmaceutical companies and governments can be held accountable.⁵²

While some prices have been revealed through leaks and local reports of price ranges, exact prices and detailed explanations for the price differentials have been absent.⁵³ Overall, pharmaceutical companies maintain a strict advantage over the negotiations because governments must procure vaccines for their residents.

B. *Right to Health and Protection of Public Safety*

The International Covenant on Economic, Social and Cultural Rights establishes that every person has the right to “the enjoyment of the highest attainable standard of physical and mental health.”⁵⁴ The Committee on Economic, Social and Cultural Rights (CESCR) recognized the right of everyone to enjoy the benefits of scientific progress as instrumental in realizing the right to health, and emphasized the need to share scientific and medical knowledge during a pandemic to combat the disease and create a vaccine.⁵⁵

However, with disparate pricing and sweeping indemnity clauses among other terms, pharmaceutical companies make it difficult for States to provide the highest level of health care at a time when it is the most crucial. These actions disproportionately affect developing countries, exacerbating inequalities in accessing COVID-19 vaccines.⁵⁶

52. UNODC, *COVID-19 Vaccines and Corruption Risks: Preventing Corruption in the Manufacture, Allocation and Distribution of Vaccines* 8, https://www.unodc.org/documents/corruption/COVID-19/Policy_paper_on_COVID-19_vaccines_and_corruption_risks.pdf (last visited Nov. 22, 2021).

53. Jason Beaubien, *Price Check: Nations Pay Wildly Different Prices for Vaccines*, NPR (Feb. 19, 2021), <https://www.npr.org/sections/goatsandsoda/2021/02/19/969529969/price-check-nations-pay-wildly-different-prices-for-vaccines>.

54. G.A. Res. 2200 (XXI) A, art. 12(1) (Dec. 16, 1966) International Covenant on Economic, Social and Cultural Rights.

55. Economic and Social Council, art. 15.1(b) ¶¶ 67, 82, U.N. Doc. E/C.12/GC/25, (Apr. 30, 2021) <https://docstore.ohchr.org/Self-Services/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oX-TdImnsjZZVQdxONLLLJiul8wRmVtr5Kxx73i0Uz0k13FeZiqChAWHK-FuBqp%2B4RaxfUzqSAfyZYAR%2Fq7sqC7AHRa48PPRRALHB> (“If a pandemic develops, sharing the best scientific knowledge and its applications, especially in the medical field, becomes crucial to mitigate the impact of the disease and to expedite the discovery of effective treatments and vaccines”).

56. Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental health, transmitted by Letter date 11 August 2008 from the Secretary General, ¶ 23, U.N. Doc. A/63/263, https://www.who.int/medicines/areas/human_rights/A63_263.pdf.

IV. CHALLENGING THE LACK OF TRANSPARENCY

A. *Transparency Requirements in Public Procurements and Right to Information Requests*

Many countries have domestic laws that, with limited exceptions, require transparency in public procurements.⁵⁷ Recognizing the importance of transparency in keeping governments accountable and combatting corruption, the World Bank launched the Global Public Procurement Database (GPPD) which consolidates procurement information, laws, best practices, and more by country.⁵⁸

In countries with transparency requirements for public procurements, signing an NDA may be illegal and challenged in court to obtain more information regarding the COVID-19 vaccine procurement contracts.

For example, in June 2021, Nepal signed an NDA with Sinopharm, a Chinese state-owned pharmaceutical corporation, acquiescing to Sinopharm's demand, even while violating Nepal's domestic transparency laws, to procure desperately needed vaccines.⁵⁹ An official from Nepal's Public Procurement Monitoring Office stated that all public procurements, except for defense-related materials which are sensitive to national security, must be disclosed under Nepal's Public Procurement Act.⁶⁰ To ensure the legality of the procurement, the Nepalese government considered procuring the vaccines through a policy decision of the Cabinet because such policy decisions cannot be investigated by the Commission for Investigation of Abuse of Authority.⁶¹ However, even then, Nepal will likely have difficulty securing loans from donors like the World Bank and the Asian Development Bank, which Nepal relies on to fund the procurement of vaccines, without disclosing details of the procurement.⁶²

57. See OECD, *Transparency in Public Procurement*, https://www.globalpublicprocurementdata.org/gppd/country_profile/Z (last visited Dec. 2, 2021) (compiling survey data of 33 OECD member countries, as well as Brazil, Egypt, and Ukraine on laws and levels of transparency in public procurements).

58. The World Bank, *Global Public Procurement Database*, <https://www.globalpublicprocurementdata.org/gppd/> (last visited Dec. 2, 2021).

59. Prithvi Man Shrestha, *Nepal Signs Non-disclosure Agreement to Buy Chinese Covid-19 Vaccines But Legal Questions Remain*, KATHMANDU POST (June 6, 2021), <https://kathmandupost.com/national/2021/06/06/nepal-signs-non-disclosure-agreement-to-buy-chinese-covid-19-vaccines-but-legal-questions-remain>.

