The Case for Less-Stringent Global Health Treaties: Lessons from Multiple Regimes

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Abstract

Global health has grabbed significant attention in the international legal community since COVID-19 hit the world. The formulation of a pandemic treaty ignited discourse on how the regime’s treaties should be designed; whether they should adhere strictly to stringent measures or adopt more lenient approaches. This paper argues on behalf of the latter. In doing so, this research first explains the objectives and characteristics of global health treaties as a primary composer of global health governance. Then, two sides of the debate on flexibility, namely idealism of full commitment by all and pragmatism of willingness to participate and enforce, are compared in depth. With the facts attained, a contextual analysis of the diplomatic dynamics at the World Health Organization (WHO) is performed to understand the constrains of treaty-making at the main international global platform for public health. Lastly, the research proposes four main ideas that make up the ideal party: cognizance of pre-existing realities, allowance for differentiated commitment levels, careful linguistic choices, and inclusion of minimal yet effective enforcement mechanism.

A. Introduction

At the December 2021 special session of the World Health Assembly (WHA), member states of the World Health Organization (WHO), having learned the lessons from the COVID-19 pandemic, decided to establish an intergovernmental negotiating body (INB) to formulate a pandemic prevention treaty. In early 2023, the INB introduced the Zero Draft of the WHO CA+, a 32-page document that included notable provisions like states’ obligations to allocate capital for pandemic prevention and research as well as empowering the WHO to be more involved on the state level.1 However, just a few months later in May, an updated draft text obtained and distributed by the Health Policy Watch attracted lots of criticism, especially by developing countries, at the WHA for being more lenient than before.2

The dynamics seen in the ongoing and soon-to-conclude treaty negotiation is, however, not unique in several ways. First, dissent over the way a treaty is written has become an inseparable part of the negotiation process itself. Legal scholarship has come to an understanding that international treaties vary in terms of how strictly they regulate the conduct of the parties, manifested through the choice of words and the extent of enforcement mechanisms’ elaboration.³ A few factors contribute to this fact, including geopolitics and the economic state of negotiating countries that influence how treaties are shaped and framed.⁴ Though, by paper, most international organizations and treaty-making bodies today employ an egalitarian approach to decision-making, these political factors usually find their way to be materialized in the legal text.

Second, within the field of global health—the larger regime of international cooperation within which the future treaty lies, there is a growing sentiment of a need to reform the ways of governance. Among the notable progress made is the 2005 International Health Regulations (IHR), which many have criticized for employing antiquated approaches that are not relevant to the twenty-first century.⁵ Ergo, calls for an updated regime have been voiced for many years to address the shortcomings of current frameworks, and the pandemic treaty is expected to be a hallmark of that to make way for more principled global health treaties in the future.⁶ This is bearing in mind the fact that in ways more significant than other areas of multilateral cooperation, these treaties establish oft-rudimentary, transversal mutual commitments with immeasurable impact once effectuated by national policies.⁷

Utilizing a library approach to relevant theories and discussions, this research aims to posit key actionable feature items for the creation of global health treaties, primarily on the level of flexibility that can be tolerated of them. Considering the ongoing discourse surrounding the pandemic treaty and increasing global awareness of the need for a better health regime, the research is novel in the sense that it enriches current literature from a treaty-making perspective. Consequently, the author more elaborately defines treaties as an important component of global health governance, dives into arguments for and against treaty flexibility by also taking examples from other themes like human rights and the environment, looks into intricacies in decision-making at the WHO, and proposes concrete ways to formulate global health treaties.

B. Discussion

1. Global Health Treaties and Governance

In 2003, members of the WHO came to an agreement on the Framework Convention on Tobacco Control (FCTC). The Convention, being the first concluded under the Organization’s constitutional authority in global public health under Article 19 of its Constitution, is known as a breakthrough for its use of an evidence-based policy-making approach and ability to balance the equally strong interests of trade and human right to health.⁸ Other instruments such as the IHR and 2011 Pandemic Influenza Preparedness (PIP) Framework followed, collectively building a system of public health governance at an international level among states.

