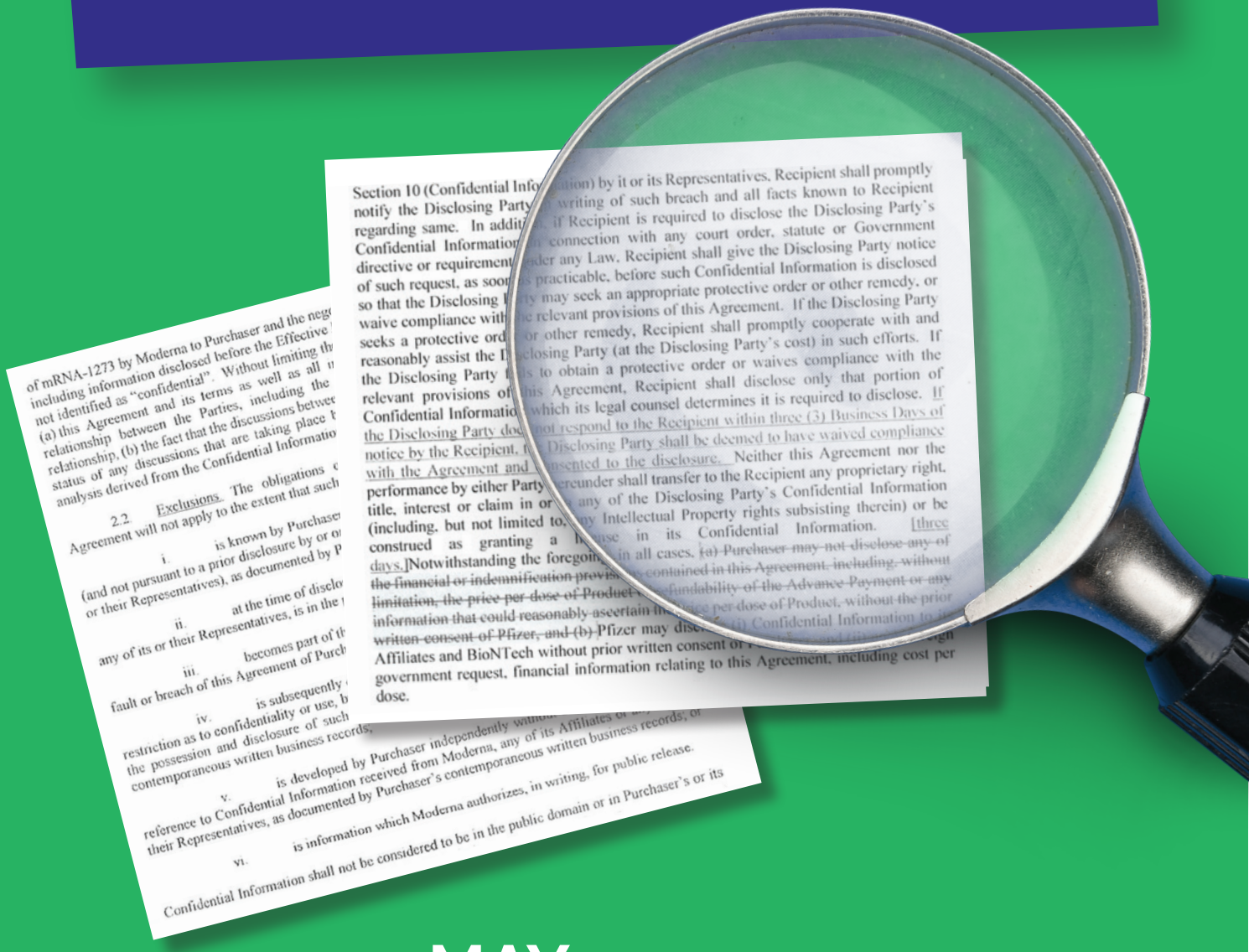
THE NEGOTIATIONS...

"ONE-SIDED"

PART 2



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HEALTH JUSTICE INITIATIVE

O'NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW
GEORGETOWN LAW

PUBLICCITIZEN

“We need to be able to disclose and be accountable”

– South African government official[1]

1. On 18 February 2022 in Gauteng, South Africa, the Health Justice Initiative (HJI) launched legal proceedings in the Pretoria High Court in South Africa for the disclosure of all COVID-19 vaccine procurement contracts and all negotiation records with relevant companies and institutions.
2. This follows an access to information request in July 2021 to the National Department of Health (NDoH) which was refused. Specifically, HJI asked for the following:
    a. Copies of all COVID-19 vaccine procurement contracts, and memoranda of understanding, and agreements (we refer to this as “part 1”) and
    b. Copies of all COVID-19 vaccine negotiation meeting outcomes and/or minutes, and correspondence (we refer to this as “part 2”).
3. This case was heard by Millar J in the Pretoria High Court on Tuesday, 25 July 2023.
4. On 17 August 2023, the Pretoria High Court (Millar J) ruled in favour of HJI and its bid to compel the NDoH to provide access to the COVID-19 vaccine procurement contracts. The Court ordered that all COVID-19 vaccine contracts must be made public, and the costs of the case were awarded in HJI’s favour.
5. The Court ordered the disclosure of:
    a. Copies of all COVID-19 vaccine procurement contracts, and memoranda of understanding, and agreements (we refer to this as “part 1/a”) and
    b. Copies of all COVID-19 vaccine negotiation meeting outcomes and/or minutes, and correspondence (we refer to this as “part 2/b”)

    -within ten court days of the Judgment (being 31 August 2023).
6. The Minister of Health did not pursue an application for leave to appeal the Judgment. The Department’s legal representatives, however, requested an extension until 29 September 2023 for the handover of the “part 1/a” and “part 2/b” documents.
    a. HJI granted the extension for the “part 2/b” documents (negotiation meeting outcomes, minutes, and correspondence) but did not grant it for the “part 1/a” documents (Contracts, MoU, and Agreements).
    b. On Thursday, 31 August 2023 there was a handover of documents from the NDoH to HJI’s legal representatives. The Department claimed that the documents were Contracts, MoUs, and Agreements” (part 1/a) with three companies (Janssen/ J&J, Pfizer, SII, and with one not-for-profit initiative – GAVI (for COVAX). The documents were not redacted.
    c. The HJI received the “part 2/b” documents on 29 September 2023 and 17 November 2023.

Background

Disclosure Part 1/a: The Contracts 2023

Immediately following the release of South Africa's COVID-19 vaccine procurement contracts, the HJI worked with a multistakeholder group to conduct an analysis of the four agreements which we released in September 2023 with the contracts on the HJI's website. HJI 2023 ***Multistakeholder Report, "One-Sided": Vaccines Save Lives —Transparency Matters,"*** detailed how supply agreements for COVID-19 vaccines heavily favoured multinational corporations to the detriment of the South African public. Analysing the final contracts released pursuant to HJI's legal victory to access vaccine procurement agreements, the multistakeholder group explained how corporations leveraged the conditions of the pandemic and their monopoly control over the vaccines to diminish transparency; eliminate accountability for the late, or even the complete failure, to deliver doses; and coerce government to put up sovereign assets as collateral.[2] The 2023 Multistakeholder Report found the terms and conditions were overwhelmingly one-sided and favoured multinational corporations, placing governments in the Global South, and in turn, the people living in these countries, with unusually hefty demands and conditions, including a lack of transparency, and very little leverage against late or no delivery of supplies or inflated prices resulting in gross profiteering. But the scale of these corporations' contractual arm twisting amidst the pandemic comes into clearer view in light of the second release of documents (Part 2/b), which includes draft text for the contracts and proposed revisions and commentary by the South African government via health department officials.

Disclosure Part 2/b: Negotiation records – 2023

Several documents and records were disclosed under Part 2/b for the various companies/ institutions as listed below. While all of the documents are useful and relevant for future pandemic preparation, detailed analysis is only provided for the additional documents shared in relation to Pfizer, and for documents shared relating to Moderna – with the expert legal and analysis support of Public Citizen.

