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Pfizer's Power

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In February, Pfizer was accused of “bullying” governments in COVID vaccine negotiations in a groundbreaking story by the Bureau of Investigative Journalism.^[1] A government official at the time noted, “Five years in the future when these confidentiality agreements are over you will learn what really happened in these negotiations.”^[2]

Public Citizen has identified several unredacted Pfizer contracts that describe the outcome of these negotiations. The contracts offer a rare glimpse into the power one pharmaceutical corporation has gained to silence governments, throttle supply, shift risk and maximize profits in the worst public health crisis in a century. We describe six examples from around the world below.^[3]

TABLE 1: SELECT PFIZER CONTRACTS REVIEWED^[4]

Purchaser	Date	Type	Doses	Price Per Dose	Total Cost
Albania	Draft ^[5]	Draft Definitive Agreement	500,000	\$12	\$6 million
Brazil	03/15/21 ^[6]	Definitive Agreement	100 million	\$10	\$1 billion
Colombia	02/02/21 ^[7]	Definitive Agreement	10 million	\$12	\$120 million
Chile	12/01/20 ^[8]	Definitive Agreement (Redacted)	10 million	Redacted	Redacted
Dominican Republic	10/29/20 ^[9]	Binding Term Sheet ^[10]	8 million	\$12	\$96 million
European Commission	11/20/20 ^[11]	Custom Advance Purchase Agreement	200 million	\$18.6 ^[12]	\$3.7 billion
Peru	17/9/20 ^[13]	Binding Term Sheet	10 million	\$12	\$120 million
United States	21/07/20 ^[14]	Custom Advance Purchase Agreement (Redacted)	100 million	\$19.5	\$1.95 billion
United Kingdom	12/10/20 ^[15]	Custom Advance Purchase Agreement (Redacted)	30 million	Redacted	Redacted

Pfizer’s demands have generated outrage around the world, slowing purchase agreements and even pushing back the delivery schedule of vaccines.^[16] If similar terms are included as a condition to receive doses, they may threaten President Biden’s commitment to donate 1 billion vaccine doses.^[17]

High-income countries have enabled Pfizer's power through a favorable system of international intellectual property protection.^[18] High-income countries have an obligation to rein in that monopoly power. The Biden administration, for example, can call on Pfizer to renegotiate existing commitments and pursue a fairer approach in the future. The administration can further rectify the power imbalance by sharing the vaccine recipe, under the Defense Production Act, to allow multiple producers to expand vaccine supplies.^[19] It can also work to rapidly secure a broad waiver of intellectual property rules (TRIPS waiver) at the World Trade Organization.^[20] A wartime response against the virus demands nothing less.

1. Pfizer Reserves the Right to Silence Governments.

In January, the Brazilian government complained that Pfizer was insisting on contractual terms in negotiations that were “unfair and abusive.”^[21] The government pointed to five terms that it found problematic, ranging from a sovereign immunity waiver on public assets to a lack of penalties for Pfizer if deliveries were late. The Bureau of Investigative Journalism soon published a scathing story on Pfizer's vaccine negotiations.^[22]

Less than two months later, the Brazilian government accepted a contract with Pfizer that contains most of the same terms that the government once deemed unfair.^[23] Brazil waived sovereign immunity; imposed no penalties on Pfizer for late deliveries; agreed to resolve disputes under a secret private arbitration under the laws of New York; and broadly indemnified Pfizer for civil claims.^[24]

The contract also contains an additional term not included in other Latin American agreements^[25] reviewed by Public Citizen: The Brazilian government is prohibited from making “any public announcement concerning the existence, subject matter or terms of [the] Agreement” or commenting on its relationship with Pfizer without the prior written consent of the company.^[26] Pfizer gained the power to silence Brazil.

Brazil is not alone. A similar nondisclosure provision is contained in the Pfizer contract with the European Commission and the U.S. government.^[27] In those cases, however, the obligation applies to both parties.