At the core of global health governance is a universal objective to ensure the attainment of the human right to health for everyone. Despite fluctuating performance because of global politics across decades, WHO’s works consistently reflect how it has been well-centered around this notion as seen in the formulation of the 1987 Global Strategy for the Prevention and Control of AIDS.\(^9\) The Organization, however, is not the sole authority on the matter. Having itself built upon foundations set by predecessors like the Office International d’Hygiène Publique (OIH), WHO works alongside other actors in initiatives like the 2014 Global Health Security Agenda (GHSA) to further their agenda in a more comprehensive capacity.\(^10\) The European Union is a prime example of how proactive regional organizations can take part in the promotion of transnational health governance, with the likes of the Association of Southeast Asian Nations (ASEAN) catching up.\(^11\)

Treaties and other instruments play a crucial role in any multinational effort in the field of global health. This is due to the fact that treaties, especially those which include robust implementation and accountability mechanisms, prompt actions at the domestic level.\(^12\) Without limitation to those labeled or directly targeting health, legal instruments at the global, regional, and national levels complement each other in ensuring not only access to facilities that sustain health but also its equitable distribution across geographies and demographics.\(^13\) Thus, aligning the interest of stakeholders, both vertical and horizontal, is primal to building better systems.

The COVID-19 pandemic brought an awakening to the international health ecosystem as governments panicked to respond according to what they individually deem best for their people. However, a myriad of evidence proves that a conjoint effort that spans beyond borders is substantially better to increase the speed and effectiveness of pandemic countermeasures.\(^14\) Further, the complexity of global health has now become so apparent with the emergence of many non-state actors like philanthropies and non-governmental organizations that a question of WHO’s role and capacity as a facilitator in responding to medical emergencies arises.\(^15\)

2. Idealism vs. Pragmatism: Two Sides of Treaty Flexibility

One of the biggest critiques of treaty flexibility, such as prominently in the form of a clause allowing reservations, has been that it allows for states to become ‘free riders’.\(^16\) This notion, which was coined in the discussion on human rights treaty regimes, stems from the concern for the integrity of a treaty and its content as a package. It is believed that integrity may be compromised if states are able to cherry-pick provisions that are beneficial or agreeable to them and discard others that are not in line with their individual agenda.\(^17\)

The same level of ambition used to also be shared in the context of environmental law with the Kyoto Protocol at its peak. Setting fixed emission reduction targets for countries through its top-down, legally binding approach, the Protocol set high expectations to states—especially

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\(^{17}\) Ibid.
developed ones—to try to promptly drive down emissions significantly. Though some provisions like the emission credit trading system were included to ease the burden parties held, they were not enough to attract a sufficient pool of countries including the world’s (indirect) leader in all sorts of pollution, the United States of America, eventually making it ineffective and having to be replaced a decade after its entry into force by the Paris Agreement.\(^{18}\)

An alternative view was then introduced within the human rights discussion, which is that reservation (and the larger terms of flexibility) should be seen as a necessary evil.\(^{19}\) As no two states have fundamentally similar points of view or circumstances, it makes sense that instead of acting as a non-negotiable all-sized template, treaties should allow room for differences. For example, human rights, culture, and religion are closely interlinked in many countries. For the sake of the greater picture of ensuring human rights universally, reservations are allowed in some human rights treaties to certain extents.\(^{20}\)

The limitation of reservations mainly falls under Article 19 of the 1969 Vienna Convention on the Law of Treaties (VCLT) which stipulates that in formulating a reservation, parties need to make sure that it does not defeat the object and purpose of the treaty itself.\(^{21}\) The determination of what is defeating the object or purpose of a treaty is not universal and shall therefore be judged on a case-by-case basis by testing against parameters that take into account both regime-wide characters and treaty-specific provisions.\(^{22}\)

Environmental treaties are (in)famous for being strict on the parties by, for example, not allowing reservations with the rationale that doing otherwise would be in direct contradiction with VCLT Article 19 due to the close interlinkage with principles.\(^{23}\) Kyoto Protocol’s formation process has shown that the slightest difference among negotiating parties may lead to disagreements and/or failure to fully enforce provisions once adopted, especially when great imbalances exist.\(^{24}\) Inflexibility in performing duties depending on a party’s own capabilities proves to hinder effective participation. Because of this, many have called for environmental treaties’ openness to entertain differences by replacing prohibition with time-barred or adaptive reservation clauses—by and by birthing what is now mainstreamed as the concept of ‘common but differentiated responsibilities’ (CBDR).\(^{25}\)