Moderna – documents disclosed – per Part 2/b:

NOTE: South Africa never entered into a final, signed vaccine supply agreement with Moderna and in the end did not procure vaccines from Moderna in 2020, 2021 or since, but it did enter into discussions and negotiations, governed by a binding Confidential Disclosure Agreement, as now confirmed by the release of the following documents:

1. A **Confidential Disclosure Agreement** for the exchange of ''Confidential Information'' between Moderna and South Africa, so that the South African government could decide whether to enter into and negotiate the terms of a vaccine supply agreement [hereinafter "Confidentiality Agreement"]; and
2. A **Summary Framework of Moderna's supply agreement** [Terms and Conditions Supply Agreement] with South Africa that notes its principal terms [hereinafter "Summary Framework"]. It states that the document's sole purpose is to "discuss'' the proposed transaction, that the terms do not constitute ''binding obligations'' on either of the parties, and "only execution and delivery of the Supply Agreement will result in any binding or enforceable obligations."[3]

At HJI's request, the multi-disciplinary group tasked with the joint analysis and Report of the contracts released as Part 1/a in late 2023, was again asked to review the documents on HJI's behalf. The team at Public Citizen [4]analysed the above documents and found that Moderna sought to use more one-sided provisions than other manufacturers supplying COVID-19 vaccines to South Africa, as explained below:

1. The Confidentiality Agreement included proposed longer confidentiality terms, defining the confidentiality agreement itself and discussions about supplying the country with vaccines as ''confidential information,'' barring the use of confidential information in legal and patent proceedings against the company, and an inequitable arbitration provision that allowed only Moderna to seek preliminary injunctive relief from the courts.
2. The Summary Framework [of the unfinalised Agreement] reveals that Moderna actually wanted to charge an excessive price for its vaccines and also required South Africa to be fully responsible for retrieving the vaccines from Moderna's European sites, which contrasted with the somewhat less restrictive provisions in the unfinalised agreement, including a payment structure that seem to propose a portion of the payment to be made after delivery and a narrower indemnification obligation.

Key clauses and terms in the Confidentiality Agreement included a:

1. **Prohibition against using Confidential Information in legal or patent proceedings against Moderna**: The Confidentiality Agreement wanted to bar South Africa from using the Confidential Information disclosed pursuant to the agreement for starting or advancing legal or patent proceedings against Moderna or its Affiliates.[5] The Confidentiality Agreement does not define what a "legal or patent proceedings" is, allowing for a broad interpretation that includes compulsory licensing, pre- and post-grant oppositions, among other measures. However this is difficult to confirm given the secrecy around these documents in other countries. Moderna likely sought a similar obligation from other governments and companies. This means that in South Africa and possibly other countries Moderna used COVID-19 vaccine contract negotiations to build greater barriers to intellectual property and knowledge sharing.
2. **Fifteen-year bar against the disclosure of Confidential Information**: The Confidentiality Agreement came into effect on 24 December 2020, when it was signed by both parties and would apply for 15 years after the last Confidential Information disclosure, so long as that information disclosed still qualified as confidential pursuant to the agreement.[6]
    a. The 15 years of confidentiality protection[7] by Moderna appears to be longer than that sought by other manufacturers. Janssen, for example, included a 10-year term of confidentiality following expiry of the agreement, and appears to give greater leeway for government disclosure of confidential information, such as when it "is legally required to be disclosed in terms of Law."[8]
    b. Pfizer also included a 10-year term of confidentiality, but states that for information considered a trade secret, that protection will extend indefinitely so long as the information remains a trade secret. In any case, Pfizer required confidentiality protection for trade secrets to be no less than the aforementioned 10-year term.[9]
    c. Serum Institute's supply agreement merely states that its confidentiality clause shall survive the termination or expiry of its agreement, with no specification as to the length of the protection.[10]
    d. Thus, the 15-year term of protection Moderna sought for its confidential information is, in some respects, longer than that negotiated by some manufacturers. In other respects, Moderna's confidentiality protections may seem shorter because they fail to reference lengthier trade secret protections and include a defined endpoint.

3. **Categorising the Confidentiality Agreement itself as Confidential Information (and see below):** Exemplifying the trend of shielding agreements related to vaccine supply from public accountability, the Confidentiality Agreement defined Confidential Information to include (1) the agreement, its terms, all information relating the proposed supply relationship between the parties, and the proposed commercial terms of the supply relationship; and (2) the fact that discussions between the Parties are occurring and the content and status of any discussions.[11]

4. **A one-sided exception to arbitration for all disputes in New York City pursuant to the laws of New York State:** Moderna ensured arbitration of any disputes in New York, subject to the laws of the State of New York but *excepted itself* from the requirement by allowing Moderna to seek preliminary injunctive relief in *any court* of competent jurisdiction.[12]

The Summary Framework:

Critical provisions that were included:

1. **Disclosure of price terms, delivery schedule, and payment structure:**

Moderna seemingly wanted to price doses differentially based on the quarter of receipt:

a. For doses delivered in Q2 2021, the price per dose would have been $42 USD.

b. In Q3 2021, the price per dose would have been $32.30 USD.

c. Finally, in Q4 2021, the price per dose would have been $28.50 USD.

And:

a. South Africa would receive a 5% discount for an order of 20 million doses.

b. 30% of the total payment was non-refundable, and 30% of the total payment would be due within 15 days of signing the Supply Agreement.

c. 40% of the total payment would be due within 30 days of local marketing approval, including emergency use authorisation.

d. For each delivery, 30% of the total payment for the delivered doses would be due within 30 days of delivery.

e. The anticipated delivery schedule would then have been 300,000 doses in Q2 2021, 5.7 million doses in Q3 2021, and 14 million doses in Q4 2021.[13]

I. By comparison, Pfizer sought to charge $10 USD per dose in each of these quarters in its interim delivery schedule. [14]

II. Janssen sought the same price initially for the same quarters although it's unclear if the price was decreased according to its secret Global Not for Profit Basis Framework that would reduce the price of the vaccine just in 2021.[15]

III. Serum also charged a much lower price per dose, at $5.35 USD.[16]

f. Moderna's price per dose as contained in these negotiation documents, and compared to these manufacturers, appears excessive.[17]

By contrast:

I. In its initial agreement, Pfizer required an advance payment of $2 USD per dose (20%) and

provided a 50% refund on the advance payment for undelivered doses if Pfizer failed to deliver all of the contracted doses (20,001,150) by December 2022 (a very lengthy grace period).[18] Pfizer also required the complete cost of the vaccine to be paid prior to each delivery.[19]

II. Janssen required a down payment of 27.5 million USD for 11 million doses (25%) in its initial supply agreement that was not refundable and also required the balance of the payment for doses to be paid prior to delivery.[20]

III. Serum required a 100% advance payment before 22 January 2021, of $8.025 million USD for 1.5 million doses, 1 million of which would be delivered in January 2021 and .5 million would be delivered in February 2021.[21] Serum would refund the advance payment for undelivered doses if it failed to receive regulatory approval of its vaccine.[22]

In sum, Moderna had sought egregious price terms and had harsher non-refundability provisions. This is despite a payment schedule, which allowed for a portion of the payment after delivery of the doses.