For example, neither Pfizer nor the U.S. government can make “any public announcement concerning the existence, subject matter or terms of this Agreement, the transactions contemplated by it, or the relationship between the Pfizer and the Government hereunder, without the prior written consent of the other.”^[28] The contract contains some exceptions for disclosures required by law. It is not clear from the public record whether Pfizer has elected to prohibit the U.S. from making any statements thus far. The E.C. cannot include in any

announcement or disclosure the price per dose, the Q4 2020 volumes, or information that would be material to Pfizer without the consent of Pfizer.^[29]

2. Pfizer Controls Donations.

Pfizer tightly controls supply.^[30] The Brazilian government, for example, is restricted from accepting Pfizer vaccine donations from other countries or buying Pfizer vaccines from others without Pfizer's permission.^[31] The Brazilian government also is restricted from donating, distributing, exporting, or otherwise transporting the vaccine outside Brazil without Pfizer's permission.^[32]

The consequences of noncompliance can be severe. If Brazil were to accept donated doses without Pfizer's permission, it would be considered an "uncurable material breach" of their agreement, allowing Pfizer to immediately terminate the agreement.^[33] Upon termination, Brazil would be required to pay the full price for any remaining contracted doses.^[34]

3. Pfizer Secured an "IP Waiver" for Itself.

The CEO of Pfizer, Albert Bourla, has emerged as a strident defender of intellectual property in the pandemic. He called a voluntary World Health Organization effort to share intellectual property to bolster vaccine production "nonsense" and "dangerous."^[35] He said President Biden's decision to back the TRIPS waiver on intellectual property was "so wrong."^[36] "IP, which is the blood of the private sector, is what brought a solution to this pandemic and it is not a barrier right now," claims Bourla.^[37]

But, in several contracts, Pfizer seems to recognize the risk posed by intellectual property to vaccine development, manufacturing, and sale. The contracts shift responsibility for any intellectual property infringement that Pfizer might commit to the government purchasers. As a result, under the contract, Pfizer can use anyone's intellectual property it pleases—largely without consequence.

At least four countries are required "to indemnify, defend and hold harmless Pfizer" from and against any and all suits, claims, actions, demands, damages, costs, and expenses related to vaccine intellectual property.^[38] For example, if another vaccine maker sued Pfizer for patent infringement in Colombia, the contract requires the Colombian government to foot the bill. At Pfizer's request, Colombia is required to defend the company (i.e., take control of legal proceedings).^[39] Pfizer also explicitly says that it does not guarantee that its product does not violate third-party IP, or that it needs additional licenses.

Pfizer takes no responsibility in these contracts for its potential infringement of intellectual property. In a sense, Pfizer has secured an IP waiver for itself. But internationally, Pfizer is fighting similar efforts to waive IP barriers for all manufacturers.^[40]

4. Private Arbitrators, not Public Courts, Decide Disputes in Secret.

What happens if the United Kingdom cannot resolve a contractual dispute with Pfizer? A secret panel of three private arbitrators—not a U.K. court—is empowered under the contract to make the final decision.^[41] The arbitration is conducted under the Rules of Arbitration of the International Chamber of Commerce (ICC). Both parties are required to keep everything secret:

The Parties agree to keep confidential the existence of the arbitration, the arbitral proceedings, the submissions made by the Parties and the decisions made by the arbitral tribunal, including its awards, except as required by Law and to the extent not already in the public domain.^[42]

The Albania draft contract and Brazil, Chile, Colombia, Dominican Republic, and Peru agreements require the governments to go further, with contractual disputes subject to ICC arbitration applying New York law.^[43]

While ICC arbitration involving states is not uncommon, disputes involving high-income countries and/or pharmaceuticals appear to be relatively rare.^[44] In 2012, 80% of state disputes were from Sub-Saharan Africa, Central and West Asia, and Central and Eastern Europe.^[45] The most common state cases were about the construction and operation of facilities.^[46] In 2020, 34 states were involved in ICC arbitrations.^[47] The nature of state disputes is not clear, but only between 5 to 7% of all new ICC cases, including those solely between private parties, were related to health and pharmaceuticals.^[48]

Private arbitration reflects an imbalance of power. It allows pharmaceutical corporations like Pfizer to bypass domestic legal processes. This consolidates corporate power and undermines the rule of law.

