

A WHO Pandemic Treaty Must Not Infringe on U.S. Sovereignty

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KEY TAKEAWAYS

The U.S. has an opportunity to shape the World Health Agency's pandemic treaty into a narrow agreement that prepares the world for future pandemics.

Without careful diplomacy and clear red lines, this treaty is near certain to devolve into an unserious, ideological agreement that infringes on U.S. sovereignty.

The Biden Administration should only join a pandemic treaty if it advances U.S. national interests, and with the advice and consent of the Senate.

The World Health Organization (WHO) performed inexcusably poorly in its response to the COVID-19 pandemic. It also suffers from other significant governance concerns, including sexual exploitation by WHO staff in the Democratic Republic of the Congo.¹ And yet the Biden Administration has turned to the WHO to formulate a solution to combatting future pandemics.

On November 28, 2021, the United States and other nations urged the World Health Assembly (WHA)—the governing body of the WHO—to establish an intergovernmental negotiating body (INB) to “draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response.”² The WHA set an ambitious timetable for drafting the pandemic treaty, with an August 1, 2022, deadline for the first draft.

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There is as yet no draft text for the treaty, but proposals have been floated that would harm U.S. interests. The Biden Administration and Senate representatives should engage as participants in the INB to ensure that U.S. interests are represented and oppose objectionable proposals. Moreover, any resulting treaty should be sent to the Senate for its advice and consent in accordance with Article II of the U.S. Constitution. Our framers recognized the dangers of treaties and instituted a supermajority requirement in the Senate for ratification to ensure that such agreements receive due scrutiny. Ultimately, U.S. support must hinge on the forthcoming text, but the Administration and Congress should proactively voice priorities and concerns, which are many.

Solving Pandemics through “Equity” and “Solidarity”

Although there is no treaty text to scrutinize yet, the WHA decision to initiate negotiations for a pandemic treaty—a decision supported by the Biden Administration—is sprinkled with buzzwords that have no place in an international legal instrument. For instance, the WHA announcement states that the new treaty must prioritize “the need for equity” and stresses that countries should develop the new treaty “by the principle of solidarity with all peoples and countries.”

The words “equity” and “solidarity” appear in neither the WHO constitution nor the International Health Regulations (IHRs) that currently govern international pandemic response.³ And yet the WHA and many commentators have seized on those terms as the essential elements of any pandemic treaty.

A group of commentators on the London School of Economics COVID blog contends that there “is an urgent need to promote equity in pathogens and data sharing during outbreaks, as part of efforts to decolonise global health and the environment.”⁴ The group does not elaborate on what it means to “decolonise global health,” but it is unlikely to be something that any international agreement could accomplish, nor is it a goal that the WHO has any business pursuing. As the world witnessed, the WHO is not even meeting its current mandate and should not seek additional responsibilities that threaten to divert attention and resources from its core mission to combat communicable diseases, including pandemics, and bolster health care capacity in developing countries.

Other academics have seized on the WHA language to call for “equity” and “solidarity” to be central to the pandemic treaty. For instance, *The British Medical Journal* advocates that “more comprehensive equity must

also be central to pandemic governance in the future, especially gender, racial, geographical, and socio-economic equity.”⁵ Additionally, the *BMJ* recommends that treaty negotiators “[a]dopt feminist principles of equity, equality, autonomy, empowerment, meaningful participation, and inclusion as central to both the content of the treaty, and the process by which the treaty is negotiated and will be implemented.”

The Biden Administration appears to be in agreement with these commentators. *Politico* reports that a document drafted by the Department of Health and Human Services (HHS) states that “[i]dentifying opportunities to promote equity in the response to health emergencies is a policy priority for the United States,” and includes the gobbledygook that “[w]e...must consider how to tailor approaches to address underlying issues necessary to enhance equity in preparing for and responding to the next pandemic...”⁶ Whatever Biden’s HHS means by “enhancing equity” it doesn’t sound like it means prioritizing the protection of American citizens.

U.S. Red Lines

At the recently completed WHA meetings, the Biden Administration proposed many detailed amendments to the IHRs that it argued would “ensure we have the information, resources, capacity, and transparency needed to address future global health crises.”⁷ Most of these amendments were not adopted, but the WHA member states did agree to establish a working group to consider those and other amendments that can be submitted by September 30.⁸ Aside from the U.S. proposal, the nature of these amendments is yet to be determined.