2. **Broad indemnification, except for wilful misconduct**:

Except in the case of wilful misconduct by Moderna Parties, South Africa would have been required to indemnify Moderna and all parties in Moderna's supply chain from losses, damages, etc. associated with the manufacture, testing, research, development, delivery, distribution, administration, offer for sale, sale, import, export or use of the product.

a. Indemnification extends to the provision of clinical interventions or compensation to participants in clinical trials in the territory.

b. Indemnification in these scenarios would have been required if Moderna would enjoy statutory immunity under the "PREP Act" if it applied in South Africa, or where South Africa is responsible for the losses, damages, etc.[23] References to the "PREP Act" in the term sheet presumably refers to the United States's Public Readiness and Emergency Preparedness Act (PREP Act).

c. Pfizer had a similarly sweeping indemnification obligation, but egregiously did not except wilful misconduct by the company from South Africa's indemnification obligation.[24] Pfizer's indemnification obligation appears to have extended to its vaccine regardless of whether it was supplied through the agreement, but Moderna stipulated that part of the indemnification obligation would be circumscribed to vaccines supplied under the agreement (except with respect to clinical trials in the territory).

d. Pfizer's indemnification obligation, however, does not reference the United States' legislation, the PREP Act. Moderna's reference to it results in confusion as to whether the indemnification obligation is broader and covers vaccines not supplied through the agreement. *[The PREP Act gives immunity for any "covered countermeasure," except in the case of wilful misconduct that causes death or serious bodily injury.[25] In theory, then, the reference could encompass vaccines not supplied through the agreement. The wording of the indemnification obligation is not at all clear, so it's challenging to discern the scope of South Africa's indemnification obligation based on the framework's reference to the PREP Act. In any case, the reference to the domestic legislation in the United States for understanding this obligation is surprising.]*

e. Janssen similarly excepted wilful misconduct and failure to follow cGMP by the company from South Africa's sweeping indemnification obligation, which covered vaccines regardless of whether they supplied under the agreement.[26]

f. Serum also excepts wilful misconduct and gross negligence with respect to the manufacture of the vaccine from South Africa's indemnification obligation and narrows the obligation to only those vaccines manufactured by Serum and purchased under the Agreement.[27]

Moderna's indemnification obligation included a peculiar reference to domestic legislation in the United States that sought to provide the company with immunity, which makes the boundaries of South Africa's indemnification obligation then ambiguous.

3. **South Africa was completely responsible for delivery from Moderna's European sites**: Moderna sought an undertaking that Moderna would make its product available at its sites in the European Union or Switzerland. South Africa would then assume **all responsibility** for conducting exportation, importation, storage, distribution, product traceability, and related activities.[28]

This is one of the most surprising provisions – seeking to hold South Africa completely responsible for the delivery of the vaccines from Moderna's sites and it stands in stark contrast to the provisions for delivery in Pfizer's, Janssen's, and Serum's supply agreements:

a. Pfizer, for example, stipulated that the parties will reasonably agree upon a location for delivery before shipments, that it would take up responsibilities related to importation, but imposed the obligation of unloading the vaccines on the South African government.[29]

b. Janssen set the delivery address as the international airport in Johannesburg, but displaced compliance with importation requirements to the South African government.[30]

c. Serum also set the delivery address for the international airport in Johannesburg and placed the responsibility for clearing the vaccine delivery on the South African government.[31]

Thus, the delivery requirements Moderna sought to impose upon South Africa were the most one-sided of the four manufacturers.

4. **Categorising the Confidentiality Agreement itself as Confidential Information**
As mentioned above, Moderna's Confidentiality Agreement exemplified manufacturers' approach to shielding all COVID-19 supply agreements and their negotiations from public accountability.

a. Moderna defined as confidential information (1) the agreement, its terms, all information related to the proposed supply relationship between the parties, and the proposed commercial terms of the supply relationship; and (2) the fact that discussions between the Parties are occurring and the content and status of any discussions. [32]

b. Janssen similarly defined its confidential information to include the supply agreement, and any information supplied by it or its affiliates to the government relating to the agreement.[33]

c. Pfizer, by contrast, defined confidential information to include the terms and conditions of the supply agreement.[34] In enumerating certain legal circumstances requiring disclosure of confidential information, Pfizer barred the disclosure of the financial and indemnification provisions, including price per dose and the partial refundability of the advance payment without prior written consent.[35]

d. The Serum Institute, by contrast, does not expressly include the supply agreement or its terms in its definition of confidential information.[36]

Moderna appears to have taken the most aggressive approach to try to shield any possible supply of COVID-19 vaccines to South Africa from public accountability. It goes further than other manufacturers by defining the confidentiality agreement itself as well as any and all discussions about the supply relationship as ''confidential information.'' [*One limitation of this finding is that it is possible that a similar provision could have been included in pre-supply agreements entered into by the other manufacturers that were perhaps not disclosed by government in this case.]*

5. **A one-sided exception to arbitration for all disputes in New York City pursuant to the laws of New York State**

   Moderna required arbitration of any disputes arising from the confidentiality agreement in New York, subject to the laws of the State of New York. However, it included a self-serving exception that allowed Moderna to seek preliminary injunctive relief in any court of competent jurisdiction.[37]

   a. Janssen and Pfizer had also required arbitration of disputes arising from their supply agreements. Janssen required arbitration of disputes in London according to the Laws of England and Wales, and there is no exception for resort to the courts for injunctive relief.[38] Pfizer's supply agreement required arbitration of disputes in New York, according to New York State Law, but expressly allowed either party to seek preliminary injunctive relief to avoid irreparable harm.[39] Revisions proposed by South African officials in negotiating the supply agreement with Pfizer suggest they believed that the Laws of England and Wales would have been preferable and more neutral compared to those of New York.[40]

   b. The Serum Institute did not require arbitration in its supply agreement, instead stipulating that the Courts of Pune, Maharashtra, India, would have exclusive jurisdiction over disputes from the agreement.[41]

Thus, on top of employing a more secretive dispute resolution method, arbitration, Moderna employed the most one-sided approach of these manufacturers by only permitting itself to break the binding arbitration commitment to seek preliminary injunctive relief in the courts.

NOTE: During April 2024, Moderna announced it was pausing operations at its single African plant in Kenya, which was criticised by the Africa Centres for Disease Control (CDC) among others.[42]

PFIZER:

"We need to be able to disclose and be accountable"

– South African government official[43]

The 2023 Multistakeholder Report identified several contractual provisions that heavily favoured Pfizer in the supply of its vaccine to South Africa, including, but not limited to, unfair indemnification and confidentiality provisions, a complete lack of certainty regarding the supply of doses, and a deficient remedy in case Pfizer failed to deliver doses.

The release of the second set of documents (Part 2/b) – the negotiation texts – demonstrates that South African officials did try to include provisions to mitigate the unfettered power and control Pfizer sought to exercise over the supply agreement, and even though it was largely unsuccessful, because of Pfizer's conduct, it did try to advocate for:

1. critical liability provisions to ensure Pfizer fulfilled its obligations to supply doses;
2. transparency and flexibility for disclosure of confidential information in emergencies;
3. fairer indemnification provisions that did not grant a blank check of immunity for actions purely under Pfizer's control; and
4. greater flexibility in both receiving and supplying Pfizer's vaccines to other entities, which could have achieved fairer bargains and advanced the utility of vaccines if they were no longer efficacious in South Africa.

Pfizer's almost universal rejection of the South African government's proposed amendments is the clearest example of and indictment of concentrated private power, particularly in public health emergencies.

The Part 2/b or second release of documents includes prior drafts of procurement agreements, which contain several government officials' proposed revisions and reactions to Pfizer's proposed contractual terms. At the request of HJI and given its long standing scrutiny of Pfizer's one-sided supply agreements in other jurisdictions too, Public Citizen was asked to analyse three prior drafts of South Africa's procurement agreements with Pfizer. It found that South African officials did also:

1. seek to include terms that would hold Pfizer accountable for late, or incomplete, delivery of doses;
2. seek to narrow the unreasonably broad indemnification obligation, which could be construed to cover even wilful misconduct by Pfizer;
3. try to include flexibilities for the disclosure of confidential information to bolster transparency, increase trust in the vaccine programme, and allow for the release of information in public emergencies; and
4. seek the inclusion of terms that would not reinforce Pfizer's restrictive hold on global vaccine supply.

Pfizer categorically rejected each and every one of these requests and proposals or amendments. This outsized power in the contract negotiations is also readily apparent throughout the final procurement agreement that was disclosed in 2023 (Part 1/a).