5. Pfizer Can Go After State Assets.

The decisions reached by the secret arbitral panels described above can be enforced in national courts.^[49] The doctrine of sovereign immunity can sometimes, however, protect states from corporations seeking to enforce and execute arbitration awards.

Pfizer required Brazil, Chile, Colombia, the Dominican Republic, and Peru to waive sovereign immunity.^[50] In the case of Brazil, Chile and Colombia, for example, the government “expressly and irrevocably waives any right of immunity which either it or its assets may have or acquire in the future” to enforce any arbitration award (emphasis added).^[51] For Brazil, Chile, Colombia, and the Dominican Republic, this includes “immunity against precautionary seizure of any of its assets.”^[52]

Arbitral award enforcement presents complex questions of law that depend on the physical location and type of state asset.^[53] But the contract allows Pfizer to request that courts use state assets as a guarantee that Pfizer will be paid an arbitral award and/or use the assets to compensate Pfizer if the government does not pay.^[54] For example, in U.S. courts, these assets could include foreign bank accounts, foreign investments, and foreign commercial property, including the assets of state-owned enterprises like airlines and oil companies.^[55]

6. Pfizer Calls the Shots on Key Decisions.

What happens if there are vaccine supply shortages? In the Albania draft contract and the Brazil and Colombia agreement, Pfizer will decide adjustments to the delivery schedule based on principles the corporation will decide. Albania, Brazil, and Colombia “shall be deemed to agree to any revision.”^[56]

Some governments have pushed back on Pfizer’s unilateral authority for other decisions. In South Africa, Pfizer wanted to have the “sole discretion to determine additional terms and guarantees for us to fulfill the indemnity obligations.”^[57] South Africa deemed this “too risky” and a “potential risk to [their] assets and fiscus.”^[58] After delays, Pfizer reportedly conceded to remove this “problematic term.”^[59]

But others have not been as successful. As a condition to entering into the agreement, the Colombian government is required to “demonstrate, in a manner satisfactory to Suppliers, that Suppliers and their affiliates will have adequate protection, as determined in Suppliers’ sole discretion” (emphasis added) from liability claims.^[60] Colombia is required to certify to Pfizer the value of the contingent obligations (i.e., potential future liability), and to start appropriating funds to cover the contingent obligations, according to a contribution program.^[61]

Pfizer’s ability to control key decisions reflects the power imbalance in vaccine negotiations. Under the vast majority of contracts, Pfizer’s interests come first.

A Better Way

Pfizer’s dominance over sovereign countries poses fundamental challenges to the pandemic response. Governments can push back. The U.S. government, in particular, can exercise the leverage it holds over Pfizer to require a better approach. Empowering multiple manufacturers to produce the vaccine via technology transfer and a TRIPS waiver can rein in Pfizer’s power. Public health should come first.

References

Sarah Teng, intern in the Access to Medicines Program, designed the cover image.

[1] Madlen Davies, Rosa Furneaux , Iván Ruiz, Jill Langlois, 'Held to Ransom': Pfizer Demands Governments Gamble with State Assets to Secure Vaccine Deal, Bureau of Investigative Journalism (Feb 23 2021), <https://tinyurl.com/t2z39a63>.

[2] *Id.*

[3] While there are similarities across the contracts, each agreement is unique. The specific examples outlined below should not read as reflective of other contracts.

[4] In several cases, governments signed additional deals with Pfizer. We reviewed select contracts that were publicly available.

[5] Albania-Pfizer Contract Draft, ("Albania Draft Contract"), (Jan. 6 2021) <https://www.documentcloud.org/documents/20616251-albanian-pfizer-covid-19-vaccine-contract>. The final provisions of the agreement may have differed from this draft. However, given similarities between this draft and the other reviewed agreements, we believe the modifications, if any, were likely not substantial. The contract was first leaked on Twitter, and then shared widely in the press.

[6] Brazil-Pfizer Contract ("Brazil Contract"), (March 15 2021) <https://aurores.org/wp-content/uploads/2021/08/Brazil-Pfizer.pdf>. The contract was leaked online and later covered by The Guardian in August. See e.g., <https://tinyurl.com/yupsz2j4>.