Simultaneously, negotiations for a pandemic treaty are ongoing and a first draft is expected by August 1, 2022. Obviously, there is considerable overlap in focus between those negotiations and the proposed IHR amendments. In addition to the equity aspirations articulated above, which could lead drafters to insert an inappropriate ideological agenda into what should be a narrow agreement to prepare the world for future pandemics, many other proposals have been floated that should concern the U.S. and other governments hoping to avoid a repetition of the WHO’s disastrous handling of the COVID-19 pandemic.

Specifically, the U.S. should:

- **State unequivocally that any international agreement on pandemic response must be ratified and be subject to Senate advice and consent before entering into force.** The Biden Administration

should not follow the example of the Obama Administration, which treated the Paris Agreement on climate change as an executive agreement rather than a treaty.⁹ Without the Senate's advice and consent, the Paris Agreement lacks democratic legitimacy. President Barack Obama signed the agreement, President Donald Trump withdrew from it, and President Joe Biden re-joined it. It is possible, even likely, that a future President will again withdraw from the agreement. That is not a sustainable way to manage U.S. international obligations, and such actions damage U.S. credibility in international treaty negotiations.

The expected scope of a pandemic treaty is significant—the stated purpose for the agreement is to govern how the international community will prepare for, prevent, and respond to future pandemics. A comprehensive agreement, particularly one that would require specific actions or regulatory changes by the United States, would meet the State Department's standards for what qualifies as a treaty, unlike the IHRs, which were adopted as an executive agreement.¹⁰ As such, Senate advice and consent to ratification is necessary under Article II, Section 2 of the Constitution.

- **Defend American sovereignty.** The U.S. should only join treaties that advance its national interests. It is theoretically possible that a pandemic treaty could do so without unduly infringing on U.S. sovereignty. The existence of any such infringement cannot be ascertained until the text of a draft treaty is released, but U.S. negotiators should be wary of any attempt to affect or constrain U.S. domestic decision-making relating to pandemic response or health policy generally. For instance, the Biden Administration should consider any provision of a pandemic treaty that seeks to supplant or override U.S. policy regarding the domestic production and distribution of vaccines, or the intellectual property protections that underpin them, dead on arrival. The U.S. government's primary obligation is to its citizens, not to the rest of the world, even during a pandemic. The Biden Administration and Congress should consider any treaty that binds or seeks to dictate U.S. domestic health policy, particularly the declaration of a public health emergency, a non-starter. Similarly, the U.S. should defend its sovereign authority to control the entry of goods and people into the country when necessary to defend public health.

- **Separate funding from the pandemic treaty.** Not surprisingly, in the wake of COVID-19, there have been calls to increase funding for pandemic preparedness and response. A WHO Independent Panel for Pandemic Preparedness and Response called for the creation of an International Pandemic Financing Facility (IPFF) with “the capacity to mobilize long-term (10–15 year) contributions of approximately US\$5–10 billion per annum to finance ongoing preparedness functions. The IPFF will have the ability to disburse up to US\$50–100 billion at short notice by front loading future commitments in the event of a pandemic declaration.”¹¹

The merits and allocation of any funding should be subject to regular debate and adjustment in the WHA by member states, not mandated in a separate treaty. This is especially relevant considering recent decisions by the WHA to approve significant increases in WHO funding,¹² including dramatically increasing the share of mandatory funding versus voluntary funding.¹³ The inexcusable performance of the WHO in response to the COVID-19 pandemic and other governance concerns, including sexual exploitation by WHO staff in the Democratic Republic of the Congo,¹⁴ highlight the need for reform and stronger oversight—not a blank check.

- **Protect intellectual property and reject mandatory transfer of technology.** Academics and activists have called for the pandemic treaty to declare pandemic health technologies as “global public goods” or require pharmaceutical companies to share intellectual property and genomic data regarding treatment of pathogens with the international community.¹⁵ This proposal echoes calls from some countries and the Independent Panel for Pandemic Preparedness and Response during the COVID-19 pandemic to waive intellectual property rights for vaccines.¹⁶ While the appeal during an emergency is understandable, waiving intellectual property rights would harm U.S. interests and make the world more vulnerable to a future pandemic, as well as undermine the future development of vaccines and treatments for many other diseases or health conditions.