1. The first version of the draft contract appears to contain revisions and comments from government officials external to NDoH, as some commentators left notes to NDoH in the draft, and it states it is "SUBJECT TO FURTHER INTERNAL REVIEW BY PFIZER".[44]
2. The second version is entitled "NDOH COMMENTS 23.02.2021," and contains the same stipulation that it is subject to further review by Pfizer.[45]
3. For the third version, it is unclear which government-side employees were responsible for the proposed amendments and comments, which is simply titled "WW comments 16021(2)," and similarly states that it is subject to Pfizer's review.[46]

In sum, the three drafts give us a glimpse into the reactions of and positions taken by South African officials and also the revisions that they sought. It remains unclear if Pfizer responded to these concerns in between iterations of the drafts and/or if the drafts were circulated in a consecutive manner between different units in the health department without input or feedback from Pfizer. Several comments in the third version suggest at least some serious concerns and issues in prior drafts had been raised with Pfizer.[47]

> "We will want to pertinently again raise the issue of indemnity with Pfizer, particularly as our Minister is seemingly expected to sign the agreement. We would propose a delineation of indemnification that would retain liability in respect of those matters that are under its knowledge, responsibility and control and are not at all in respect of the Government's knowledge or control-especially, design, development, investigation, formulation, testing, clinical testing, manufacture."[48]

Public Citizen's analysis presumes, at the very least, that if revisions or comments in the most recent draft of the agreement, the third version, failed to be included in the final contract, Pfizer rejected those terms. Public Citizen's analysis includes comparing the final manufacturing and supply agreement between South Africa and Pfizer, the three prior drafts of the agreement, and the proposed ''modifications / revisions'' and ''comments'' by South African officials – almost all of which were rejected in wholesale fashion by Pfizer.[49]

Four central aspects of the draft agreements and negotiations warrant discussion as they illustrate Pfizer's outsized power and control from the outset that pervade the final agreement that was eventually signed.

However, beyond the four substantive areas of the procurement agreement outlined below, there are a number of other provisions and comments in the drafts that illustrate how Pfizer almost universally rejected any attempts to moderate its power, ranging from rejected amendments on arbitration clauses; joint publicity; obligations to minimise losses; requests for a prompt response in the case of non-compliant vaccine deliveries; coercion of government into atypical obligations, such as unloading deliveries, covering the costs of vaccine recalls, and organising the return of equipment; and in one instance, a broken promise regarding the use of Pfizer's shipping containers – all pointing to Pfizer's absolute control– which pervade the final procurement Agreement.

Four central aspects: Pfizer

1. Insulation from accountability for dose delivery:

Pfizer categorically rejected terms that would hold the company accountable for late or failed deliveries of contracted doses, even where South Africa had already paid for the doses.

2. Broad obligations to indemnify Pfizer:

Pfizer forced the South African government into accepting an unreasonably broad indemnification obligation, which could be construed to cover wilful misconduct and losses derived from the earliest stages of vaccine development that the South African government had no responsibility for.

3. Ironclad confidentiality provisions that hamper public health responses:

Pfizer rejected provisions that would have permitted disclosures of confidential information in emergency circumstances and for bolstering transparency and trust in the vaccination programme. Dialogue from officials also suggests the provisions may hamper oversight from lawmakers and the Auditor General.

4. Pfizer's stranglehold on the supply of vaccines: **Pfizer categorically rejected** all attempts by the South African government to ensure that the company could not unreasonably withhold or delay its consent for South Africa to receive its vaccine from another entity or to allow South Africa to donate or resell the doses to other countries.

Insulation From Accountability For Dose Delivery

1. As the 2023 Multistakeholder Report details, Pfizer's final contract allowed only for a partial refund of 50% of an Advance Payment of $40,002,300 for the contracted doses if Pfizer failed to deliver the doses.[50] That amounts to less than 10% of what South Africa legally obligated itself to pay for the contracted doses.[51]
2. If Pfizer was unable to deliver doses by 31 March 2022, Pfizer would have no obligation to deliver against the interim or adjusted delivery schedule, a broad provision that absurdly fails to guarantee any supply certainty in a supply agreement.[52]
3. A closer examination of the draft versions of the agreements demonstrates just how one-sided these provisions were. In response to the provision eliminating liability for Pfizer's failure to deliver doses in accordance with the estimated delivery dates and depriving the government of any right to cancel orders based on this failure, one government official noted: **"So, how will we performance manage them?"[53] Similarly, another official noted: "This is unacceptable – how do we then performance manage them?"[54]**
4. Officials were also concerned with a provision that stated: "Purchaser shall submit to Pfizer a legally binding and irrevocable Purchase Order(s) for twenty million one thousand one hundred fifty (20,001,150) doses. . ." Here, officials expressed concern that the inability to stagger the purchase order would commit South Africa to purchasing doses that, in the future, lacked efficacy against other variants.[55]
    a. After requiring South Africa to make an irrevocable purchase commitment to the 20 million doses, Pfizer mandated that all payments be made on the first business day of the calendar quarter for which deliveries are scheduled, with deliveries being scheduled in each of the last three quarters of 2021.[56] Further, Pfizer mandated that payment must be made before doses are delivered,[57] and Pfizer deprived South Africa of the right to cancel orders for failure to deliver.[58]
    b. The termination provisions are also one-sided:
        I. The ''Termination for Cause'' provision stated that either party may terminate the agreement upon written notice in the event of a material breach, where it has been uncured for 30 days or is incurable in nature – but despite such a right (to terminate), the documents suggest that[59] South Africa would be the only one facing a financial risk here: even if Pfizer terminated the agreement pursuant to this provision, South Africa would have been obligated to pay the full price of all the contracted doses within 30 days.[60]
        II. South African officials attempted to include the following modification: "In the event that this agreement is terminated by Purchaser under this section 6.2, Pfizer shall reimburse Purchaser with the Advance Payment and all other payments made by Purchaser within 30 days of the date of notice of termination of this agreement."[61] **Pfizer again categorically rejected the modification**. The ''Mutual Termination Rights Section'' that follows provides South Africa with a very limited remedy.
        III. That provision states if authorisation for the vaccines is not issued by 30 September 2021 and Pfizer has not supplied any doses by that date, or if Pfizer is unable to supply all of the contracted doses by 31 December 2022, either party may terminate the agreement.[62] South Africa's seemingly sole remedy in this circumstance is a 50% refund of the Advance Payment for the Contracted Doses not delivered, which would be pro-rated based on the doses undelivered.[63] The last doses, according to the interim delivery schedule, would have been

delivered by the end of Q4 in 2021.[64] Therefore, it appears that the 31 December 2022 date for terminating the agreement in case Pfizer fails to deliver the contracted doses gives the company a grace period of a year to complete any late deliveries, prior to which South Africa has no remedy. In the second version of the draft agreement, South African officials tried to address these troubling provisions by proposing a cut-off date of 31 December 2021 for the delivery of doses instead of 31 December 2022, among other changes **which was not included in the final agreement.**[65]

Note: It remains unclear why these proposed revisions were not included in the third draft of the agreement or the final contract: either Pfizer rejected these modifications in other communications not available here, or South African officials working on subsequent versions of the agreement removed the revised cut-off date for unknown reasons. A possible reason, though, is that Pfizer's strong position against accepting revisions by the South African government may have led to pessimism as to achieving this modification.

In summary, despite efforts by South African officials to include amendments that would ensure at least some supply certainty and some accountability for Pfizer's failure to deliver doses, Pfizer exploited the conditions of the pandemic and its monopoly power resulting in South Africa signing provisions that exempted Pfizer from any liability for late or incomplete delivery of doses. The provisions provided Pfizer with an asymmetric remedy of full payment of the contract in the event of a breach by South Africa, but seemed to only provide South Africa with a 50% refund on the advance payment of undelivered doses (which was less than 10% of the entire required payment) if South Africa terminated the agreement because Pfizer failed to deliver all the contracted doses one year after the last scheduled delivery date in the agreement.

