

## SUMMARY OF COLOMBIAN RULING ON THE PUBLIC RELEASE OF COVID-19 VACCINE CONTRACTS

### GENERAL INFORMATION OF THE RULING

<b>Tribunal</b>	Administrative Tribunal of Cundinamarca ( <i>Tribunal Administrativo de Cundinamarca</i> )
<b>Name of the case</b>	International Institute of Anticorruption Studies ( <i>Instituto Internacional de Estudios Anticorrupción</i> ) <i>Versus</i> The National Unit for Disaster Risk Management ( <i>Unidad Nacional de Gestión del Riesgo de Desastres</i> )
<b>Ruling reference</b>	2021-05-081 R1 (Recurso de insistencia)
<b>Topics</b>	Right to access information Right to health COVID-19 vaccine contracts
<b>Date</b>	11 May 2021
<b>Link</b>	Text of the ruling available (in Spanish) at: <a href="https://n9.cl/aw9nr">https://n9.cl/aw9nr</a>

### RELEVANT DOMESTIC LAW

#### **A. RIGHT TO ACCESS TO INFORMATION**

The right to access information is guaranteed in the Colombian Constitution. In this regard, Article 74 of the Constitution provides that “everyone has the right to access public documents except in the cases established by law”.

The Colombian domestic legislative framework establishes multiple mechanisms to guarantee the exercise of this right. One of the most important mechanisms is set out in Article 23 of the Constitution. The article establishes the right to petition the authorities to access public information and documents. This right is called “*derecho de petición*”. Filing a *derecho de petición* does not require a special procedure or format.

National and local authorities have the duty to provide access to all information requested in a *derecho de petición*. However, they can deny the petition if the information concerned qualifies for classified or confidential treatment. Should the petitioner disagree with the apparent confidential nature of the information requested, Article 26 of Law 1755 of 2015 establishes a judicial remedy, “**recurso de insistencia**”, to request the verification the decision’s compliance with the law. The *recurso de insistencia* is a one-instance procedure before administrative judges.

A person can file a *recurso de insistencia* to request an administrative judge to determine if the information should be treated as confidential. If the judge finds the information should not be treated as such, they can order the handover of the requested information to the petitioner.

#### **B. CONFIDENTIAL INFORMATION**

Several Colombian laws regulate the types of information that are considered restricted or classified. Relevant for the ruling discussed here is Article 24.2 of Law 1755 of 2015. This Article establishes that negotiations conducted by the Government can be considered restricted (*información reservada*). In this regard, the Constitutional Court has held that the details of

negotiations can be restricted, provided it is necessary to maintain the said information confidential to guarantee the proper exercise of the constitutional functions of the government.<sup>1</sup>

In addition, Article 19 of Law 1712 of 2014 establishes exceptions to access public information when it can harm public interests, including when the information is related to national security and public health.

#### SUMMARY OF RELEVANT FACTS OF THE CASE

On 12 January 2021, the International Institute of Anticorruption Studies (*Instituto Internacional de Estudios Anticorrupción*), a Colombian non-profit organization<sup>2</sup> filed a *derecho de petición* before the National Unit for Disaster Risk Management (*Unidad Nacional de Gestión del Riesgo de Desastres -UNGRD*), the Colombian Government Unit in charge of COVID-19 vaccine procurement.<sup>3</sup>

In the *derecho de petición*, the Institute requested access to information regarding government actions taken against the COVID-19 pandemic, including details of the acquisition process of COVID-19 vaccines.

Regarding the acquisition of COVID-19 vaccines, the information requested by the Institute included: (1) preliminary or pre-purchase agreements with pharmaceutical companies; (2) advance purchase agreements; (3) confidentiality agreements; (4) purchase and sale of vaccines agreements; (5) any type of documentation, agreement or contract for vaccine acquisition; and (6) the price paid for vaccines.

The Institute argued that access to this information was required to ensure social control over public resources used to react to the pandemic and acquire COVID-19 vaccines.

In response to the petition, on 15 January 2021, the Government Unit handed over some of the information requested but did not release information on negotiations or contracts with pharmaceutical companies regarding the acquisition of COVID-19 vaccines. The Unit stated that the requested information was subject to confidentiality and thus unavailable to the public.

The Institute did not agree with the Unit's decision and related assessment and insisted the information should, contrary to the Unit's arguments, be made publicly available. It thus filed a *recurso de insistencia* before the administrative Tribunal of Cundinamarca, thereby requesting a judicial review of the decision and a determination by a judicial instance, the Tribunal, of the nature of the information requested.

