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Department of International Law, Faculty of Law, Universitas Lampung, Bandar Lampung, Indonesia.
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Less Stringent Global Health Treaties: Insights from Various Regimes

Rafsi Azzam Hibatullah Albar

Universitas Gadjah Mada, Indonesia, E-mail: rafsiazzam@mail.ugm.ac.id

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Abstract

Global health captured significant attention in the international legal community after COVID-19 struck the world. The formulation of a pandemic treaty sparked 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 argued in favor of the latter. Initially, the research explained the objectives and characteristics of global health treaties as a primary component of global health governance. Then, it compared two sides of the debate on flexibility: the idealism of full commitment by all and the pragmatism of willingness to participate and enforce. With the facts obtained, a contextual analysis of the diplomatic dynamics at the World Health Organization (WHO) was performed to understand the constraints of treaty-making at the main international platform for public health. Lastly, the research proposed four main ideas that make up the ideal party: cognizance of pre-existing realities, allowance for differentiated commitment levels, careful linguistic choices, and the inclusion of a minimal yet effective enforcement mechanism.

A. Introduction

A In December 2021, during a special session of the World Health Assembly (WHA), member states of the World Health Organization (WHO) resolved to create an intergovernmental negotiating body (INB) in response to the lessons learned from the COVID-19 pandemic. This body's mandate was to draft a pandemic prevention treaty. By early 2023, the INB had presented the Zero Draft of the WHO CA+, a comprehensive 32-page document outlining states' obligations to fund pandemic prevention and research, and enhancing the WHO's involvement at the state level.[1] However, by May of the same year, a revised draft released by Health Policy Watch faced significant criticism, particularly from developing countries at the WHA. These nations argued that the updated draft was considerably more lenient than its predecessor.[2]

[1] World Health Organization, "Zero Draft of the WHO CA+ for the Consideration of the Intergovernmental Negotiating Body at Its Fourth Meeting," 2023.
[2] Jenny Lei Ravelo, "Disappointment at WHA over Leaked Update to Pandemic Treaty Draft," Devex, 2023, https://www.devex.com/news/disappointment-at-wha-over-leaked-update-to-pandemic-treaty-draft-105586.

This pattern of negotiation and dissent is not uncommon in the treaty-making process. Legal scholars recognize that the drafting of international treaties often involves disputes over their content, reflecting differing degrees of regulatory strictness, choice of language, and the scope of enforcement mechanisms.[3] Such variations are influenced by several factors, including geopolitical dynamics and the economic conditions of the countries involved.[4] Despite most international organizations and treaty bodies nominally adopting an egalitarian approach to decision-making, political considerations invariably shape the final legal documents.

International cooperation in the global health needs urgent governance reform. The 2005 International Health Regulations (IHR), while a significant advancement at the time, have faced criticism for their outdated methodologies that seem misaligned with twenty-first-century requirements.[5] Consequently, there has been a longstanding call for an updated regime that addresses these deficiencies. The anticipated pandemic treaty is viewed as a crucial milestone in this direction, setting a precedent for future global health treaties that are expected to introduce more sophisticated, principle-based commitments.[6] These treaties, once implemented through national policies, have the potential to deliver profound, far-reaching impacts.[7]

This research employs a library approach to gather and analyze relevant theories and discussions, aiming to propose key actionable items for the crafting of global health treaties, with a particular focus on the level of flexibility these treaties can sustain. Given the ongoing dialogue around the pandemic treaty and heightened global awareness of the need for an improved health governance framework, this research contributes to the academic field by offering fresh insights from a treaty-making perspective. It explores the broader implications of treaty flexibility, drawing parallels with other areas such as human rights and environmental policy. Additionally, the research delves into the decision-making intricacies within the WHO and suggests practical strategies for formulating robust global health treaties.

B. Discussion

1. Global Health Treaties and Governance

In 2003, the World Health Organization (WHO) member states ratified the Framework Convention on Tobacco Control (FCTC), marking the first convention adopted under the organization's constitutional authority for global public health, as outlined in Article 19 of its Constitution. This convention was groundbreaking for its evidence-based policymaking and for balancing the competing interests of trade and the human right to health.[8] It set a precedent that influenced subsequent instruments like the International Health Regulations (IHR) and the 2011 Pandemic Influenza Preparedness (PIP) Framework, contributing to the development of a robust international public health governance framework.

