

# The WHO Pandemic Treaty Fails Again

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By Brett D. Schaefer

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In the aftermath of the COVID-19 pandemic, the World Health Organization (WHO) launched a process to update the International Health Regulations (IHR) and draft a “convention, agreement or other international instrument under the Constitution of the World Health Organization to strengthen pandemic prevention, preparedness and response.”<sup>1</sup>

Since its launch in December 2021, the International Negotiating Body (INB) has held

nine sessions and has released successive drafts of the prospective Pandemic Agreement reflecting input from governments.

The INB published the latest draft of the agreement on March 13 of this year. The draft is expected to serve as the negotiating text for government consideration and amendment before a final draft is presented for adoption at the May 2024 session of the World Health Assembly (WHA).<sup>2</sup>

The draft differs from earlier versions in several particulars, both positive and negative. Overall, however, the negotiations since the October draft was released have not resulted in significant improvements, and the draft still retains many troublesome provisions.

As drafted, the agreement does not merit U.S. support in the upcoming WHA. Should the Biden Administration support the treaty and do so without fixing its many serious problems, the Senate should withhold its advice and consent, which are necessary for ratification.

### **Opacity and Failure to Address Problems**

The COVID-19 pandemic exposed the inability of the current international health architecture, led by the World Health Organization, to prevent, detect, and respond effectively to pandemics. To shore up the shortcomings of the current international processes in responding to pandemics, governments initiated two parallel

processes in the WHO to amend the International Health Regulations and draft a new pandemic agreement.<sup>3</sup>

Both processes, for different reasons, should trouble U.S. policymakers.

### **Working Group on Amendments to the International Health Regulations (WGIHR).**

Discussions on amending the IHR have been extraordinarily opaque with the Working Group meeting regularly but releasing only vague updates on the negotiations. The last substantive update was a nearly 200-page list of proposed amendments released early in 2023.<sup>4</sup>

According to the most recent interim report, the WGIHR was still receiving input from governments and was still drafting and discussing the text of amendments.<sup>5</sup>

Without a publicly available, final version of the proposed amendments, it is impossible to assess the efficacy of the proposed changes. Nonetheless, the WHO expects to present a finalized package of amendments for consideration at the 77th World Health Assembly in May 2024.<sup>6</sup>

Serious matters such as this deserve sunlight and consideration. Refusing to make amendments available until just before they are to be adopted is counter to good governance and violates Article 55 of the IHR, which specifies that

the text of proposed amendments must be communicated to all States Parties “at least four months before the Health Assembly at which it is proposed for consideration.”<sup>7</sup> The U.S. should insist that any consideration of amendments to the IHR be subject to public availability for at least four months before their consideration by the WHA.

**International Negotiating Body (INB) to Draft a Pandemic Convention, Agreement, or Other International Instrument.** To its credit, the INB has been far more transparent than the WGIHR and has released multiple drafts during its negotiations on the proposed pandemic agreement. The most recent draft, released publicly on March 13, differs from earlier drafts in several particulars, both positive and negative.

On the positive side, Article 27 of the draft now expressly permits reservations “unless incompatible with the object and purpose of the WHO Pandemic Agreement.” This is a significant improvement that acknowledges the proper role of U.S. Senate advice and consent in the ratification process. However, the second part of the article would circumscribe that authority in unspecified ways: “Notwithstanding paragraph 1 of this Article, no reservation may be made to Article XX, Article YY, or Article ZZ of the WHO Pandemic Agreement.” Obviously, these limitations could vitiate the very purpose of allowing reservations in the first instance.

Similarly, unlike the previous draft, which failed to address the lack of cooperation and transparency on China's part that contributed to the magnitude of COVID-19, the current draft specifically calls on parties to share genomic data and biological materials as soon as they are available.<sup>8</sup>

Unfortunately, the draft fails to restore language requiring parties to facilitate rapid access to WHO expert teams in outbreak areas—a critical weakness in the pandemic response architecture. Similarly, this draft appropriately acknowledges that “emergency trade measures” might be required to respond to a pandemic, although travel restrictions are unmentioned.<sup>9</sup> In general, the agreement expresses no specific consequences for failure to report a potential outbreak, share genomic data, or allow access to independent experts. Thus, as with the current system, it is dependent on good faith cooperation of the parties—cooperation that cannot be assumed as the world saw with China and the outbreak of COVID-19.

Notably, in response to sovereignty concerns, Article 24 of the new text states that:

Nothing in the WHO Pandemic Agreement shall be interpreted as providing the WHO Secretariat, including the WHO Director-General, any authority to direct, order, alter or otherwise prescribe the domestic laws or policies of any Party, or to mandate or otherwise impose any requirements that Parties take specific actions, such as ban or accept travellers, impose vaccination mandates or therapeutic or diagnostic measures, or implement lockdowns.

On the negative side, the draft reinserted text asserting that “common but differentiated responsibilities” among nations would be a guiding principle of the agreement.<sup>10</sup>

This concept was first codified in in the U.N. Framework Convention on Climate Change to assert greater responsibilities for industrialized economies in addressing climate change because of their greater historical contribution to emissions. The purpose is to make explicit in the agreement that primary responsibility for implementation of its provisions lies with the United States and other developed countries. As stated by the U.S. earlier in negotiations, “We do not support ‘common but differentiated responsibilities and capabilities.’ This concept is not appropriate in the context of pandemic PPR [prevention, preparedness, and response].”<sup>11</sup>

Similarly, the new draft introduces an obligation in Article 20 specifying that:

The Parties commit to working together to...promote, within relevant bilateral, regional and/or multilateral mechanisms, innovative financing measures, including but not limited to debt relief...for affected countries whose debt payment might affect expenditures on pandemic prevention, preparedness and response, and in the case of pandemics, take measures for debt relief, including the suspension of debt servicing and debt cancellation.