Before the Administrative Tribunal, the Government Unit elaborated its arguments in support of treating the information in the contracts as confidential. The Unit stated that confidentiality clauses in the contracts with pharmaceutical companies prevented them from sharing any details with the general public. The Unit affirmed that the confidentiality clauses were in accordance with the Colombian legislation. Specifically, the Unit argued that the requested information should remain confidential as it addressed issues relating to the safety and health of the general public and its disclosure could harm and compromise the interests of the general public (Article 19 of Law 1712 of 2014).

On this point, the Unit further indicated that the global shortage of COVID-19 vaccines should be considered, as well as the dominant position and power of pharmaceutical companies in the

<sup>1</sup> Colombian Constitutional Court, decision C-951 de 2014.

<sup>2</sup> More information of the Institute (in English) is available at: <https://n9.cl/9xl1>

<sup>3</sup> More information of the UNGRD (in English) is available at: <https://n9.cl/76on>

international COVID-19 vaccine market. Therefore, breaking the confidentiality clauses would, according to the Unit, compromise the health and safety of the Colombian population, as it would impair the National Government's ability to negotiate contracts with pharmaceutical companies and effectively compete with other countries in accessing COVID-19 vaccines. In other words, maintaining the confidentiality in the agreements and contracts was a necessity to adequately protect the safety and health of the general public throughout the COVID-19 immunization process, a process considered of general interest under the Colombian law (Law 2064 of 2020).

The Unit also indicated that the information was part of negotiations conducted by the National Government that required confidentiality (Article 24.2 of Law 1755 of 2015). The Unit further underlined that the objective of the negotiations with pharmaceutical companies, the procurement of COVID-19 vaccines, would be compromised if the requested information was released.

## SUMMARY OF THE CONSIDERATIONS

### **A. THE RIGHT TO ACCESS INFORMATION**

The Tribunal based its decision primarily on international human rights standards on the right to access information. In this respect, the Tribunal considered Inter-American human rights standards on the right to freedom of opinion and expression. Specifically, the Tribunal considered Article 13.1 of the American Convention on Human Rights, Article IV of American Declaration of the Rights and Duties of Man, and Article 4 of the Inter-American Democratic Charter (freedom of expression as one of the essential components of the exercise of democracy). The Tribunal also referenced Article 19 of the Universal Declaration of Human Rights (guaranteeing the right to freedom of opinion and expression).

Equally important, the Tribunal examined and analyzed decisions of the Inter-American Court on Human Rights,<sup>4</sup> and documents of the Inter-American Commission on Human Rights<sup>5</sup> on the content and the scope of the right to access information.

In light of this analysis and of the Inter-American human rights framework, the Tribunal set out key aspects and elements of the right to access information:

#### **1. In the context of democratic systems, the right to information is essential as:**

- a. It is part of the right to freedom of thought, belief, and expression, and plays a critical role in strengthening and maintaining democratic governing systems. It is necessary to prevent the establishment of authoritarian regimes/systems.
- b. It allows for public oversight over public resource allocation and management. Additionally, it contributes to ensuring that State officials can be held accountable to their public obligations and official duties.

<sup>4</sup> The Tribunal considered the following decisions of the Inter-American Court on Human Rights: *Caso Claude Reyes y otros Vs. Chile*, Fondo, Reparaciones y Costas, Sentencia de 19 de septiembre de 2006, Serie C No. 151; *Caso Herrera Ulloa Vs. Costa Rica*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 2 de julio de 2004, Serie C No. 107; *Caso Ricardo Canese Vs. Paraguay*, Fondo, Reparaciones y Costas, Sentencia de 31 de agosto de 2004, Serie C No. 111; *Caso Ríos y otros Vs. Venezuela*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 28 de enero de 2009. Serie C No. 194; *Caso Perozo y otros Vs. Venezuela*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 28 de enero de 2009, Serie C No. 195; *Caso Kimel Vs. Argentina*, Fondo, Reparaciones y Costas, Sentencia de 2 de mayo de 2008; and *Caso Tristán Donoso Vs. Panamá*, Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 27 de enero de 2009. Serie C No. 193.

In addition, the tribunal considered an advisory opinion: Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5.

<sup>5</sup> The Tribunal considered the following:

Annual Report of The Inter-American Commission on Human Rights 1994, Chapter V, Report on the compatibility of "desacato" laws with the American Convention on Human Rights; Inter-American Commission of Human Rights, IACHR and its SRESCER Call on American States to Make Public Health and Human Rights the Focus of All their Decisions and Policies Concerning the COVID-19 Vaccine, 5 February 2021; Inter-American Commission of Human Rights, Resolution 1 of 2021, COVID-19 vaccines and Inter-American human rights obligations, 6 April 2021.

