

Why the U.S. Should Oppose the New Draft WHO Pandemic Treaty

Brett D. Schaefer and Steven Groves

KEY TAKEAWAYS

Despite its failure during COVID-19 and complicity in China's cover-up, the World Health Organization (WHO) has drafted a new global pandemic treaty.

The draft treaty focuses on expanding WHO power, trampling intellectual property rights, and "equitably" redistributing knowledge, technology, and other resources.

The U.S. should not join this treaty as drafted and Congress must ensure that the Administration does not circumvent Senate approval on any treaty.

Hindsight makes clear that the World Health Organization's (WHO's) response to the COVID-19 pandemic was inept. China shirked its responsibilities under the WHO's International Health Regulations (IHRs) by being neither transparent nor cooperative in alerting the international community to the outbreak, refusing to share genomic sequences of the disease, and impeding the visit of international health experts to assess the situation. Instead of challenging Beijing's lack of cooperation, the WHO parroted the Chinese Communist Party (CCP) talking points and even praised the regime's response to the pandemic. As a result, the COVID-19 pandemic was far more deadly and economically harmful to the U.S. and the rest of the world than it would otherwise have been.

To avoid such a repetition, the U.S. and other WHO member states convened an Intergovernmental

This paper, in its entirety, can be found at <http://report.heritage.org/ib5306>

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Negotiating Body (INB) to draft a new agreement on pandemic prevention, preparedness, and response. The “zero draft”¹ of that agreement, called WHO CA+, was released on February 1, 2023.² The draft is highly problematic and does little to address the shortfalls revealed by COVID-19 and instead focuses on empowering the WHO, trampling intellectual property rights, and mandating funding by the U.S. and other developed nations to support health systems in developing countries, likely including China.

Unless the draft undergoes substantial improvement during the upcoming INB meeting starting February 27, the U.S. should oppose this treaty.

Deeply Flawed Draft Treaty

It has been misreported that the WHO CA+ draft would give the WHO authority over U.S. domestic pandemic policies.³ As the draft makes clear,

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to determine and manage their approach to public health, notably pandemic prevention, preparedness, response and recovery of health systems, pursuant to their own policies and legislation, provided that activities within their jurisdiction or control do not cause damage to their peoples and other countries.⁴

Nonetheless, the draft treaty is deeply flawed and, as currently drafted, should be rejected by the Biden Administration. Some major concerns include:

Expansion of WHO Authority. The WHO performed terribly in the initial stages of the COVID-19 pandemic. Despite obstruction and opacity by Beijing, WHO Director-General Tedros Adhanom Ghebreyesus echoed Chinese misrepresentations of the nature of the threat from COVID-19. The WHO downplayed Beijing’s unwillingness to allow a WHO technical team to visit Wuhan and its refusal to share critical genomic data and virus samples. On the contrary, yielding to political pressure, the Director-General praised China repeatedly. Subsequently, the WHO has been unable or unwilling to confront China and insist on a thorough, independent investigation into the origins of COVID-19.⁵

Nonetheless, the WHO CA+ draft would dramatically expand WHO authority to declare a pandemic and, thereby, trigger provisions in the treaty that would reallocate resources and encourage governments to waive intellectual property rights. It also proposes giving

real-time access by WHO to 20% of the production of safe, efficacious and effective pandemic-related products, including diagnostics, vaccines, personal protective equipment and therapeutics, to enable equitable distribution, in particular to developing countries, according to public health risk and need and national plans that identify priority populations.⁶

Half of the 20 percent is to be provided as a donation and the other half at “affordable prices.” At least until the WHO is reformed,⁷ expanding the organization’s power in this manner should be a non-starter.