Unilaterally Broad Obligations To Indemnify Pfizer

The **2023 Multistakeholder Report** notes that Pfizer required South Africa, as well as many other countries in the Global South, to establish ''indemnification and compensation'' funds in exchange for supplying its vaccine.[66] From the documents disclosed to HJI, it is clear that South Africa's indemnification obligations was a key site of controversy in the multiple drafts of the agreement.

1. First, in the second draft of the agreement, officials tried to limit how long South Africa was required to indemnify Pfizer for essentially all vaccine-related activities, many of which the country had no responsibility for.
    a. The officials sought a modification that would have only required South Africa to indemnify Pfizer for the term of the agreement.[67]
    b. Further, the officials sought to narrow the indemnification obligation to only those vaccines procured under the terms of the agreement, as Pfizer's definition of "Vaccines" includes any of its vaccines used within the country's territory, whether or not procured according to this agreement.[68]
    c. It is unclear whether Pfizer rejected these limitations, or if some South African officials removed these terms in a later draft.

2. Second, officials tried to eliminate indemnification of any entities Pfizer or its affiliates indirectly owed indemnity to in relation to the vaccine.[69]
3. Third, officials wanted to limit the indemnification obligation to "those issues where the Purchaser is responsible for the loss, rather than purely indemnifying Pfizer against all losses that are or were under the control of Pfizer."[70]
    a. To that effect, they sought (1) to limit their coverage of losses relating to the design, development, investigation, formulation, testing, clinical testing, and manufacture of the vaccine; and (2) a modification to limit their obligation such that covered ". . . activities, actions, processes and other operations referred to are not solely under the knowledge, responsibility and/or control of the Indemnitees to the exclusion of the Purchaser."[71]
    b. Pfizer rejected South Africa's proposed terms on indirect indemnification and the limitation of coverage to activities the country was somehow responsible for, **essentially forcing South Africa to indemnify Pfizer for any and all possible claims that may arise against the company in exchange for supply of the doses**.

What Pfizer wants; Pfizer gets: The rejected contract amendments

a. Pfizer refused to accept a proposed revision that would have prevented indemnification for wilful misconduct or failure to comply with cGMP.[72] To put this refusal in context, even the agreement between South Africa and COVAX says that the Facility "expects" that indemnification provisions in supply agreements with manufacturers would not apply when "an injury associated with the vaccine resulted from wilful misconduct or gross negligence of the manufacturer or from a defect in the vaccine due to noncompliance with terms of the marketing authorisation, cGMP, or the like."[73] In its contract with South Africa, Janssen accepted to exclude "adjudicated wilful misconduct" or "adjudicated failure" to comply with cGMP from the indemnification clause.[74]
b. Pfizer rejected modifications that would have required it to minimise the risk of an indemnified claim and mitigate losses that South Africa would ultimately bear responsibility for.[75]
c. Pfizer rejected limitations on its unilateral right to assume defence of an indemnification claim within 30 days, for which South Africa would pay all expenses.[76] *A South African official noted that the provision was unusual because assuming the defence in this manner normally occurs if, for example, NDoH fails to defend the claim. Here, however, Pfizer has wide authority to assume the indemnification defence and require South Africa to pay all related costs.*[77]
d. To fulfil the indemnification obligation, ***Pfizer required South Africa to establish a no-fault compensation fund by 30 April 2021*** that would cover claims of ''damage, injury or harm relating to the development, administration, or use of the Vaccine.''[78] The 30 April 2021 deadline for stablishing the fund was only a month after the effective date of the agreement. In contrast, although Janssen also demanded a no-fault compensation system, under that agreement South Africa was required to establish it "as soon as possible" after the effective date.[79]
    i. Coverage would be applicable to losses or injuries occurring before or after the creation of the fund.[80]
    ii. Initially, the Compensation Fund would compensate injuries deriving from only the administration or use of the vaccine, but in the final contract, Pfizer also received indemnification coverage for the development of the vaccine.[81]
    iii. South African officials also sought a more equitable system where the Compensation Fund

would cover losses and claims deriving only from vaccines procured under the agreement, as opposed to the vaccine's use generally, and the Compensation Fund would stop covering losses once the vaccines were registered with the South African Health Products Regulatory Authority. However, these changes were not included in the final contract, either because Pfizer rejected these terms or government officials removed these modifications in the next draft.[82]

As the **2023 Multistakeholder Report** noted, Pfizer initially had the sole and exclusive right to determine the nature of guarantees against indemnification claims, but the company backed down on some of its expansive requests after public pressure.[83]

1. South African officials did fight against Pfizer's sole discretion to determine whether adequate protection would be afforded with respect to the vaccine and to require additional terms and guarantees to fulfil the indemnification obligations.[84]
2. While Pfizer did retain that the Purchaser had to demonstrate adequate protection in a manner satisfactory to Pfizer and that South Africa needed to show authorisation for the indemnification obligations, Pfizer dropped the requirement for documentation that guaranteed payment of such claims in its sole discretion and the requirement to attach such guarantees to the contract.[85]

In sum, Pfizer, in wholesale fashion, forced South Africa into accepting wide-ranging indemnification obligations, refused many commonsense limitations on such indemnification (such as bars against indemnification for wilful misconduct), and in a rare occurrence, agreed to South Africa's not providing guarantees of payment for these indemnification obligations.

Ironclad Confidentiality Provisions That Hamper The Government's Public Health Response

The draft agreements show that South Africa sought greater flexibility in disclosing confidential information:

a. In the second draft officials sought to eliminate what appears to be an absolute bar against disclosure of the ''indemnification clause, refund provision, and price information'' without Pfizer's written consent.[86] An official commented with respect to this proposed revision, **"We need to be able to disclose and be accountable."**[87]

b. In the second draft of the agreement, NDoH officials also tried to preserve self-governance by allowing **disclosure to the Auditor General, Parliament, or in compliance with existing legislation** without Pfizer's prior approval.[88] These amendments were not included in the final contract, so either Pfizer rejected them or an official removed them in next draft. By the third draft of the agreement officials expressed dismay that the government would not be able to publish price information anywhere and questioned whether Pfizer's advance notification provisions in connection to disclosures required by law, government directives, applied to the office of the Auditor General.[89]

Again, this highlights how in a pandemic, medical procurement contracting can infringe on a country's ability to self-govern, with pharma demanding provisions potentially restricting disclosure to lawmakers and even government auditors.

c. In the second draft, officials also tried to revise Pfizer's ironclad confidentiality restrictions by referencing the World Health Assembly's (WHA) resolution about transparency of markets for medicines, vaccines, and other health products.

a. Officials stated that the Resolution required the government to share information relating to medical products and referenced that the United States government, where Pfizer is headquartered, accepted the resolution adopted by the WHA to the resolution.[90]

b. They suggested the confidentiality protections last two years rather than 10.[91] The 10-year term of confidentiality was so alarming to an official that they incredulously commented, **"What?"**![92]

To South Africa's credit, its officials tried to amend the draft agreement to enable disclosure that would or could serve important public interest considerations such as:[93]

(1) "[T]he Purchaser believes transparency as regards the Programme is important to garner public trust and confidence in and support for the Programme: so as to encourage maximum public uptake of the Vaccines;"

(2) "[D]uring the course of the Programme, Purchaser considers it possible that emergency situations may arise which necessitates expeditious disclosure of Confidential Information in order to protect public safety;"

(3) "the Government Purchaser intends selling [sic] or donating any of the Products to other purchasers."