**2. The State has to duty to establish conditions that ensure the right to access information.**

**3. The general rule is that all public information must be publicly available, exceptions to this rule should only be permissible in very limited circumstances.**

- a. The right to access information is governed by the principle of "maximum disclosure" (*Principio de máxima divulgación*). This means that, as general rule, all information held by public authorities should be publicly accessible. Limitations and restrictions are only possible in very limited circumstances that must be foreseen by the law and must be subject to strict interpretations of their proportionality and reasonableness.
- b. The right to information, and effectively the principle of "maximum disclosure", is guaranteed by different international human rights instruments, such as the Universal Declaration of Human Rights (Article 19) and the American Convention on Human Rights (Article 13).

**4. Restrictions of the right to access information must be in accordance with the American Convention on Human Rights.**

Following the jurisprudence of the Inter-American Court on Human Rights,<sup>6</sup> the Tribunal indicated that to establish whether a restriction does not violate the right to access information, as protected by the American Convention on Human Rights, the following test should be applied:

- a. Restrictions must be in accordance with and provided for, in a precise and accurate/clear manner, in the constitution or national laws.
- b. Restrictions must be exceptional, temporary and/or tailored to the resolution of a specific purpose.
- c. Restrictions must be necessary, suitable/appropriate, proportionate and reasonable.
- d. Restrictions must have legitimate objectives, such as the protection of national security, public order, public health, public morality and the rights of others. It must be demonstrated that the disclosure of the information effectively threatens to cause substantial damage to the legitimate objective.
- e. Restrictions are only permissible when it is demonstrated by the State that the damage caused by disclosure is greater than the public interest in providing access to the information.

In addition to international human rights standards, the Tribunal considered that the right to access information is a right protected by the Colombian Constitution (Article 74). With respect to this, the Tribunal analysed the jurisprudence of the Colombian Constitutional Court.<sup>7</sup> The Tribunal highlighted that the Constitutional Court has held that any restrictions to the right to access information must be established by law; be precise; operate for a defined time and scope; and be of value to fulfil constitutional purposes.

## **B. CONFIDENTIALITY OF COVID-19 VACCINE NEGOTIATIONS AND CONTRACTS**

The Tribunal set out that, in terms of confidentiality, one must distinguish between negotiations leading up to a contract (before a contract is signed) and the contract itself. It showed that within the national jurisdiction (Article 24.2 of Law 1755 of 2015) negotiations taking place prior to the agreement (contract) may in fact be subject to confidentiality and secrecy. The Tribunal considered

<sup>6</sup> See: *Caso Herrera Ulloa Vs. Costa Rica*, Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 2 de julio de 2004, Serie C No. 107; *Caso Tristán Donoso Vs. Panamá*, Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 27 de enero de 2009. Serie C No. 193; and *Caso Palamara Iribarne Vs. Chile*, Fondo, Reparaciones y Costas, Sentencia de 22 de noviembre de 2005, Serie C No. 135. In addition, the tribunal considered an advisory opinion: *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5.

<sup>7</sup> The Tribunal considered the following decisions of the Constitutional Court: C-951 de 2014 and T- 487 de 2017.

that revealing the details of the negotiations could harm the strategy of the government and would thus not be in the interest of the general public. Consequently, the Tribunal found that the Unit's decision regarding the confidentiality of COVID-19 vaccine contract negotiations was lawful.

The Tribunal underlined that “negotiations” refers to a timely defined period, and once the agreements have been transcribed in a contract and signed, that period ends. Thus, while negotiations themselves may be confidential to enable the government to engage in negotiation strategies in the public interest, the result of the negotiations (i.e. contracts) must not be confidential. The details of the contracts must be publicly available to enable public oversight and control over the implementation of the terms and agreements and to require government compliance.

### **C. ACCESS TO COVID-19 VACCINES AS A GLOBAL PUBLIC GOOD**

The Tribunal stated that universal access to COVID-19 vaccines and effective immunization against COVID-19 are a global public health good and must thus be treated as such. To support this holding, the Tribunal quoted different documents of international bodies, including a resolution<sup>8</sup> of the United Nations General Health Assembly,<sup>9</sup> and a statement<sup>10</sup> and resolution<sup>11</sup> by the Inter-American Commission of Human Rights, as well as a statement by UNESCO's International Bioethics Committee and the World Commission on the Ethics of Scientific Knowledge and Technology.<sup>12</sup>

In the context of Colombia, the Tribunal affirmed that the declaration of the national immunization process against COVID-19 as a public interest (*interés general*)<sup>13</sup> does not seek to facilitate confidentiality in contracts. On the contrary, it was established to encourage the government to engage with multilateral bodies and the private sector to gather scientific, financial and logistic resources to ensure a rapid response to the COVID-19 pandemic.