[7] Colombia-Pfizer Contract ("Colombia Contract"), (Feb. 2 2021), <https://www.nodal.am/wp-content/uploads/2021/08/DOCUMENTO.pdf>. The contract was leaked in the Colombian Media in August. <https://tinyurl.com/4vswvrz4>. It is currently referenced in the UNICEF Vaccine Market Dashboard.

[8] Chile-Pfizer Contract ("Chile Contract") (Dec. 1 2021), <https://www.chiletransparente.cl/wp-content/uploads/2021/07/Acuerdo-de-fabricacion-y-suministro-PFIZER.pdf>. A Chilean transparency initiative published a redacted version of the contract.

[9] Dominican Republic-Pfizer Contract ("D.R. Contract") (Oct. 29 2020), <https://www.keionline.org/35485>. Knowledge Ecology International obtained the contract through a freedom of information law request.

[10] The text was subject to the approval of the Dominican Republican National Congress, which reportedly approved the text with no objections. Pfizer and

AstraZeneca, The Game of Contracts with Small Print, Dominican Today, <https://tinyurl.com/yhasn7um>.

[11] European Commission-Pfizer Contract (“E.C. Contract”) (Nov. 20 2020), <https://tinyurl.com/3bph89wy>. The Italian public broadcaster RAI published the EC Contract in April.

[12] 15.5 EUR.

[13] Peru-Pfizer Contract (“Peru Contract”) (Sept. 17 2020), <https://tinyurl.com/y2ap74xz>. The Bureau of Investigative Journalism published the contract.

[14] United States-Pfizer Contract (“U.S. Contract”) (July 21 2020), <https://tinyurl.com/4k5j7d5u>. The contract is available on the U.S. Department of Health and Human Services website.

[15] United Kingdom-Pfizer Contract (“U.K Contract”) (Oct. 10 2020), <https://tinyurl.com/45vt6vd5>. This likely is the definitive agreement that follows on from initial agreement announced in July. The contract is available on the U.K government website.

[16] Madlen Davies, Rosa Furneaux, Pfizer backs down over “unreasonable terms” in South Africa vaccine deal (April 19 2021). <https://tinyurl.com/tnys9u2c>. (“He described how Pfizer’s late demand caused delays in the discussions, which in turn put back the anticipated vaccine delivery dates.”). See also the impasse in Philippines. Philippines receives side letter from Pfizer; WHO sees resolution of ‘impasse’ soon (Feb 23. 2021), <https://tinyurl.com/3fs8z3cb> (“The delivery of 117,000 Pfizer-BioNTech doses, initially expected in mid-February, was delayed by concerns on indemnification.”).

[17] White House, FACT SHEET: President Biden Announces Historic Vaccine Donation: Half a Billion Pfizer Vaccines to the World’s Lowest-Income Nations (June 10 2021), <https://tinyurl.com/he8bm9tk>

[18] Peter Drahos and John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? (2007) (tracing the role of Pfizer in advocating for a system of international patent protection).

[19] Zain Rizvi, Jishian Ravinthiran, Amy Kapczynski, Sharing The Knowledge: How President Joe Biden Can Use The Defense Production Act To End The Pandemic Worldwide, Health Affairs Blog (August 6, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210804.101816/full/>

[20] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

[21] Madlen Davies , Rosa Furneaux , Iván Ruiz , Jill Langlois, 'Held to Ransom': Pfizer Demands Governments Gamble with State Assets to Secure Vaccine Deal, Bureau of Investigative Journalism (Feb 23 2021), <https://tinyurl.com/t2z39a63>.

[22] *Id.*

[23] One clause that appears to have changed is the number of doses supplied by Pfizer. It is also not clear whether Brazil developed a foreign bank guarantee fund.

[24] Brazil Contract, footnote 6, Article 9.4 (Waiver of Sovereign Immunity), pg. 45, Article 2.6 (Delivery Delays), pg. 34, Article 9.4 (Waiver of Sovereign Immunity) pg. 45, Article 3.1 (Indemnification by Purchaser), pg. 43, respectively.