Unaddressed Weaknesses. The COVID-19 pandemic exposed the weaknesses of the IHRs. Their voluntary nature allowed China, without repercussion, to conceal the outbreak, refuse to share critical information, and impede access by WHO expert teams. Although the draft WHO CA+ treaty makes transparency and cooperation mandatory (using the term “shall” when referencing facilitating access and sharing of research and genomic data), there are no repercussions for non-compliance. Thus, there is little reason to believe that China would comply with these obligations any differently than it did under the voluntary IHRs. Worse, emulating the WHO’s quiet abandonment of its COVID-19 investigation,⁸ the draft does not insist on completing an independent investigation of the origins of COVID-19, sending the wrong signal to China about its past intransigence.

In fact, the bulk of WHO CA+ focuses not on addressing the weaknesses in pandemic prevention and detection revealed in the COVID-19 pandemic, but on establishing a system to direct expenditures by the treaty parties, require regulatory and policy changes relating to pandemic-related products and intellectual property, and “equitably” redistribute knowledge, technology, and other resources.

Disincentives for Private Research and Development Related to Pandemics. Despite acknowledging that intellectual property plays a critical role in developing medicines, treatments, vaccines, and lifesaving technology, the draft WHO CA+ specifically calls on the parties to support waiving patent rights and sharing of proprietary technology and knowledge on pandemic-related products.⁹ Denying companies 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.

Cost of Billions to U.S. for “Sustainable and Predictable Financing.” Under the draft, the parties “shall” raise financial resources to implement the WHO CA+ and, additionally, “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.”¹⁰ It is unclear if the 5 percent figure refers to total health care spending, all government health expenditures, or just federal health expenditures. On the high end, for the U.S., this would be equivalent to \$213 billion (5 percent of the \$4.3 trillion in total U.S. health care spending in 2021).¹¹ In addition, there are more, unspecified, financial commitments. The draft states that the parties shall

commit to allocate, in accordance with its respective capacities, XX% of its gross domestic product for international cooperation and assistance on pandemic prevention, preparedness, response and health systems recovery, particularly for developing countries, including through international organizations and existing and new mechanisms.¹²

Parties must also establish a “global compensation mechanism for injuries resulting from pandemic vaccines.”¹³ The amount of these additional financial commitments are to be determined. The cost of these commitments to the U.S. taxpayer will likely involve billions, likely hundreds of billions, of dollars.¹⁴

Benefits for China as a “Developing Country.” Not only does the draft WHO CA+ let China off the hook for its role in exacerbating, possibly creating, the COVID-19 pandemic, it rewards Beijing. As with many U.N. resolutions and agreements, the draft endorses the concept of “common but differentiated responsibilities” among nations. In essence, this means that developed countries, like the U.S., Japan, and in Europe, with more resources or capabilities should bear a greater share of the costs than so-called developing countries.

Despite China having the second-largest economy in the world, the U.N. considers China a developing country.¹⁵ This means that China will likely be a beneficiary of WHO CA+ obligations for parties to, among other provisions, incentivize transfer of technology and know-how to developing countries, support waiving intellectual property rights to grant the use of intellectual property and other “protected substances, products, technology, know-how, information and knowledge” to developing countries, encourage patent holders to waive or manage “payment of royalties by developing country manufacturers,” and ensure “equitable distribution” of pandemic-related products, including “diagnostics, vaccines, personal protective equipment and therapeutics.”¹⁶ Beijing already engages in theft of intellectual property on health technology. This agreement will provide legal cover, especially if it can be linked to pandemic preparedness.

Assault on Free Speech. The treaty calls on the parties to “tackle false, misleading, misinformation or disinformation.”¹⁷ This ignores the fact

that governments and the WHO have themselves been sources of disinformation—notoriously, for instance, the WHO tweeted that “preliminary investigations conducted by the Chinese authorities have found no clear evidence of human-to-human transmission [of COVID-19].”¹⁸