Importantly, in light of the Tribunal's understanding of COVID-19 vaccines as a global public good, the Tribunal concluded the following:

1. A reservation of the fundamental right to access information cannot be justified by the assumption that revealing such information would harm the security and health of the public. On the contrary, as the COVID-19 vaccine is considered a global public good, the right to access information related to Colombia's procurement of COVID-19 vaccines is fundamental to ensure the public interest.
2. Pharmaceutical companies must respect human rights, including the rights to life and the right to health. This implies a duty not to actively obstruct access to these rights, including the access to information about the acquisition of COVID-19 vaccines.<sup>14</sup> The interest of the pharmaceutical companies in maintaining details of the contracts confidential thus must not prevail over the fundamental right to access information (about them).

<sup>8</sup> General Health Assembly, Resolution WHA73.1, COVID-19 response, 19 May 2020, available at: <https://n9.cl/80pc2>

<sup>9</sup> The World Health Assembly is the forum through which the World Health Organization is governed by its member states.

<sup>10</sup> Inter-American Commission of Human Rights, IACHR and its SRESCER Call on American States to Make Public Health and Human Rights the Focus of All their Decisions and Policies Concerning the COVID-19 Vaccine, 5 February 2021, available at: <https://n9.cl/afre7>

<sup>11</sup> Inter-American Commission of Human Rights, Resolution 1 of 2021, COVID-19 vaccines and Inter-American human rights obligations, 6 April 2021, available at: <https://n9.cl/xrqul>

<sup>12</sup> UNESCO calls for COVID-19 vaccines to be considered a global public good, 24 February 2021), available at: <https://n9.cl/6gb8w>

<sup>13</sup> Law 2064 of 2020.

<sup>14</sup> Inter-American Commission of Human Rights, Resolution 1 of 2021, COVID-19 vaccines and Inter-American human rights obligations, 6 April 2021, para 31, available at: <https://n9.cl/xrqul>

3. The aggravating circumstances of the COVID-19 pandemic increase the obligations of States to ensure the application of the Inter-American standards on transparency, access to public information and to fight corruption. These standards apply to the distribution, acquisition and application of COVID-19 vaccines, and information regarding the mobilization of available resources to ensure vaccine access.
4. As established by the Inter-American Court of Human Rights,<sup>15</sup> matters of public interest, such as the COVID-19 vaccine as a global public good, require a greater protection of the right to access information.

#### **D. PUBLICISING CONTRACT DETAILS DOES NOT HARM PUBLIC SAFETY OR HEALTH**

As the Tribunal had access to the requested COVID-19 contracts it was able to conclude that revealing the information in the contracts would not jeopardize public safety or health. Indeed, the Tribunal affirmed that the contracts do not feature any information that should have remained confidential. In fact, as the confidentiality clauses in the contracts only refer to financial clauses, such as the price or compensation circumstances, restrictions to such information would not align with generally applicable national laws on requiring transparency in the use of public resources. Moreover, the contracts do not contain any confidential information pertaining to the pharmaceutical companies, such as trade secrets, industrial secrets or patents, which could affect or harm their intellectual property.

Moreover, such confidentiality clauses, which are tailored to the interests of pharmaceutical commercial interests, are not justifiable under the “maximum disclosure” principle applicable to the fundamental right to access information.

While the tribunal recognized that COVID-19 vaccines procurement is related to public health, it held that this does not sufficiently justify denying access to contracts relating to the purchase of COVID-19 vaccines. The Tribunal underlined that maintaining the confidentiality of these contracts would mean that COVID-19 vaccines, other vaccines, and good medical practices would be subjected to private power and contractual clauses instead of public scrutiny and accountability. This would prevent any kind of control and simultaneously negatively impact the fulfilment of human rights. Moreover, the tribunal found that the fear of not gaining access to vaccines if the contracts are made public was unfounded.

Ultimately, the tribunal showed that the Unit’s justification for restricting access to contract details (i.e. its purported concerns over public safety and health) to guarantee the supply of vaccines was not met as:

- a) The Unit did not prove that there is a legitimate risk of harming public safety and health by publicizing the COVID-19 vaccine acquisition contracts.
- b) Contracts with pharmaceutical companies, including regarding COVID-19 treatments, have also been publicized by several countries globally, such as Brazil, Argentina, Dominican Republic, Italy, the United States and the European Union.