Government officials instead proposed several other factors that could inform disclosure:

1. The value of disclosure of Pfizer Confidential Information toward resolution of the circumstances in section 10.4(a);
2. The commercial, regulatory, scientific, strategic, or other value of the Pfizer Confidential Information to Pfizer, and the extent to which, if disclosed or otherwise made available to the public, would result in significant competitive prejudice and undue loss to Pfizer and its affiliates;
3. The extent to which similar information of other vaccine manufacturers has been disclosed (or has not been disclosed) by the Purchaser;
4. The extent to which similar information has been disclosed (or has not been disclosed) by Pfizer in other countries; and
5. Redaction, partial or selective disclosure (whether as to content or audience) or other mechanisms by which appropriate disclosure may be made while providing reasonable assurances that confidential treatment will be accorded to the confidential information.[94]

In sum, the negotiation texts reveal efforts by government officials to ensure minimum standards of transparency and flexibility in the disclosure of confidential information. They also stated therein:

> **"We have serious concerns about the Agreement itself being *confidential information*, as this creates serious difficulties for transparency by Government, and there is much criticism in the media as a result about the completely opaque nature of the agreements that have been concluded."[95]**

Pfizer rejected the South African appeal for transparency and public disclosure terms.[96]

To place this refusal in context, Janssen[97] in contrast accepted the revision proposed by South Africa and their final contract contains a framework to reach a "mutually agreeable" approach for disclosure when the government believed that transparency was "important to garner public trust" or was necessary "to protect public safety."

Pfizer's Stranglehold On The Supply Of Vaccines

The 2023 Multistakeholder Report discussed how the final contract/agreement with Pfizer barred the ''resale, transport, donation, or export'' of Pfizer's vaccines without Pfizer's ''written consent.'' Here, we note that the Johnson and Johnson contract required such consent ''not be unreasonably withheld or delayed.''[98] Officials thus sought similar provisions in its contract with Pfizer but to no avail.[99] The officials also requested modifications that would allow the resale or donation of the vaccine outside of South Africa if the vaccine was no longer efficacious within the country, but was efficacious or would be efficacious elsewhere, with Pfizer's approval, which could not be unreasonably withheld or delayed – this was also rejected.[100]

Additionally, Pfizer required South Africa to agree that it would exclusively obtain its supply of Pfizer's vaccine from the company or its affiliates; from Pfizer through GAVI - COVAX; or from a third party only with Pfizer's written consent.[101] Pfizer included a harsh penalty for any breach of the above: it gave itself the power to immediately terminate the agreement, which would trigger the aforementioned obligation to pay the full amount of the irrevocable purchase commitment.[102] Here, South Africa sought a modification so that Pfizer's written consent for procurement from third parties could not be unreasonably withheld or delayed[103]- but again, Pfizer, rejected these proposed amendments to consolidate its exclusive control over global vaccine supplies.

Pfizer's Absolute Control And Broken Promises Pervade The Rest Of The Agreement

1. South African officials unsuccessfully tried to change the arbitration forum from New York to London, such that the governing law would be of England and Wales, which they believed would be a more neutral forum.[104]
2. Pfizer also rejected a provision that would allow South Africa to assign its purchasing obligations in case the vaccine was found to be low in efficacy, with Pfizer's consent which could not be unreasonably withheld or delayed.[105]
3. South Africa's proposed amendments to the Publicity Clause of the agreement were rejected as well- officials sought a revision that consent for using the other party's name, trademark, logos etc. in publicity materials could not be unreasonably withheld.[106] For transparency purposes, officials also requested a standard format for the names and logos of the other party which could be used in publicity materials, which was also refused by Pfizer.[107]

Basically, Pfizer forced South Africa into bearing primary responsibility and risks that normally fall on the manufacturers' shoulders, such as unloading vaccines, recalls, and organising the return of equipment Pfizer may use to ship and monitor the vaccines.[108] South African officials noted this was atypical, but could do nothing about it.[109] Further, with respect to South Africa bearing even the risk of ''loss or damage to Pfizer's shipping containers and monitoring devices,'' one official noted in the second draft the language transposing full responsibility to the Purchaser (South Africa) which contradicted the position Pfizer had presented to the Minister.[110]

Pfizer also wanted the procurement contract to be contingent on sweeping exemptions:

1. Officials noted that they could not realistically have the authority to ***exempt*** Pfizer from obligations to respond to requests for local testing, lot release protocols, and registration samples, which fall within the purview of the medicine regulator, SAHPRA.
2. One official noted that SAHPRA would have to agree to any such exemption first,[111]- the subsequent version of the agreement appears to resolve the issue.[112]
3. Pfizer's stipulation that the company would not be required to submit a price reference certificate in

connection with obtaining conditional regulatory approval was met with scepticism and uncertainty by officials.[113]

4. Pfizer additionally refused to warrant that the product complied with all laws.[114]
5. Even relatively minor changes requested by South African officials, such as modifying Pfizer's obligation to respond in a "prompt manner" as opposed to a "timely manner" if South Africa needed to reject a batch of noncompliant vaccines, were refused by the company.[115]
6. Finally, according to the second draft of the agreement, Pfizer appeared to break an earlier promise that South Africa could use its long-distance shipment containers for distributing the vaccine, which may have been significant given the importance of the temperature-related storage conditions for the vaccine.[116]

As such, the totality of the final agreement and the negotiation texts demonstrate that Pfizer almost never shied away from exercising its power to South Africa's detriment.

Documents also disclosed to HJI - now available to the public:

THE GAVI ALLIANCE: Part 2/b

1. COVAX Facility Explainer – Participation Options for Self-Financing Economies
2. Correspondence from the COVAX facility to GAVI confirming intent to participate in the COVAX facility
3. Terms and Conditions for Participants dated 5 August 2020
4. Two templates of the optional purchase agreement with GAVI Alliance
5. Terms and Conditions for Participants undated
6. COVAX facility Explainer – Participation Arrangements for Self-Financing Economies
7. Terms and Conditions of the Commitment Agreement.

JANSSEN PHARMACEUTICA NV: Part 2/b

1. Term Sheet Template dated 19 November 2020 (contained in the first set of the documents as well)
2. J & J meeting minutes dated 12 October 2020
3. J &J NFC meeting minutes dated 15 February 2020
4. J & J meeting minutes dated 22 December 2020
5. Correspondence from Ministry of Health to J & J dated 23 February 2021
6. J & J meeting minutes dated 4 September 2020
7. Draft purchase agreement between Janssen Pharmaceutica NV and the Government of the Republic of South Africa dated 29 January 2021 (HJI received a similar final version of this draft in the first bundle of documents shared. This version has tracked changes and comments).

SERUM INSTITUTE OF INDIA: Part 2/b

1. Vaccine purchase agreement between the Department of Health, Serum Institute of India Private Limited and Serum Life Sciences Limited dated 15 January 2021 (the final version in the first bundle of documents is dated 18 January 2021, there are differences between the two versions)
2. E-mail correspondence from National Treasury to the NDoH dated 13 January 2021
3. Vaccine purchase agreement between the NDoH, Serum Institute of India Private Limited and Serum Life Sciences Limited dated 15 January 2021 (two copies with comments)
4. Vaccine purchase agreement between the Department of Health, Serum Institute of India Private Limited and Serum Life Sciences Limited dated 2021 (with comments)
5. Meeting notes with CIPLA and Serum Institute – undated.

ASTRAZENECA: Part 2/b

1. Notes on AstraZeneca Agreement
2. AstraZeneca/ Oxford Vaccine discussion with SAHPRA
3. Meeting Minutes 24 December 2020
4. Meeting Minutes from Ministerial Advisory Committee on COVID Vaccines 14 July 2021.

AU / AVAT: Part 2/b

1. Letter Agreement between the Republic of South Africa and AVAT for delivery to Kenya April 2022
2. Letter Agreement between the Republic of South Africa and AVAT for delivery to Botswana, Lesotho, Mauritius and Namibia dated September 2021
3. Media Statement from Moody's Investor Service
4. Purchase Agreement between Janssen Pharmaceutical and AVAT
5. Africa Medical Supplies Platform buyer registration form, commercial partners profile, guidance on pre-ordering vaccines, meeting minutes, press release and frequently asked questions
6. Agreement for the Provision of Procurement Services between Africa Medical Supplies Platform and the Department of Health.