Upon adoption of the text, the impact of flexibility will be felt more significantly on the ratification of a treaty that counts for its eventual entry into force and implementation—arguably more important than the text’s adoption itself. Treaties that are more stringent aren’t typically welcomed by parliaments with open arms, especially if the provisions don’t promote the economic (and/or other more relevant) interests.\(^{26}\) In countries with skeptical stances on treaties, such as the U.S, on various climate change agreements, ratification can stall for years or even decades.\(^{27}\) In this case, many presidents have resorted to a constitutional method of ratification called executive agreements which is attached to the presidential institution to bypass parliament’s long procedures. However, that attachment is also the primary weakness of the

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mechanism as the commitment is limited only to an administration and thus lack long-term enforceability.28

1. WHO as the Main Treaty-Making Avenue

As of 2015, there are no less than 203 global health actors, from civil society and non-governmental organizations, public-private partnerships, to academic institutions.29 The WHO, comprising 194 sovereign member states, is considered the biggest actor for both its highly representative character and functional role in the global interplay of public health.30 The Organization naturally becomes the first option when governments seek to bring change or awareness on an issue in collaboration with other countries.

The Organization’s Constitution allows a broad range of authorities. Article 2, mainly 2(a), 2(g), and 2(k) together designates its ability to host treaty negotiations and the subsequent conclusion.31 Article 19 which manifests said ability by referring to the terms conventions and agreements (according to Article 2.1(a) of the VCLT, this difference of calling does not matter) states that the WHA acts as the forum on which treaties are made.32 The adoption of texts at the Assembly requires a supermajority two-thirds vote by members present and voting.33

Though WHO is designed to serve two separate functions as a political platform and a functional operator through its different divisions, it is practically very hard not to get them intertwined, causing inefficiencies in the performance of its duties—and thereby its reputation and credibility—as the standard-bearers of health around the world.34 Most of the decision-making is done at the WHA and by an Executive Board that advises the Director-General, and the prior is where notable instruments advancing the global system get made to then be implemented by both states and the WHO itself through its regional offices and technical departments.35 Hence, it is quintessential for any proposal of great gravity at the Organization to be designed and timed strategically so that it becomes agreeable to as many states as possible by minimizing points of dissidence that may pose a significant setback to progress.36

2. Formulating the Ideal Treaty

Treaty-making is a form of delicate art as there are a multitude of ways each word is chosen and each clause is phrased. Though it may sound naive to think that it’s possible to make the ‘ideal’ treaty, history has taught us that it’s in fact possible to craft instruments that encompass both the interests of states (politically) and humankind. The two extremes of treaty forms are also branded as hard and soft laws, though there are commonly other factors to be considered

30 Ibid.
32 Ibid., Art. 19; United Nations, supra note 21, Art. 2.1(a).
33 Ibid., Art. 60.
35 Ibid.
36 T. Dong, R. Zeng, and T. Ma, “Diplomatic Dynamics of International Treaty Negotiations,” The Pump Journal of Undergraduate Research 2 (2019): 199–224. Notwithstanding the prevalence of socio-economic disparities among states, the procedural workings of the Organization at the WHA, which is proximate to that of the UN General Assembly’s one-country-one-vote system, necessitates this view. See World Health Organization, supra note 31, Ch. XIII.
as well. The interplay of the two laws may happen among treaties or within one, and there is a spectrum into which a treaty can be classified: hard, soft, or anywhere in between.

The Paris Agreement provides a noteworthy model of how intra-treaty harmonization of hard and soft obligations can help in reaching an agreement by negotiating parties while also forwarding the treaty’s agenda to a meaningful extent. A number of factors were calculatedly orchestrated, from the normative content of what duties are levied upon states, careful choice of language within a phrase, down to the details included in the often-overlooked preambulatory clauses. Learning from the Agreement and many others that have preceded and come after it, future global health treaties need to showcase at least the four following qualities.

First, from the onset, the initiating and negotiating parties should be mindful of the circumstances surrounding a treaty. From the commercial concerns of neoliberal states to contrasting political views, there are many touchpoints at which discordance can happen, among states or between state(s) and certain clauses of the draft instrument. A good example from within the global health field is how the FCTC was formulated. The Convention’s success is mainly attributable to how the WHA used empirical evidence as the basis for negotiation. The Assembly closely considered the findings of the 2002 World Health Report in parts pertaining to tobacco. When writing the Convention, drafters also took into account some states’ economic reliance on the trade of tobacco and tried to balance between that and the Convention’s core objective by setting realistic expectations and obligations that seek to solve the problem in the long run but also demanding visible small steps.