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<sup>15</sup> See: Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para 70; *Caso Claude Reyes y otros*, sentencia de 19 de septiembre de 2006, Serie C N° 151, para 85; *Caso Herrera Ulloa vs Costa Rica*, sentencia de 2 de julio de 2004, serie C N° 107 para 112; *Caso Ricardo Canese vs Paraguay*, sentencia de 31 de agosto de 2004, serie C N° 111, para 82; *Caso Rios y otros vs Venezuela*, 28 de enero de 2009, serie C N° 194, para 105; and *Caso Perozo y otros vs Venezuela*, sentencia de 28 de enero de 2009, serie C N° 195, para 116.

- c) The example of existing publicly available contracts has not shown negative impacts on public safety or health but, on the contrary, encouraged better practice and control over government actions while simultaneously increasing trust and transparency among the general public. Additionally, disclosing the contracts can improve the position of States in negotiations and the public perception of and trust towards pharmaceutical companies.
- d) Rendering information publicly available, as seen in the case of inflated vaccine prices for South Africa and Uganda, has in fact been vital in overseeing overcharging and payments with public funds and thereby positively contributed to realizing the public interest.
- e) Publishing the details of contracts regarding the acquisition of COVID-19 vaccines should not be a cause for contract termination as vaccines are to be treated and understood as a global public good.
- f) Providing the requested information to the general public would benefit the public interest as would ensure transparency in the use and allocation of public resources, thereby generating greater public interest and trust in COVID-19 vaccines and with that access to health.
- g) Contrary to the Unit's arguments, revealing information from the contracts does not negatively impact the supply of the vaccines as there have been general issues with supply provision in the past year that can be attributed to a multitude of issues including a global supply shortage for COVID-19 vaccines and should not thus falsely be attributed to the disclosure of contract details.

#### DECISION (ORDERS)

Consequently, the Tribunal held that within 3 days of the decision the National Unit for Disaster Risk Management should provide the International Institute of Anticorruption Studies, with:

- 1) Copies of the signed contracts regarding the acquisition of COVID-19 vaccines.
- 2) The contracting model used, the price, the terms of compliance and the national certificate that proves the resources that were used by the Colombian State to acquire COVID-19 vaccines.
- 3) The address to which AstraZeneca PLC and Pfizer Inc vaccine doses were agreed to be delivered and the entry dates of the doses in the country.
- 4) Statements confirming whether, at the time of signing contracts or other legal agreements/instruments with AstraZeneca and Pfizer, the companies had already been granted authorization for emergency use of their vaccines by competent Colombian (sanitary) authorities.
- 5) Information regarding whether there has been any contact or work meetings between the Unit or other National Authorities, and the companies BioNTech, Johnson & Johnson, Moderna, GlaxoSmithKline, Cansino Biologics, Sinovac, Novavax or any other pharmaceutical company, targeting the possible acquisition of COVID-19 vaccines. And if

such contact can be confirmed, provide the dates on which these took place and by whom they were led.

#### ADDITIONAL INFORMATION/RELEVANCE OF THE CASE

In light of the current COVID-19 vaccine crisis this case provides an important opportunity for the general public and States to gain access to information, such as pricing, supply amounts and delivery dates, that may positively impact their ability to fairly negotiate with big pharmaceutical companies as well as hold pharmaceutical companies and governments accountable.

To date, however, the government Unit has not provided the Institute with the demanded information as it has requested clarification of the Tribunal's decision and thus extended the legal administrative procedure.<sup>16</sup> Consequently, greater public awareness of the case and its significance is critical as it could pressure the government into eventually complying with the decision of the Tribunal.

In the local context of Colombia, this case is particularly unique as the administrative Tribunal refers to international human rights law as the basis of its decision. Effectively, it also indicates that pharmaceutical companies' interests must not trump the exercise and enjoyment of the right to access information. Additionally, it is worth underlining the importance of the Tribunal's understanding of COVID-19 vaccines and treatments as a global public good.

Lastly, and interestingly, the Tribunal also critiqued the lack of international solidarity and cooperation among States in ensuring equitable access to COVID-19 vaccines. This further underscores the importance of employing technology transfer to increase production capacities for COVID-19 vaccine access.

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<sup>16</sup> Dejusticia, Las preguntas que siguen pendientes sobre los contratos de las vacunas, 1 de junio de 2021, available at: <https://n9.cl/7ushg>