Indeed, deviation from WHO and government policy during the pandemic was often met with strong rebuke. But evidence is mounting that those policies were unsound. Guidance from the Centers for Disease Control and Prevention on the efficacy of masks shifted over time,¹⁹ and a recent analysis questions the effectiveness of mask mandates in preventing the spread of COVID-19.²⁰ There is increasing understanding that the economic, social, and educational costs from school closures far outweighed the benefits.²¹ A recent study found that natural immunity acquired by a COVID-19 infection was “associated with lower incidence of SARS-CoV-2 infection, regardless of the variant, than mRNA primary-series vaccination.”²² The theory that COVID-19 originated in a Chinese virology lab, once dismissed as a conspiracy theory,²³ has gained increasing currency.²⁴ The WHO and government experts have been proven wrong too often to give them authority to police “disinformation”—especially when it infringes on the internationally accepted right to freedom of expression.

No Reservations Permitted. The U.S. Senate regularly conditions approval of a treaty on certain provisions, called reservations. The draft WHO CA+ prohibits such reservations.²⁵ 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 WHO CA+ disqualifies itself from serious consideration by the Senate.

Emphasis on Equity. The draft states that the WHO CA+ is “guided by equity” which it defines as “[t]he absence of unfair, avoidable or remediable differences...among and within countries, including between groups of people, whether those groups are defined socially, economically, demographically, geographically or by other dimensions of inequality.”²⁶ Unsurprisingly, the terms “equity” and “equitable” appear more than 30 times. Americans deserve to know precisely what kind of commitments their government is making to the rest of the world through treaties. A treaty “guided” by concepts such as “equity”—a gauzy term rooted in Marxist ideology—should not serve as the guiding principle of any international commitment.

Blank Spots and Inter-Pandemic Obligations. In addition, there are still many blank spots in the WHO CA+ draft. One area still to be filled is the definition of many terms used in the draft. For instance, the draft commits the parties to the “progressive realization of universal health coverage.” The term “universal health coverage” remains undefined,²⁷ but in the U.S.

political context often is understood to mean government-provided health care. Considering the contentious U.S. debate over the proper role of government in health care and the willingness of some U.S. courts to rely on international agreements to interpret U.S. legal obligations, conservatives should be leery of any references to universal health coverage in the treaty.

Finally, the scope of the treaty is enormous, committing parties to providing funding, enacting policies, and adopting legislation and other measures not just during a pandemic but during “inter-pandemic times.” Thus, even though treaty parties technically retain their sovereign control over domestic pandemic response, complying with the treaty will require significant policy changes and implementation whether a pandemic is declared or not.

Conclusion

The WHO CA+ “zero draft” is significantly flawed. The draft states that the WHO CA+ “shall be subject to ratification, acceptance, approval or accession by States,” so the WHO CA+ is clearly a treaty requiring Senate advice and consent under the process outlined in Circular 175.²⁸ Specifically, it would involve commitments affecting the nation, affect state laws, require implementing legislation by Congress, and be permanent. As written, the WHO CA+ should not receive the Senate’s blessing.

The Biden Administration must realize that due to its scope and nature, any treaty resembling the current WHO CA+ draft will require the advice and consent of the Senate. Nonetheless, the Obama Administration at times circumvented Senate consideration and declared international agreements, such as the Paris Climate Agreement, legally binding. Congress should take proactive steps to ensure that any pandemic treaty is submitted to the Senate, including conditioning WHO funding on this process.

During the upcoming fourth meeting of the Intergovernmental Negotiating Body to consider the draft WHO CA+ treaty, it is incumbent upon the Biden Administration to demand substantial changes to narrow the agreement and excise or modify its objectionable provisions. Only a treaty that would preserve American sovereignty, address the mistakes of the COVID-19 pandemic, and protect the intellectual property of U.S. companies should be considered for approval by the United States.

