

WHO Pandemic Treaty Remains Fatally Flawed

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KEY TAKEAWAYS

Even after repeated drafts to address comments and criticism, the World Health Organization's (WHO's) pandemic treaty remains fatally flawed.

The treaty does not focus on shortcomings revealed by COVID-19, such as China's refusal to allow inspection teams timely entry to its lab in Wuhan.

Rather than address the failures exposed during COVID-19, the treaty pushes technology transfers, overrides property rights, and grants China special benefits.

The COVID-19 pandemic exposed the inability of the current international health architecture, led by the World Health Organization (WHO), to detect and help nations to coordinate a response to such threats. In December 2021, the World Health Assembly (WHA) established an inter-governmental negotiating body (INB)¹ to draft a “convention, agreement or other international instrument under the Constitution of the World Health Organization to strengthen pandemic prevention, preparedness and response.”²

After many meetings and several drafts, the INB released its proposed negotiating text for the pandemic agreement that will serve as the basis for governments' debates and amendments before the expected adoption at the May 2024 session of the WHA.³ Yet, the draft treaty does little to address the

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shortcomings of the current international processes in responding to pandemics, largely guided by the International Health Regulations (IHR), revealed by the COVID-19 pandemic.⁴

Specifically, the draft pandemic agreement fails to specify obligations by governments to grant immediate access to international expert teams to assess the threat of a pandemic, to provide full and timely disclosure of genomic data, and clarify steps, such as trade and travel restrictions, that governments can reasonably take in response to a pandemic. Instead, the bulk of the draft focuses on mandating resource transfers, weakening intellectual property rights, mandating technology sharing, pushing for redistribution of manufacturing and production, and empowering the WHO. The draft does not merit U.S. support in the upcoming WHA due to its failure to address the lessons of the COVID-19 pandemic. Should the Biden Administration sign the treaty, the Senate should withhold its advice and consent necessary for ratification.

Costs Outweigh the Benefits

The INB has been working over the past year to draft a pandemic agreement for governments to approve at the May 2024 meeting of the World Health Assembly. Successive drafts have been commented on by experts, academics, civil society groups, and governments, and the most recent draft no longer contains some of the controversial provisions that were present in the “zero draft,” also called the WHO CA+, released on February 1, 2023, such as endorsing the concept of “common but differentiated responsibilities” among nations and dictating that parties allocate domestic funding “not lower than 5% of its current health expenditure to pandemic prevention, preparedness, response and health systems recovery.”⁵

However, objectionable provisions remain in the proposed agreement that must be clarified, limited, or removed. The treaty is also repetitive and duplicative in its provisions and sentiments. For instance, the draft has 20 separate clauses on the need to strengthen capacities of, give special consideration to, or provide targeted resources to developing countries—which includes China. After a year of negotiations, a more succinct text that expressly states the obligations of the prospective parties should have been produced.

A more fundamental problem is that the process has lost sight of why the negotiations started in the first place: shoring up the shortcomings of the IHR that were exposed by the COVID-19 pandemic. For instance, the

zero draft required parties to “facilitate WHO with rapid access to outbreak areas within the Party’s jurisdiction or control, including through the deployment of rapid response and expert teams, to assess and support the response to emerging outbreaks.”⁶ This legitimate provision was a response to China’s obfuscation and delays in granting a WHO expert team access to Wuhan in the early days of the COVID-19 pandemic. But the latest treaty draft contains no such requirement, despite the WHO Director-General pushing Beijing for full access to conduct an unfettered investigation into the origins of COVID-19.⁷ Nor is there any mention of consequences if a party fails to alert the international community of an outbreak or share information in a timely manner, as was the case with China during the COVID-19 pandemic. Notably, the draft pandemic agreement fails to call for a serious, independent investigation of the origins of COVID-19—not even for the purposes of applying lessons learned to future pandemic prevention, detection, and response.

This omission highlights a critical flaw of the IHR, which is that they are dependent on the good faith of parties. Critical actions, such as reporting a potential pandemic, sharing vital genomic data, and giving immediate access to international expert teams to assess the situation, must be obligatory. In addition, the draft fails to specify reasonable steps, such as travel or trade restrictions, that a government could take to limit the spread of contagion. Instead, the draft broadly instructs the parties to develop, strengthen, update, review, and cooperate on various matters like detection, sanitation and waste management, diagnostic capacities, lab safety and security, disease preventive measures, and similar actions to bolster pandemic prevention, preparedness, and response. While unobjectionable, these instructions are generic and provide little actual guidance to governments. In terms of pandemic preparedness, detection, and cooperation, it is unclear why the draft needs to be a treaty at all instead of an amendment or an addendum to the IHR.

The true motivation for making this a binding treaty is revealed in the other parts of the draft. The bulk of the text focuses on mandating resource transfers to developing-country health systems, weakening intellectual property rights, and encouraging technology transfer and geographically distributed production as directed by the WHO. Other, specific objectionable provisions include a dramatic empowerment of the WHO, unspecified costs, undermining free speech, and mandating additional special treatment for developing countries, including China.