[25] The other Latin American contracts reviewed contain a more limited nondisclosure obligation. For example, under the Colombia contract, neither Pfizer nor Colombia can “use the name, trade name, service marks, trademarks, trade dress or logos of the other Party in publicity releases, advertising or any other publication, without the other Party’s prior written consent in each instance.” This does not appear to prohibit the government from talking about the contract, as long as it is not a “publicity release, advertising, or any other publication.”

[26] Brazil Contract, Article 12.3 (Publicity), pg. 32 (“Purchaser shall not make, or permit any person to make, any public announcement concerning the existence, subject matter or terms of this Agreement, the wider transactions contemplated by it, or the relationship between the Parties (except as required by Law, and subject to the protections set forth in Section 10.1), without the prior written consent of Pfizer (such consent not to be unreasonably withheld or delayed)”.

[27] E.C. Contract, footnote 11, Article II.10 (Announcements and Publicity), pg. 36.

[28] U.S. Contract, footnote 14, Article 11.11 (Announcements), pg. 25.

[29] E.C. Contract, footnote 11, Article II.10 (Announcements and Publicity), pg. 36.

[30] For example, Colombia is also required to distribute the vaccine only in its territory. Colombia Contract, footnote 7, Article 4.6 (Diversion Issues), pg. 23 (“All Product delivered to Purchaser shall be: (a) stored securely by Purchaser; and (b) distributed by Purchaser only in Colombia in a secure manner appropriate to the transportation route and destination, in each case (a) and (b) to guard against and deter theft, diversion, tampering, substitution (with, for example, counterfeits) resale or export out of Colombia, and to protect and preserve the integrity and efficacy of the Product.”).

[31] Brazil Contract, footnote 6, Article 2.1 (f) (Agreement to Supply), pg. 31 (“Purchaser, including any related Person or any agents of Purchaser, covenants to exclusively obtain all of its supply of any Vaccine of Pfizer, BioNTech or their respective Affiliates intended for the prevention of the human disease COVID-19 (including the Product) either (i) directly from Pfizer or from Pfizer through the COVAX Facility, or (ii) from a Third Party, whether by donation, resale or otherwise, only if Purchaser has obtained Pfizer’s prior written consent. Any breach of this Section 2.1(f) shall be deemed an incurable material breach of this Agreement, and Pfizer may immediately terminate this Agreement pursuant to Section 6.2. For clarity, nothing in this Section 2.1(f) shall prevent Purchaser from purchasing competing vaccine products of any Third Party.”).

[32] Brazil Contract, footnote 6, Article 4.6 (Diversion Issues), pg. 38 (“Purchaser shall not directly or indirectly resell, donate, distribute, export or otherwise transport the Product outside the Territory without Pfizer’s prior written consent.”).

[33] Brazil Contract, footnote 6, Article 2.1 (f) (Agreement to Supply), pg. 31.

[34] Brazil Contract, footnote 6, Article 6.2 (Termination for Cause), pg. 27 (“In the event that this Agreement is terminated by Pfizer under this Section 6.2, Purchaser shall pay within thirty (30) days of the date of notice of termination of this Agreement the full Price for all Contracted Doses less amounts already paid to Pfizer as of such date.”)

[35] Ed Silverman, Pharma leaders shoot down WHO voluntary pool for patent rights on Covid-19 products, STAT (May 28 2020), <https://www.statnews.com/pharmalot/2020/05/28/who-voluntary-pool-patents-pfizer/>

[36] U.S. Backs Waiver of Intellectual Property Protection for Covid-19 Vaccines, Wall Street Journal (May 6 2021), <https://www.wsj.com/articles/u-s-backs-waiver-of-intellectual-property-protection-for-covid-19-vaccines-11620243518>

[37] WTO delays decision on waiver on COVID-19 drug, vaccine rights (Dec. 10 2020), <https://www.reuters.com/article/us-health-coronavirus-wto-idUSKBN28K2WL>

[38] This extends to all civil claims, including adverse effects. That has been detailed elsewhere: Madlen Davies, Rosa Furneaux , Iván Ruiz , Jill Langlois, ‘Held to Ransom’: Pfizer Demands Governments Gamble with State Assets to Secure Vaccine Deal, Bureau of Investigative Journalism (Feb 23 2021), <https://tinyurl.com/t2z39a63>.