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

Endnotes

1. A “zero draft” is the initial draft that WHO member states use for further negotiation.
2. World Health Organization, “Zero Draft of the WHO CA+ for the Consideration of the Intergovernmental Negotiating Body at Its Fourth Meeting,” February 1, 2023, https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf (accessed February 24, 2023).
3. Brian Freeman, “Biden Admin Negotiates Deal to Give WHO Authority Over US Pandemic Policies,” Newsmax, February 20, 2023, <https://www.newsmax.com/newsfront/who-pandemic-biden/2023/02/20/id/1109356/> (accessed February 24, 2023).
4. World Health Organization, “Zero Draft of the WHO CA+,” pp. 10 and 11.
5. Smriti Mallapaty, “WHO Abandons Plans for Crucial Second Phase of COVID-Origins Investigation,” *Nature*, February 14, 2023, <https://www.nature.com/articles/d41586-023-00283-y> (accessed February 24, 2023).
6. World Health Organization, “Zero Draft of the WHO CA+,” p. 18.
7. Brett D. Schaefer and Danielle Pletka, “What the World Health Organization Must Do to Earn Back U.S. Support,” Heritage Foundation *Issue Brief* No. 5098, August 7, 2020 <https://www.heritage.org/global-politics/report/what-the-world-health-organization-must-do-earn-back-us-support>.
8. Mallapaty, “WHO Abandons Plans for Crucial Second Phase of COVID-Origins Investigation.”
9. Of further concern is that this would establish precedent for waiving intellectual property rights on other medicines, treatments, or technology. For instance, UNAids executive director Winnie Byanyima recently stated, “The World Trade Organization rules allow lifesaving medications to be traded in the same way we could trade luxury goods. They allow pharmaceutical companies to set the price wherever they want, hoard their technologies and reap billions at the cost of lives.... To me, that’s racism, even though people don’t want to call it out: valuing the profit of a few people, who happen to be white, over the lives of black and brown people around the world.” See Caroline Kimeu, “Big Pharma Must Value African Lives Above Profits, Warns Head of UNAids,” *The Guardian*, February 16, 2023, <https://www.theguardian.com/global-development/2023/feb/16/big-pharma-african-lives-profits-aids-hiv-unaids-winnie-byanyima#:~:text=%E2%80%9CThe%20World%20Trade%20Organization%20rules,of%20lives%2C%E2%80%9D%20she%20said> (accessed February 14, 2023).
10. World Health Organization, “Zero Draft of the WHO CA+,” p. 25.
11. Centers for Medicare and Medicaid Services, “Historical: NHE Tables,” <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nationalhealthaccountshistorical#:~:text=U.S.%20health%20care%20spending%20grew,spending%20accounted%20for%2018.3%20percent> (accessed February 24, 2023).
12. World Health Organization, “Zero Draft of the WHO CA+,” p. 25.
13. *Ibid.*, p. 16.
14. The Independent Panel, commissioned by the WHO, recommended financing an International Pandemic Financing Facility with “contributions of approximately US\$5–10 billion per annum to finance ongoing preparedness functions [possessing] 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.” The Independent Panel for Pandemic Preparedness & Response, “COVID-19: Make it the Last Pandemic,” May 2021, p. 57, https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf (accessed February 14, 2023).
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16. World Health Organization, “Zero Draft of the WHO CA+,” p. 14.
17. *Ibid.*, p. 23.
18. World Health Organization, “Preliminary investigations conducted by the Chinese authorities have found no clear evidence of human-to-human transmission of the novel #coronavirus (2019-nCoV) identified in #Wuhan, #China,” Twitter, January 14, 2020, <https://twitter.com/WHO/status/1217043229427761152> (accessed February 26, 2023).
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25. World Health Organization, "Zero Draft of the WHO CA+," Art. 25.
26. *Ibid.*, Art. 3, 4(3).
27. Elsewhere, the WHO states, "Universal health coverage means that all people have access to the full range of quality health services they need, when and where they need them, without financial hardship. It covers the full continuum of essential health services, from health promotion to prevention, treatment, rehabilitation and palliative care." See World Health Organization, "Universal Health Coverage," https://www.who.int/health-topics/universal-health-coverage#tab=tab_1 (accessed February 24, 2023).
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