The proposed WHO Pandemic Agreement:

Empowers the WHO. The treaty empowers the WHO in several ways. It establishes the “WHO Pathogen Access and Benefit-Sharing System (WHO PABS System), to ensure rapid and timely risk assessment and facilitate rapid and timely development of, and equitable access [among nations and populations] to, pandemic-related products for pandemic prevention, preparedness and response.”⁸ As part of this system, the parties are instructed to develop and use a “Standard Material Transfer Agreement (a PABS SMTA)” wherein

in the event of a pandemic, real-time access by WHO to a minimum of 20% (10% as a donation and 10% at affordable prices to WHO) of the production of safe, efficacious and effective pandemic-related products for distribution based on public health risks and needs, with the understanding that each Party that has manufacturing facilities that produce pandemic-related products in its jurisdiction shall take all necessary steps to facilitate the export of such pandemic-related products, in accordance with timetables to be agreed between WHO and manufacturers.⁹

Failure to agree to a PABS SMTA with the WHO is no protection, as “it shall be understood that the production of pandemic-related products requiring the use of WHO PABS Materials, implies the use of the WHO PABS System” and parties are obligated to take all appropriate steps to require manufacturers to comply with that system. The agreement would also establish a WHO Global Supply Chain and Logistics Network to assess the demand and direct the stockpiling and delivery of pandemic-related products.¹⁰

Of course, implementing these new powers requires an unspecified number of new administrators and support staff. The agreement envisions a Secretariat for the WHO Pandemic Agreement, subsidiary bodies, and expert advisory groups, all of which could amount to hundreds, if not thousands, of new international bureaucrats.¹¹

The politicization and failures of the WHO during the COVID-19 pandemic should raise fundamental questions about whether this institution should be rewarded and empowered in this manner.

Incurs Unspecified Costs. The zero draft required parties to “commit to prioritize and increase or maintain...domestic funding by allocating in its annual budgets not lower than 5% of its current health expenditure to pandemic prevention, preparedness, response and health systems recovery.”¹² Aside from the sovereignty concerns of removing discretion from elected officials over such allocations, the costs to the U.S. would have been extensive. This language is not in the most recent draft.

There are, however, substantial, undefined financial commitments in the current proposal. For instance, in Article 15, the Conference of Parties to the pandemic agreement are obligated to establish a “no-fault vaccine injury compensation mechanism(s), with the aim of promoting access to financial remedy for individuals experiencing serious adverse events resulting from a pandemic vaccine.” Article 17 obligates the parties to “establish, implement and adequately finance an effective national coordinating multisectoral mechanism” for pandemic prevention, preparedness, and response. Articles 19 and 20 obligate the parties to “cooperate to raise financial resources for the effective implementation of the WHO Pandemic Agreement;” “mobilize financial resources for international cooperation and assistance in respect of pandemic prevention, preparedness and response;” provide “adequate, accessible, new and additional and predictable financial resources” for a capacity development fund, to support the Secretariat of the WHO Pandemic Agreement; and to fund an endowment for pandemic prevention, preparedness, and response.

As currently drafted, the financial responsibilities are vague, open ended, and leave discretion to the Conference of Parties to the agreement and whatever international bureaucracy is created to determine which amount of financial support is required from countries that ratify the treaty. The U.S. should demand clarification on the precise financial obligations of the draft agreement. At a minimum, the U.S. should insist that all expenses related to the pandemic agreement, including staffing, funds, and endowments, be provided strictly on a voluntary basis.

Weakens Intellectual Property Rights. As with earlier drafts, the most recent proposed agreement 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 calls on the parties to agree to “use of the flexibilities provided in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)” and support “time-bound waivers of intellectual property rights” during a pandemic. In other words, while the WHO acknowledges the critical role played by intellectual property rights in developing medicines, the draft would limit and override those rights during a pandemic. Such an explicit threat to intellectual property rights will curtail future investment in health research, which is the opposite incentive needed to deal with future pandemics.

In addition, parties are obligated to encourage entities under their authority to allow developing-country manufacturers, including China, to share proprietary technology and knowledge and waive their intellectual property rights.¹³ These references are sometimes, but not always, caveated

with terms such as “within available means and resources” or “as appropriate” or “on mutually agreed terms” that weaken their compulsory nature. Nonetheless, these provisions would do grave harm to the internationally recognized right to property and disincentivize future research and development.¹⁴ The U.S. should reject codification of violations of intellectual property rights and demand that all such references be clarified to make clear that such arrangements are non-compulsory and must be negotiated with the rights holder.

Assaults Free Speech. Echoing similar language in earlier drafts, the most recent version of the agreement calls on the parties to “combat false, misleading, misinformation or disinformation, including through effective international collaboration and cooperation.”¹⁵ China is the global leader in this sort of offense. Most relevant, the Chinese Communist Party misled the world about COVID-19, costing millions of lives and enormous economic harm as a result. More broadly, governments and the WHO were themselves sources of misinformation and disinformation during the COVID-19 pandemic. For instance, the WHO parroted false information from China that “preliminary investigations conducted by the Chinese authorities have found no clear evidence of human-to-human transmission [of COVID-19].”¹⁶ Subsequent information has belied government assertions on efficacy of masks in preventing the spread of COVID-19, the origins of COVID-19, and the economic, social, and educational costs from school closures.¹⁷ Quite simply, the WHO and governments have been wrong (and dishonest) too often to give them authority to police misinformation and disinformation—especially when it infringes on the internationally accepted right to freedom of expression.