U.S. corporations are global leaders in developing vaccines, therapeutics, and other medical countermeasures to viruses. As such, it is natural that most or all less-developed countries—as well as more developed countries like China, India, and Russia—are interested

in obtaining, for free, a host of health technologies developed by American companies. But the companies that develop vaccines and therapeutics have their headquarters in the U.S. and other developed countries because they have strong property-rights protections. Innovations and discoveries require costly investment. Denying the opportunity to profit from investments by abrogating property rights will curtail future investment and force some companies out of business. Chilling investment in health research is exactly the opposite incentive needed to deal with future pandemics.

Moreover, society's response to COVID-19 shows that governments and businesses are willing to respond in emergency situations to address shortages. The U.S. is a leader in the donation of COVID-19 vaccines globally, and to date has already delivered more than half a billion doses worldwide.¹⁷ Some vaccine manufacturers, such as Moderna, chose not to enforce their COVID-related patents, which indicates that including mandatory technology transfers in a new pandemic treaty is unnecessary. As such, the U.S. should insist that any technology sharing or waiving of property rights be strictly voluntary, and these discussions should take place outside of the ambit of the WHO, which has no legal jurisdiction over the matter. Indeed, intellectual property discussions are best handled in organizations like the World Trade Organization that have specific mandates and agreements to address these matters.¹⁸

- **Congressional participation.** Finally, interested members of the U.S. Senate and House should work with the State Department to be kept abreast of any negotiations relating to a pandemic treaty, and Members of Congress should have the option of attending the in-person negotiations as observers. Allowing robust congressional observation of the negotiations should reduce the possibility that the Senate, which will have to give its consent to ratify—will be surprised by a treaty text that is not politically viable.

In addition to the above red lines, recent experience has shown the importance of having a global network to detect and respond to potential pandemics. Therefore, the Biden Administration should also insist that nations and territories, such as Taiwan, that are not member states of the WHO or Observers at the WHA be explicitly able to participate in any pandemic treaty.

Conclusion

It is clear that the WHO failed to address the COVID-19 pandemic adequately. Although the IHRs are legally binding, China faced no consequences for its lack of transparency and communication about COVID-19. Worse, the WHO failed in its responsibilities to be an honest broker and, instead, appeased China at the expense of rest of the world.

Preparing for future pandemics is something that should unite the international community. The U.S. and the WHO have an opportunity to strengthen the current IHRs or draft a pandemic treaty that reinforces the current obligations of nations to report potential pandemics quickly and forthrightly as outlined in the IHRs. But, without careful diplomacy and clear red lines, such an effort is likely to degenerate into an international agreement that infringes on U.S. sovereignty and costs American taxpayers far more than the effort is worth. The Biden Administration should oppose any measure that is not in the U.S. interest, and seek ratification of a pandemic treaty only if it advances U.S. national interests.