SOLIDARITY FUND: Part 2/b

1. Correspondence regarding Commitment Agreement, Donation Agreement and Memorandum of Agreement in relation to donation.

GAMALEYA INSTITUTE: Part 2/b

1. Ministerial Committee Meeting Minutes
2. Advisory Feedback from Ministerial Advisory Committee on COVID-19 vaccines.

SINOPHARM: Part 2/b

1. Correspondence regarding letter of supply
2. Correspondence Chenshia and NIH partnership
3. Minutes of DG Meeting
4. Correspondence regarding Sinopharm approval.

ASPEN AND BIOVAC

No documents were included in the disclosure. As a result, while we cannot be certain, we assume that this means that none exist.

Endnotes

1 South African government official in annotated notes to Pfizer Draft Contract Version 2, at 33. All documents and draft agreements referenced in this briefing and analysis are available for public viewing at: https://healthjusticeinitiative.org.za/pandemic-transparency/#contracts

2 Health Justice Initiative and Multistakeholder Group, "One-Sided": Vaccines Save Lives —Transparency Matters (hereafter ''ONE-SIDED 2023 Multistakeholder Report'') (Sept. 5, 2023). See: https://healthjusticeinitiative.org.za/wp-content/uploads/2023/10/HJI_One-Sided-FINAL-10-10.pdf- available at: https://healthjusticeinitiative.org.za/pandemic-transparency/#contracts

3 Summary Framework, at 1.

4 HJI is grateful to Jishian Ravinthiran (Researcher, Access to Medicines Program) and Peter Maybarduk (Director, Access to Medicines Program) at Public Citizen for their expert analysis, review, and assistance in preparing this analysis. HJI also extends its thanks to Luis Gil Abinader from the O-Neill Institute (reviewer); Power & Associates who acted for HJI as its legal representatives in this matter; and Advocate Isabel Goodman- counsel for HJI in this matter.

5 Confidentiality Agreement, page 3, para. 3.6. (". . .Purchaser and its representatives shall not use any of the Confidential Information, for the purpose of: (i) initiating or progressing any legal or patent related proceedings against Moderna or its Affiliates; or (ii) procuring a commercial benefit to Purchaser or its Representatives or any third party, or (iii) supporting nay patent applications being made by purchaser or its Representative or any third party").

6 Confidentiality Agreement, page 5, para. 8.1 ("This Agreement shall become effective on the date of the last signature (the "Effective Date") and shall continue to apply for 15 years after the date of disclosure of the last Confidential information hereunder as long as information disclosed hereunder still qualifies as Confidential Information").

7 Confidentiality Agreement, at 5.

8 Janssen, Supply Agreement, at 23-24.

9 Pfizer, Supply Agreement, at 29.

10 Serum, Supply Agreement, at 17.

11 Confidentiality Agreement, page 2, para. 2.1 ("Without limiting the foregoing, Confidential Information includes (a) this Agreement and its terms as well as all information pertaining to the proposed supply relationship between the Parties, including the proposed commercial terms of such supply relationship, (b) the fact that the discussion between the Parties are taking place and the content and status of any discussions that are taking place between the Parties, and (c) all information and analysis derived from the Confidential Information"); Confidentiality Agreement, page 6, para. 14.1 ("Except as otherwise permitted under this Agreement, Purchaser shall not issue any written communication in relation to this Agreement, or the subject matter hereof, without prior consultation with, and the consent of, Moderna. Either Party may subsequently publicly disclose any information previously contained in any public announcement made in accordance with this Agreement").

12 Confidentiality Agreement, page 5, para. 12.1-12.2 ("12.1 This Agreement shall be governed by the laws of the State of New York. 12.2 All disputes arising out of or in connection with this Agreement shall be finally settled by arbitration administered in accordance with the procedural rules of the International Chamber of Commerce in effect at the time of submission, by three arbitrators appointed in accordance with said Rules. Such arbitration shall be completed within 180 days of arbitrator confirmation with limited discovery rights. Arbitration shall be governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards. The seat, or legal place, of arbitration shall be New York, New York. The language to be used in the arbitral proceedings shall be English. Each Party hereby irrevocably submits to the exclusive jurisdiction of the courts located in New York, New York for matters related to the conduct of the arbitration. Moderna may however request preliminary injunctive relief in any court of competent jurisdiction").

13 Summary Framework, at 1.

14 Pfizer, Supply Agreement, at 38.

15 Janssen, Supply Agreement, at 11, 36.

16 Serum, Supply Agreement, at 4.

17 Darcy Jimenez, COVID-19: vaccine pricing varies wildly by country and company, Pharmaceutical Technology (26 October 2021), https://www.pharmaceutical-technology.com/features/covid-19-vaccine-pricing-varies-country-company/?cf-view; Pauline Bax, Moderna Offers South Africa Vaccines at $30 to $42 a Dose, Bloomberg Law (Feb. 5, 2021), https://news.bloomberglaw.com/health-law-and-business/moderna-offers-south-africa-vaccines-at-30-to-42-a-dose.

18 Pfizer, Supply Agreement, at 14.

19 Id. at 14-15.

20 Janssen Supply Agreement, at 19.

21 Serum, Supply Agreement, at 4,21.

22 Id. at 5.

23 Summary Framework, at 2 ("Except in the case of willful misconduct by Modern Parties, purchaser is required to indemnify Moderna and all parties in Moderna's supply chain ('Moderna Parties'), and defend and hold Moderna Parties harmless, from and against any and all losses, liabilities, claims, fines, damages, costs and expenses of any nature suffered or incurred by Moderna Parties 1) in connection with manufacture, testing, research, development, delivery, distribution, administration, offer for sale, sale, import, export or use of the product supplied under the supply agreement, 2) in connection with provision of clinical intervention or compensation to participants in any clinical trial in the territory, 3) for which such Moderna Party would have statutory immunity pursuant to the Prep Act if it were applicable in the territory or 4) for which the purchaser is responsible.

24 Pfizer, Supply Agreement, at 23-24.

25 Congressional Research Service, The PREP Act and COVID-19, Part 1: Statutory Authority to Limit Liability for Medical Countermeasures (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10443#:~:text=The%20PREP%20Act%20specifies%20four,emergency%20use%3B%20and%20(iv).

26 Janssen, Supply Agreement, at 25-28.

27 Serum, Supply Agreement, at 11-12.

28 Summary Framework, at 2 ("Moderna will make Product available to the RSA FCA (FCA – INCOTERMS 2020) at Moderna's site in the European Union or Switzerland. RSA will assume all responsibility, at its own cost and expense, for conducting all exportation, importation, storage, distribution, product traceability and related activities relating to the Product in its territory").

29 Pfizer, Supply Agreement, at 10, 13.

30 Janssen, Supply Agreement, at 5, 17.

31 Serum, Supply Agreement, at 5.

32 Confidentiality Agreement, at 2.

33 Janssen, Supply Agreement, at 5.

34 Pfizer, Supply agreement, at 3-4, 28.

35 Id. at 28-29.

36 Serum, Supply Agreement, at 17.

37 Confidentiality Agreement, at 5.

38 Janssen, Supply Agreement, at 33-34.

39 Pfizer, Supply Agreement, at 31-32.

40 Pfizer, Draft Contract Version 3, at 36.

41 Serum, Supply Agreement, at 16.

42 For more on Moderna's conduct in relation to the WHO MPP mRNA Hub in South Africa, see: Baker B and Hassan F. COVID-19's silver lining? The WHO mRNA Technology Transfer Programme for the Global South Overcoming IP Barriers is central to the South-South Innovation and Access Goals of the WHO mRNA Technology Transfer Programme, in Health Justice Initiative Pandemics and the illumination of "hidden things" – Lessons from South Africa on the global response to COVID-19. Edited Volume. June 2023. Available at: https://healthjusticeinitiative.org.za/wp-content/uploads/2023/09/13.-Pandemic-Compendium_B.-K.-Baker-F.-Hassan.pdf

43 SA government official in annotated notes to Pfizer Draft Contract Version 2, at 33.

44 Draft Contract Version 1, at 1,28.

45 Draft Contract Version 2

46 Draft Contract Version 3, at 1.

47 Draft Contract Version 3, at 36 ("Can incorporate previously discussed approach to facilitate assignment"); Draft Contract Version 3, at 26 "We will want to pertinently again raise the issue of indemnity with Pfizer, particularly as our Minister is seemingly expected to sign the agreement. We would propose a delineation of indemnification that would retain liability in respect of those matters that are under its knowledge, responsibility and control and are not at all in respect of the Government's knowledge or control-especially, design, development, investigation, formulation, testing, clinical testing, manufacture."