[39] Colombia Contract, footnote 7, Article 8.2 (Assumption of Defense), pg. 31.

[40] Pfizer signed the letter opposing the TRIPS waiver sent to President Biden in March, for example. PhRMA Letter Opposing TRIPS Waiver to President Biden (March 5 2021), <https://patentdocs.typepad.com/files/2021-03-05-phrma-letter.pdf>

[41] U.K. Contract, footnote 15, Article 23 (Dispute Resolution) pg. 36. (“The arbitration award shall be final and binding on the Parties, and the parties undertake to carry out any award without delay. Judgment upon the award may be entered by any court having jurisdiction of the award or having jurisdiction over the relevant party or its assets.”)

[42] *Id.*

[43] Article on Governing Law. Albania Draft Contract pg. 34, Brazil Contract pg. 45, Chile Contract pg. 29, Colombia Contract pg. 43, DR Contract pg. 17, Peru Contract pg. 9.

[44] Our analysis is limited by a lack of transparency.

[45] Arbitration Involving States and State Entities under the ICC Rules of Arbitration – Report of the ICC Commission on Arbitration and ADR (2012), <https://iccwbo.org/publication/arbitration-involving-states-state-entities-icc-rules-arbitration-report-icc-commission-arbitration-adr/>, pg. 4.

[46] Arbitration Involving States and State Entities under the ICC Rules of Arbitration – Report of the ICC Commission on Arbitration and ADR (2012), <https://iccwbo.org/publication/arbitration-involving-states-state-entities-icc-rules-arbitration-report-icc-commission-arbitration-adr/>, pg. 4.

[47] 194 state-owned entities were also involved. ICC Dispute Resolution 2020 Statistics, <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/> pg. 11. See also, an analogous mechanism known as investor-state dispute resolution, which is based on international law as opposed to contract: Global Trade Watch, Table of Foreign Investor-State Cases and Claims Under NAFTA and Other U.S. “Trade Deals” (Jan. 15 2021), <https://www.citizen.org/article/table-of-foreign-investor-state-cases-and-claims-under-nafta-and-other-u-s-trade-deals/>

[48] ICC Dispute Resolution 2020 Statistics, <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/> pg. 17.

[49] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.”)

[50] Article on Waiver of Sovereign Immunity. The language differs in some of the contracts. Brazil Contract, pg. 45, Chile Contract pg. 24, Colombia Contract pg. 36, DR Contract pg. 17, Peru Contract pg. 9.

[51] *Id.*

[52] *Id.*

[53] In the U.S., the governing statute is the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C § 1602. Sovereign property used for commercial activity can be used to execute a judgment based on an arbitral award if the state has waived immunity. Property belonging to an instrumentality of a foreign state engaged in commercial activity can also be used. 28 U.S.C § 1610. However, certain kinds of foreign sovereign property are absolutely immune from award attachment and execution. This includes property belonging to the foreign central bank or monetary authority and property used for military purposes. 28 U.S.C §1611.

[54] Under FSIA, this is known as “attachment prior to the entry of judgment” and can be done if the state waives this kind of immunity and “the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state.” 28 U.S.C § 1610

[55] Other jurisdictions may handle these questions differently, potentially exposing other types of sovereign assets. These assets may also be vulnerable in settlement negotiations.

[56] Albania Draft Contract, pg. 14. Brazil Contract, pg. 22. Colombia Contract, pg. 15.

[57] Pfizer Backs Down Over Unreasonable Terms in South Africa Vaccine Deal (April 19 2021), <https://www.thebureauinvestigates.com/stories/2021-04-19/pfizer-backs-down-over-asset-seizing-clause-in-south-africa-vaccine-deal>.

[58] *Id.*

[59] *Id.*

[60] Colombia Contract, footnote 7, Article 8.5 (Privileges and Immunities), pg. 32. This includes but is not limited to funding state contractual contingency funds.

[61] *Id.*



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