Allows Special Treatment for Developing Countries, Including China. References to “common but differentiated responsibilities” among nations, which would impose a greater share of the costs on developed countries, such as the U.S., than on so-called developing countries, appeared in the zero draft. These references have been dropped from the latest proposed pandemic agreement. However, references remain specifying that developing countries should benefit from “financial and technical support” or other provisions intended to strengthen developing-country health capacities and health emergency prevention, preparedness, and response.¹⁸ Several provisions also instruct the parties to promote research collaboration, access to research, technology co-creation, and joint-venture initiatives with developing countries.¹⁹ While there are benefits to the U.S. in bolstering the health capacities in developing countries, this support should be voluntary, not a compulsory or mandatory obligation established by a treaty.

In addition, a glaring oversight in the current draft is the failure to define “developing country.” Despite China having the second-largest economy in the world, the United Nations considers China to be a developing country.²⁰ Without clarification, China will be considered a developing country in the agreement and benefit from arrangements intended to help low-income countries. As China is notorious for theft of intellectual property, allowing China to benefit from provisions facilitating technology transfer and allowing developing-country manufacturers to use proprietary technology and waive intellectual property rights would facilitate and give cover for China’s illicit actions. The U.S. should insist that the agreement define developing countries as low-income or lower-middle-income economies as defined by the World Bank.²¹

Permits No Reservations. The U.S. Senate regularly conditions approval of a treaty on certain provisions, referred to as reservations, understandings, and declarations. For instance, the U.S. Senate provided its advice and consent to the International Covenant on Civil and Political Rights only subject to several conditions, such as rejecting provisions that would “restrict the right of free speech and association protected by the Constitution and laws of the United States.”²² Such provisions explicitly state how the Senate interprets specific elements of agreements and, where reservations and declarations are applied, which parts of the treaty the U.S. does not consider binding. The current negotiating text of the WHO Pandemic Agreement prohibits such reservations.²³ While the Senate should not use a reservation to vitiate the purpose of a treaty, it must still retain the ability to modify the terms of a treaty so that it comports with U.S. law and the Constitution. By banning such reservations at the outset, the proposed WHO Pandemic Agreement disqualifies itself from serious Senate consideration.

Recommendations for the United States

The proposed negotiating text for a WHO Pandemic Agreement remains dangerously flawed and unfocused on the ostensible reason for the negotiations—to shore up the weaknesses of the international health system as revealed by COVID-19. Namely, the international effort to address weaknesses revealed by COVID-19 should be focused on preventing, detecting, and, in the event of an outbreak, alerting the international community to potential pandemics expeditiously. Instead, the draft Pandemic Agreement focuses predominantly on mandating resource transfers, weakening intellectual property rights, mandating technology sharing, pushing for redistribution of manufacturing and production, and empowering the WHO.

The U.S. government should:

- **Oppose empowerment of the WHO to direct “equitable” access to pandemic-related products**, including awarding the WHO access to 20 percent of global supply of pandemic-related products for WHO-directed export under a WHO Global Supply Chain and Logistics Network. The politicization and failures of the WHO during COVID-19 should raise fundamental questions about whether this institution should be rewarded and empowered in this manner.
- **Demand clarification on the precise financial obligations of the draft agreement.** At a minimum, the U.S. should insist that all expenses related to the pandemic agreement, including staffing, funds, and endowments, be provided strictly on a voluntary basis.
- **Reject any codification of violations of intellectual property rights and demand that all such references be clarified** to make clear that such arrangements are non-compulsory and must be negotiated with the rights holder.
- **Eliminate the language calling on the parties to “combat false, misleading, misinformation or disinformation, including through effective international collaboration and cooperation” and oppose any similar advocacy** for policing of speech or expression.
- **Clarify that special provisions aimed at assisting developing countries are voluntary** and that “developing country” be defined as low-income or lower-middle-income economies as defined by the World Bank so that China cannot inappropriately benefit.
- **Eliminate the prohibition on reservations, understandings, and declarations** that are a key means for the U.S. Senate to interpret and confirm exactly the obligations to which the U.S. is committing and reject those that violate the Constitution or are otherwise objectionable.

Conclusion

Despite multiple rounds of negotiations, this latest pandemic draft treaty maintains provisions that should lead the Biden Administration to oppose adoption at the upcoming World Health Assembly. Moreover, under the

“Circular 175 Procedure” and past practice, the current proposal is clearly a treaty requiring Senate advice and consent as it would involve commitments affecting the nation, require implementing legislation by Congress, and be permanent.²⁴ The Senate should reject the draft agreement if President Joe Biden submits it as written. It is incumbent upon the Biden Administration to demand substantial changes to narrow the agreement and excise or modify its many remaining harmful provisions before proposing to impose it on the American people.

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