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Endnotes

1. "WHO Horrified over Sexual Exploitation by Aid Workers in DR Congo," BBC, September 28, 2021, <https://www.bbc.com/news/world-africa-58710200> (accessed June 10, 2022).
2. World Health Assembly, "The World Together: Establishment of an Intergovernmental Negotiating Body to Strengthen Pandemic Prevention, Preparedness and Response," December 1, 2021, [https://apps.who.int/gb/ebwha/pdf_files/WHASSA2/SSA2\(5\)-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/WHASSA2/SSA2(5)-en.pdf) (accessed June 10, 2022).
3. Constitution of the World Health Organization, July 22, 1946, <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1> (accessed June 10, 2022), and World Health Organization, "International Health Regulations 2005," 2nd ed., January 1, 2008, <https://www.who.int/publications/i/item/9789241580410> (accessed June 10, 2022).
4. Maike Voss et al., "A New Pandemic Treaty: What the World Health Organization Needs to Do Next," London School of Economics blog, March 30, 2022, <https://blogs.lse.ac.uk/covid19/2022/03/30/a-new-pandemic-treaty-what-the-world-health-organization-needs-to-do-next/> (accessed June 10, 2022).
5. Clare Wenham et al., "Pandemic Treaty: A Chance to Level Up on Equity," *The BMJ*, May 20, 2022, <https://www.bmj.com/content/377/bmj.o1279> (accessed June 10, 2022).
6. Erin Banco, "U.S. Pushes for More Global Sharing of Health Tech in Next Pandemic," *Politico*, March 17, 2022, <https://www.politico.com/news/2022/03/17/u-s-global-health-tech-sharing-next-pandemic-00017977> (accessed June 10, 2022).
7. John Zarocostas, "WHA Sees Changes to Health Regulations and WHO Funding," *The Lancet*, June 4, 2022, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(22\)01007-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)01007-8/fulltext) (accessed June 20, 2022).
8. *Ibid.*
9. An executive agreement is a legally binding instrument that the President is empowered to commit the nation to because: (1) it is within his constitutional authority; (2) there is no need to implement its provisions through legislation; or (3) because Congress has previously enacted legislation signaling its support. Steven Groves, "The Paris Agreement Is a Treaty and Should Be Submitted to the Senate," Heritage Foundation *Backgrounder* No. 3103, March 15, 2016, <https://www.heritage.org/environment/report/the-paris-agreement-treaty-and-should-be-submitted-the-senate>.
10. The State Department has an established process, known as the Circular 175 Procedure (C-175), to guide its decision to designate an international agreement as a treaty or otherwise. See, State Department *Foreign Affairs Manual*, 11 FAM 723.3, <https://fam.state.gov/FAM/11FAM/11FAM0720.html> (accessed June 10, 2022).
11. The Independent Panel for Pandemic Preparedness and Response, "COVID-19: Make it the Last Pandemic," World Health Organization, p. 14, https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf (accessed June 10, 2022).
12. The WHA approved a 13 percent increase (\$604.4 million) to the 2022–2023 biennial budget in May 2022. This increase expands the 2022–2023 budget to \$4.968 billion (compared to the \$3.769 billion 2020–2021 budget). World Health Organization, "Seventy-Fifth World Health Assembly—Daily Update: Programme Budget Revision Approved," May 24, 2022, <https://www.who.int/news/item/24-05-2022-daily-update---24-may-2022> (accessed June 10, 2022).
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14. "WHO Horrified over Sexual Exploitation by Aid Workers in DR Congo," BBC, September 28, 2021.
15. See, for instance, Ellen 't Hoen, "The Pandemic Treaty and Intellectual Property Sharing: Making Vaccine Knowledge a Public Good," Harvard Law Petrie-Flom Center blog, October 15, 2021, <https://blog.petrieflom.law.harvard.edu/2021/10/15/pandemic-treaty-intellectual-property/> (accessed June 10, 2022), and Médecins Sans Frontières, "Overcoming Intellectual Property Monopolies in the COVID-19 Pandemic," *Technical Brief*, July 24, 2020, <https://msfaccess.org/overcoming-intellectual-property-monopolies-covid-19-pandemic> (accessed June 10, 2022).
16. In December 2020, dozens of other countries, led by South Africa and India, went so far as to petition the World Trade Organization to suspend intellectual property rights relating to COVID-19 vaccines. Ann Danaiya Usher, "South Africa and India push for COVID-19 Patents Ban," *The Lancet*, December 5, 2020, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32581-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32581-2/fulltext) (accessed June 10, 2022).
17. "U.S. International COVID-19 Vaccine Donations Tracker—Updated as of June 1," Kaiser Family Foundation, June 1, 2022, <https://www.kff.org/coronavirus-covid-19/issue-brief/u-s-international-covid-19-vaccine-donations-tracker/> (accessed June 10, 2022).
18. Specifically, the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). World Trade Organization, "Agreement on Trade-Related Aspects of Intellectual Property Rights as amended on 23 January 2017," https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm (accessed June 20, 2022). It is worth noting that keeping deliberations in the proper venue cannot overcome poor policy with exhibit A being the Biden Administration's support for the WTO decision to waive intellectual property rights for COVID-19 vaccines. See Editorial Board, "Biden's Patent Gift to Beijing," *The Wall Street Journal*, June 17, 2022, https://www.wsj.com/articles/bidens-patent-gift-to-beijing-world-trade-organization-intellectual-property-china-11655498904?mod=MorningEditorialReport&mod=djemMER_h