48 Ibid.

49 This analysis also expands on Public Citizen's prior findings of how Pfizer exploited the power imbalance in contract negotiations to silence governments, impose restrictive controls on vaccine supply, immunise itself for intellectual property infringement, funnel disputes to arbitration forums rather than courts, and seek state assets as an option for guaranteeing payment. See: Public Citizen, Pfizer's Power 3 (19 October 2021). Available at https://www.citizen.org/news/report-how-pfizer-silences-world-governments-in-vaccine-negotiations/

50 One-Sided Report, at 35-36; Final Supply Agreement, at 14. Health Justice Initiative and Multistakeholder Group, "One-Sided": Vaccines Save Lives —Transparency Matters (hereafter ''ONE-SIDED 2023 Multistakeholder Report'') (Sept. 5, 2023). See: https://healthjusticeinitiative.org.za/wp-content/uploads/2023/10/HJI_One-Sided-FINAL-10-10.pdf- available at: https://healthjusticeinitiative.org.za/pandemic-transparency/#contracts

51 One-Sided Report, 36.

52 One-Sided Report, 36-37.

53 Draft Contract Version 3, at 10.

54 Draft Contract Version 3, at 13.

55 Draft Contract Version 3, at 10-11.

56 Final Contract, at 38. In prior drafts, deliveries were scheduled in all 4 quarters. Draft Contract Version 3, at 43; Draft Contract Version 2, at 45; Draft Contract Version 1, at 40.

57 Final Contract, 14-15. Draft Contract, Version 3, at 16; Draft Contract, Version 2, at 16-17.

58 Final Contract, at 8.

59 Final Contract, at 22.

60 Final Contract, at 22,

61 Draft Contract Version 3, at 24; Draft Contract Version 2, at 25.

62 Final Contract, at 22.

63 Final Contract, at 22. Pfizer also limited South Africa's ability recoup, withhold, or offset any amounts owed under this agreement if Pfizer or its affiliates owe an amount to South Africa, which further shows how Pfizer limited any and all remedies the country could seek. Final Contract, at 16.

64 Final Contract, at 38; Amendment to Final Contract, at 5

65 Compare Draft Contract Version 2, at 25-26 to Final Contract, at 22. Other changes South African officials sought included removing language that would have limited South Africa's termination rights based on the government's role in the termination, language that does not appear anywhere to limit Pfizer's termination rights based on the company's role in any termination.

66 One-Sided Report, at 34-35. Health Justice Initiative and Multistakeholder Group, "One-Sided": Vaccines Save Lives — Transparency Matters (hereafter ''ONE-SIDED 2023 Multistakeholder Report'') (5 September 2023). See: https://healthjusticeinitiative.org.za/wp-content/uploads/2023/10/HJI_One-Sided-FINAL-10-10.pdf- available at: https://healthjusticeinitiative.org.za/pandemic-transparency/#contracts

67 Draft Contract Version 2, at 27.

68 Draft Contract Version 2, at 27.

69 Draft Contract Version 2, at 27; Draft Contract, Version 3, at 26.

70 Draft Contract Version 2, at 27. See also Draft Contract, Version 3, at 26 ("We will want to pertinently again raise the issue of indemnity with Pfizer, particularly as our Minister is seemingly expected to sign the agreement. We would propose a delineation of indemnification that would retain liability in respect of those matters that are under its knowledge, responsibility and control and are not at all in respect of the Government's knowledge or control-especially, design, development, investigation, formulation, testing, clinical testing, manufacture.")

71 Draft Contract Version, 2, at 27; Draft Contract Version 3, at 26

72 Draft Contract Version 3, at 26.

73 COVAX term and conditions, at 5

74 Janssen final contract at 26

75 Draft Contract Version 3, at 26, 27 ("Both Parties undertake and endeavor to use their best commercial endeavors to fulfil their responsibilities in terms of applicable Law and requirements and this Agreement and to act with the utmost good faith in all dealings with each other, third parties and SAHPRA in connection with this Agreement, and in a manner that minimizes the risk of any indemnified Claim (defined below), Losses or liability arising in respect of Purchaser. . .Pfizer shall, at all times, including where a potential Indemnified Claim might arise, fulfil its obligations in a reasonable manner and in accordance with all Law and ensure it uses its best efforts to mitigate any Losses, liability or risk which might arise for Purchaser, to the extent reasonably possible").

76 Draft Contract Version 3, at 27.

77 Draft Contract Version 3, at 27.

78 Final Contract, 26-27.

79 Janssen final contract at 12

80 Final Contract, at 26.

81 Final Contract, 26-27.

82 Compare Draft Contract, Version 2, at 30-31 with Final Contract, 26-27.

83 One-Sided Report, at 34.

84 Draft Contract Version 2, at 31-32; One-Sided Report, at 34

85 Compare Final contract, at 27 to Draft Contract, Version 3 at 30 & Draft Contract, Version 2, at 31.

86 Draft Contract Version 2, at 33.

87 Draft Contract Version 2, at 33.

88 Draft Contract Version 2, at 34.

89 Draft Contract Version 3, at 31-32.

90 Draft Contract Version 2, at 35.

91 Draft Contract Version 2, at 35.

92 Draft Contract Version 3, at 33.

93 Draft Contract Version 3, at 32-33.

94 Draft Contract Version 3, at 32-33; Draft Contract Version 2, at 35.

95 Draft Contract Version 3, at 4.

96 Compare Final Contract, at 28-29 with Draft contract Version 3, at 31-34.

97 See forthcoming, Hassan, Abinader and Kavanaugh: ''Analysis of South Africa's COVID Vaccine Contracts and Negotiation Documents''.

98 One-Sided Report, at 35.

99 Compare Final Contract, at 19 with Draft Contract Version 3, at 21; Draft Contract Version 1, at 20.

100 Draft Contract Version 2, at 22; Draft Contract Version 3, at 21.

101 Final Contract, at 8-9.

102 Final Contract, at 9.

103 Draft Contract Version 3, at 10; Draft Contract Version 1, at 10.

104 Draft Contract Version 3, at 36.

105 Draft Contract Version 3, at 33.

106 Draft Contract Version 2, at 38; Draft Contract Version 3, at 36.

107 Draft Contract Version 3, at 36.

108 Compare Final Contract, at 12-13, 19 to Draft Contract, Version 3, at 14, 15, 21; Draft Contract, Version 2, at 15, 16, 22.

109 Draft Contract, Version 3, at 15, 21.

110 Draft Contract, Version 2, at 15.

111 Draft Contract Version 2, at 19.

112 Draft Contract Version 3, at 18.

113 Draft Contract Version 2, at 20; Draft contract Version 3, at 19.

114 Draft Contract Version 3, at 22.

115 Compare Final Contract, at 18 to Draft Contract Version 3, at 19; Draft Contract, Version 2, at 21.

116 Draft Contract Version 2, at 47. Though the prior representation by Pfizer that South Africa could use its shipment containers for distribution was mentioned only in the second draft of the agreement, the relevant provision continued to raise concerns in the third version of the agreement, with an official noting, "Needs Discussion."