Second, leveraging the aforementioned knowledge, treaties should try to accommodate the different capacities that countries have to fulfill the obligations set forth. The Paris Agreement again embodies this very well as its construction of obligations and their subjecting to states caters to the varying levels of contribution parties are able (or willing) to give—an actualization of the CBDR principle. In particular, the Agreement employs a pledge-and-review approach to the imposition of state obligations. By allowing states to set their own commitment levels and subsequently report progress on their own accord, taking part in the Agreement does not become an excessive burden for states to ratify. Against skepticism of potency, an indirect enforcement mechanism emerges. The name-and-shame practice of states has been an effective motivation for compliance and deterrence to subversion, as can be seen in the case of the U.S. planned withdrawal from the treaty that gained significant pushback from countries worldwide.

Reservations are also another form of flexibility that can be used to answer the question of parity in treaty enforcement ability. Many scholars have come to the conclusion that in spite of the idealistic tendencies a treaty may have, it is only best to open up to the possibility of reservations being made to parts of it. As a matter of fact, this may even be most appropriate in regimes related to human rights like health and requiring cross-border coordination due to the need to have as many jurisdictions as possible to take part in the collective effort. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is one of the most reserved human rights treaties. Countries in the Middle East and North African region, due to their largely religious society and government system, have made headline-

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38 *Ibid*.
40 Kenji Shibuya et al., *supra* note 8.
making reservations to it. As polemic as it is, these reservations have not been unequivocally used against states for the reason that it is better to make do with the option available rather than to not have them on board the mission.\(^{45}\)

Third, the way provisions are phrased matters a lot. A highlight among the concerns over the pandemic treaty’s draft and negotiation is the use of words signaling optionality instead of obligation by removing words like ‘shall’ that imply obligation while adding others like ‘as appropriate’ that are argued to weaken the treaty and give room for subjectivity to intervene.\(^{46}\)

Echoing the argumentation for reservations, such leniency should not be ruled out if the goal is to encourage the greatest amount of participation by states, in this case by minimizing the leeway for resistance. In a lot of cases, treaties fail to fulfill the goals they intend to accomplish due to either inconsistent practice of parties or the outright unwillingness to ratify and enter into force when states are ‘forced’ to perform an action.\(^{47}\)

Fourth, treaties need to be highly efficient with the inclusion of ‘mechanisms’. Legal instruments in different fields have varying degrees of sophistication, from oversight and periodic reviews to complaint-filing and dispute resolution. Quantitative research has shown, however, that in many regimes with the notable exception of trade, solely focusing on putting in an enforcement mechanism is sufficient.\(^{48}\) Having too many mechanism clauses would not only be redundant and make the treaty hard to enforce, but it also unlocks the likelihood of nonconformity among negotiating parties during its creation process with each provision.

Even within mechanism clauses, there is also the need to balance breadth and depth. Treaties that try to cover a lot of ground usually end up having to sacrifice the profundity of their mechanical provisions that ensure compliance by parties.\(^{49}\) The give-and-take seen is directly correlated to the individual state’s capacity to enforce the treaty as a package. In the context of devising regime consequences of non-compliance, drafters need to make sure that there are strong-enough measures to disincentivize disobedience yet not too strong that states are deterred from taking part.\(^{50}\)

C. Conclusion

Treaty-making does not happen in a vacuum. Even on matters of universal interest such as health, politics—which can be driven by other things like economic benefit–always finds its way into influencing the behavior of states. As the world’s authority on health, WHO and more specifically the WHA is the most probable avenue to create progress through the creation of new legal instruments that can be operationalized almost anywhere in the world to address pressing challenges, from endemics to pandemics.

The two dominating views of idealism and pragmatism on treaty design would always persist. However, learning from human rights and environmental regimes’ progression throughout recent history, it seems unwise to see the two as complete exclusives. Concession needs to be made and is proven possible to get states to meet minds, especially at the WHO where each vote counts.

This research has identified—at least in the theoretical sense—four ways to concretize the ideal global health treaty. First, the treaty should work with instead of against preexisting realities. Second, it should allow different levels of commitment by states through reservations

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\(^{50}\) Ibid.
and/or designating differentiated responsibilities. Third, the use of language should be intentional to fulfill specific purposes at various points in the text. Last, enforcement mechanisms should be included to ensure efficacy instead of overregulating by having too many mechanistic provisions.

REFERENCES