60. Public Procurement Act, 2007, § 60 (Nepal); Shrestha, *supra* note 59.

61. Shrestha, *supra* note 59.

62. *Id.*

As of 2019, 127 countries have implemented some form of right to information legislation.⁶³ While enforcement and respect for such laws and mechanisms vary greatly, using a right to information request may be an effective way to challenge the government's lack of transparency and gather some additional information on COVID-19 vaccine contracts. The successful challenge for transparency by an NGO in Colombia and the ruling tribunal's reliance on international human rights law strengthens the significance of international transparency standards and provides promising insight for future challenges.

B. Successful Challenge in Colombia

On January 12, 2021, the International Institute of Anticorruption Studies (IIAS), a Colombian non-profit organization, filed a petition to request information regarding the government's COVID-19 vaccine contracts.⁶⁴ While the Colombian government responded by providing some information, the Colombian government did not release information regarding the negotiations and contracts with pharmaceutical companies.⁶⁵ In response, IIAS filed a *recurso de insistencia*, a form of complaint, before an administrative tribunal.⁶⁶

The Colombian government alleged that the requested information could not be released to the public because of the contracts' confidentiality clauses, which the Colombian government argued are consistent with Colombian law.⁶⁷ The government also argued that keeping the information confidential was required for the health and safety of the general public, and therefore, disclosing the information would compromise the public interest.⁶⁸

Relying on a range of international and domestic laws, the tribunal rejected the government's arguments and ordered the government to

63. Gerwin De Roy, *Right to Information laws: Where do we stand?*, DW AKADEMIE (May 24, 2019), <https://www.dw.com/en/right-to-information-laws-where-do-we-stand/a-48812029>.

64. INT'L COMM'N OF JURISTS, *Maximum Disclosure: Secrecy in COVID-19 Vaccine Contracts and Other Shortcomings of Colombia's Vaccine Rollout*, Briefing Paper 2021, at 21, (July 2021), <https://www.icj.org/wp-content/uploads/2021/08/Columbia-Vaccine-Briefing-Paper-ENG-2021.pdf> [hereinafter *Maximum Disclosure*]

65. *Id.* at 22.

66. *Id.* See also INT'L COMM'N OF JURISTS, *Summary of Colombian Ruling on the Public Release of COVID-19 Vaccine Contracts*, <https://www.icj.org/wp-content/uploads/2021/08/Final-Colombia-Case-Summary-27-July-2021.pdf> (last visited Jan. 10, 2022) (providing an English summary of the Colombian tribunal ruling and relevant domestic and international laws) [hereinafter *Summary of Colombian Ruling*]

67. *Maximum Disclosure*, *supra* note 64, at 22.

68. *Id.*

provide the IAS with the requested documents and details.⁶⁹ Primarily, the tribunal upheld the right to access information, which, as a part of the right to freedom of thought, belief, and expression, is crucial for a healthy democracy.⁷⁰ The tribunal also recognized the importance of promoting the right to access information because it holds governments accountable and prevents pharmaceutical companies from putting their private interests before the public's interest.⁷¹

Having seen the contracts in question, the tribunal also held that publicly disclosing the contract details would not jeopardize the public health and safety nor harm the pharmaceutical companies' intellectual property.⁷² Therefore, the tribunal held that a failure to disclose these contracts would violate the principle of "maximum disclosure," an Inter-American standard used by the Colombian Constitutional Court for the right to access information.⁷³

Three months after the ruling, IAS published copies of the COVID-19 vaccine contracts signed between the Colombian government and Pfizer and AstraZeneca.⁷⁴ Along with the contracts, the IAS published a statement explaining that publishing these contracts do not violate the confidentiality clauses and consequently should not affect Colombia's vaccination plan.⁷⁵ IAS's success and the administrative tribunal's reliance on international human rights law, particularly the right to access information, provides a strong foundation for similar, future challenges.⁷⁶

69. *Id.* at 22-23.

70. *Id.* at 23.

71. *Id.*

72. *Id.* at 24.

73. *Id.*

74. ANTICORRUPTION INSTITUTE, *Anti-Corruption Institute Publishes Copies of the Contracts Signed by the Colombian Government and the Pharmaceutical Companies AstraZeneca and Pfizer*, <https://www.estudiosanticorruccion.org/en/anti-corruption-institute-publishes-copies-of-the-contracts-signed-by-the-colombian-government-and-the-pharmaceutical-companies-astrazeneca-and-pfizer/> (last visited Jan. 28, 2022).

75. *Id.*

76. See Rocio Quintero, Timothy Hodgson & Young Park, *COVID-19 and Courts Symposium: Maximum Disclosure – Colombian Tribunal Leads Way in Ensuring Transparency over COVID-19 Vaccine Contracts*, OPINIOJURIS (Aug. 2, 2021), <https://opiniojuris.org/2021/08/02/covid-19-and-courts-symposium-maximum-disclosure-colombian-tribunal-leads-way-in-ensuring-transparency-over-covid-19-vaccine-contracts/> (recognizing the importance of the Colombian tribunal decision in upholding the need to publicly disclose COVID-19 vaccine procurement contracts).

V. CONCLUSION

In the unprecedented emergency we continue to live in, COVID-19 vaccines should be made accessible to all, regardless of a country's wealth or resources. To ensure equitable access to COVID-19 vaccines, barriers like NDAs, which result in unfavorable pricing, create legal issues that delay procurement, and violate international human rights standards, should not be allowed.