This provision is beyond the scope of a pandemic agreement and should be opposed by the U.S. Overall, the negotiations since the

October draft was released have not resulted in substantive improvements, and the draft still retains many troublesome provisions criticized in earlier iterations.

*Special Treatment for China.* The draft is replete with provisions calling on the parties to grant special consideration to developing countries with regard to promoting investment and co-creation, equitable access to research, geographic production, and transfer of technology and proprietary knowledge. Despite China's having the world's second-largest economy, the United Nations considers it a developing country.<sup>12</sup>

Without clarification, China will be considered a developing country in the agreement and will benefit from arrangements that are intended to help low-income countries.

*Unclear Financial Obligations.* As with earlier drafts, the current text would impose substantial, undefined financial commitments on the parties to the agreement. The Conference of Parties is empowered to establish a budget to implement the agreement and support subsidiary bodies with little specificity with respect to how this will be done.

In addition, the agreement obligates developed-country parties to provide unspecified but presumably significant financial assistance to developing countries. For instance:

- Article 4 obligates the parties to enhance “financial and technical support to developing countries.”
- Article 5 obligates the parties to “develop and implement or strengthen, as appropriate, bilateral, subregional, regional and other multilateral mechanisms to enhance financial and technical support, assistance and cooperation, in particular in respect of developing countries.”
- Article 6 commits parties to “provide or facilitate financial, technical and technological support, assistance, capacity-strengthening and cooperation, in particular in respect of developing countries.”
- Article 7 commits parties to “assist and provide financial and technical support within means and resources at their disposal to other Parties in need, with special attention to the needs of countries that are particularly vulnerable to the adverse effects of pandemics.”
- Article 19 requires parties, “upon request, [to] facilitate the provision of technical assistance and support for those Cooperating Parties that have requested such assistance or support, in particular developing countries, either bilaterally or through relevant regional and/or international organizations.”

The costs of these obligations are unclear but likely involve billions of dollars in expected financial and technical support for developing countries, including China. To keep pressure on them to comply, developed countries must report to the Conference of Parties on their support for consideration and review.<sup>13</sup>

*Weakening Intellectual Property Rights.* As with earlier drafts, the recent draft acknowledges



that respect for intellectual property rights plays a critical role in developing medicines, treatments, vaccines, and lifesaving technology. But Article 11 of the agreement also calls on the parties to “encourage” rights holders to forego or reduce royalties of their products and knowhow during a pandemic, consider time bound waivers of intellectual property rights, and “recognize that they have the right to use to the full, the flexibilities inherent in the TRIPS Agreement as reiterated in the Doha Declaration on the TRIPS Agreement and Public Health of 2001, which provide flexibility to protect public health including in future pandemics” and to respect the use by other governments of those “flexibilities.” The clear intent is to encourage states to support infringement of intellectual property.

*Encouraging Censorship.* Unlike earlier drafts, the most recent version of the agreement does not explicitly call on the parties to “combat false, misleading, misinformation or disinformation.” Instead, Article 18 encourages the promotion of “timely access to credible and evidence-based information on pandemics and their causes, effects and drivers, with the aim of countering and addressing misinformation or disinformation.” Unfortunately, the latter part of that article encourages censorship by instructing parties to “cooperate, in accordance with national law, in preventing misinformation and disinformation.” While this is an improvement

on earlier language, the agreement should focus on encouraging governments to promote accurate information rather than on “preventing” misinformation or disinformation, which was abused during the COVID-19 pandemic.

*Perplexing Provisions.* In addition to the foregoing issues, there are other provisions that merit more attention. For instance:

- Unusually, the agreement permits ratification by regional economic integration organizations that are empowered to exercise the cumulative votes of their members if they have transferred authority to make decisions on their behalf. This right applies only if individual members do not vote. This would extend the European Union’s efforts to invest itself with governmental privileges in international organizations. Sovereignty is invested in governments, not regional organizations, and should not be misused in this manner.
- Article 28 of the draft now permits declarations and understandings, but only if “such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of the WHO Pandemic Agreement in their application to that State.” The very point of declarations and understandings is to clarify the scope of treaty provisions.
- The withdrawal procedure in Article 32, which establishes a two-year period after the agreement enters into force before a party can initiate the one-year notification period for withdrawal, seems designed to complicate the ability of the next U.S. Administration to withdraw from the agreement should the Biden Administration assert that the U.S. can join without Senate advice and consent.

## Conclusion

The COVID-19 pandemic exposed the fundamental inadequacies of the current international health architecture, led by the WHO, to detect and help nations to coordinate a response to pandemic outbreaks. There is no doubt that fixes are necessary, but it is increasingly doubtful that the current process is leading to a fruitful outcome. At a minimum, the U.S. should:

In addition, the U.S. Senate should insist that any pandemic agreement be submitted to the Senate for advice and consent before ratification pursuant to Article II of the Constitution. The provisions of the draft agreement clearly qualify it to be treated as an Article II treaty under the “Circular 175 Procedure” articulated by the U.S. Department of State.<sup>15</sup>

Past practice also supports such treatment, as the only other “convention, agreement or other international instrument” negotiated “under the Constitution of the World Health Organization”<sup>16</sup>—the WHO Framework Convention on Tobacco Control—is considered an Article II treaty.

***Brett D. Schaefer** is the Jay Kingham Senior Research Fellow in International Regulatory Affairs in the Margaret Thatcher Center for Freedom at The Heritage Foundation. **Steven***

***Groves is the Margaret Thatcher Fellow in the  
Thatcher Center.***