Central to global health governance is the universal goal of ensuring the human right to health for all. Although global politics have sometimes hindered its efforts, the WHO has consistently focused on this goal, as evidenced by initiatives such as the 1987 Global Strategy

[3] Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *World Politics* 54, no. 3 (2000): 421–56.
[4] Steven J. Hoffman, "Mitigating Inequalities of Influence among States in Global Decision Making," *Global Policy* 3, no. 4 (2012): 421–32.
[5] Lawrence O. Gostin, "World Health Law: Toward a New Conception of Global Health Governance for the 21st Century.," *Yale Journal of Health Policy, Law, and Ethics* 5, no. 1 (2005): 413–24.
[6] Johnathan H. Duff et al., "A Global Public Health Convention for the 21st Century," *The Lancet Public Health* 6, no. 6 (2021): 428–33.
[7] See, for example, Jennifer Prah Ruger, "Normative Foundations of Global Health Law," *The Georgetown Law Journal* 96, no. 2 (2008): 423–43; Jennifer Kates and Rebecca Katz, "The Role of Treaties, Agreements, Conventions, and Other International Instruments in Global Health," *Infectious Disease Clinics of North America* 25, no. 2 (June 2011): 455–75.
[8] Kenji Shibuya et al., "WHO Framework Convention on Tobacco Control: Development of an Evidence Based Global Public Health Treaty," *British Medical Journal* 327, no. 7407 (2003): 154–57.

for the Prevention and Control of AIDS.[9] The organization does not operate in isolation; it builds on the work of predecessors like the Office International d'Hygiène Publique (OIHP) and collaborates with other entities. For instance, the 2014 Global Health Security Agenda (GHSA) showcases how WHO works alongside various actors to enhance health security globally.[10] Furthermore, regional organizations such as the European Union and the Association of Southeast Asian Nations (ASEAN) play active roles in advancing transnational health governance. [11]

Treaties and other legal instruments are critical in multinational health efforts, as those with strong implementation and accountability frameworks encourage domestic action.[12] These legal tools, whether directly health-related or not, facilitate access to health services and promote equitable health outcomes across different regions and populations.[13] Therefore, aligning the interests of stakeholders at various levels is essential for improving health systems.

The COVID-19 pandemic highlighted vulnerabilities in the international health ecosystem, as nations scrambled to respond in most appropriate ways. However, the pandemic also underscored the superiority of collaborative, cross-border efforts in enhancing the speed and efficacy of response to health crises.[14] Moreover, the increasing visibility of non-state actors, such as philanthropic organizations and NGOs, raises important questions about the WHO's role and capacity as a coordinator in health emergencies.[15]

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

One of the major criticisms of treaty flexibility, notably through clauses that allow for reservations, is the risk of states becoming 'free riders.'[16] This term originated in discussions about human rights treaty frameworks and highlights concerns about the integrity of treaties. Critics argue that such flexibility undermines the cohesiveness of treaties by allowing states to selectively adhere to advantageous provisions while ignoring others that conflict with their national interests.[17]

This concern was similarly prevalent in the field of environmental law, particularly during the era of the Kyoto Protocol. The Protocol established stringent, legally binding emission reduction targets through a top-down approach, placing high expectations on countries, especially developed ones, to rapidly reduce their emissions. Although mechanisms like the emission credit trading system were introduced to alleviate the burdens on parties, they proved insufficient to engage a broad array of countries, including major polluters like the United States. This ultimately led to the Protocol's ineffectiveness and its replacement by the Paris Agreement a decade after it came into force.[18]

An alternative perspective in the human rights debate suggests that reservations—and broader treaty flexibility—are perhaps a necessary compromise. Given the diversity of national

[9] B. M. Meier and W. Onzivu, "The Evolution of Human Rights in World Health Organization Policy and the Future of Human Rights through Global Health Governance," *Public Health* 128, no. 2 (2014): 179–87.
[10] Rebecca Katz et al., "Global Health Security Agenda and the International Health Regulations: Moving Forward," *Biosecurity and Bioterrorism* 12, no. 5 (2014): 231–38.
[11] Marie Lamy and Kai Hong Phua, "Southeast Asian Cooperation in Health: A Comparative Perspective on Regional Health Governance in ASEAN and the EU," *Asia Europe Journal* 10, no. 4 (2012): 233–50.
[12] Haik Nikogosian and Ilona Kickbusch, "The Legal Strength of International Health Instruments - What It Brings to Global Health Governance?," *International Journal of Health Policy and Management* 5, no. 12 (2016): 683–85.
[13] Haik Nikogosian and Ilona Kickbusch, "The Legal Strength of International Health Instruments - What It Brings to Global Health Governance?," *International Journal of Health Policy and Management* 5, no. 12 (2016): 683–85.
[14] Luis A. Fernández-Portillo, Antonio Sianes, and Francisco Santos-Carrillo, "How Will Covid-19 Impact on the Governance of Global Health in the 2030 Agenda Framework? The Opinion of Experts," *Healthcare (Switzerland)* 8, no. 4 (2020).
[15] Lawrence O. Gostin, Suerie Moon, and Benjamin Mason Meier, "Reimagining Global Health Governance in the Age of COVID-19," *American Journal of Public Health* 110, no. 11 (2020): 1615–19.
[16] David Harris et al., *International Human Rights Law*, 2nd ed. (Oxford: Oxford University Press (OUP), 2014), p. 106.
[17] *Ibid*.
[18] Jonathan Pickering et al., "The Impact of the US Retreat from the Paris Agreement: Kyoto Revisited?," *Climate Policy* 18, no. 7 (2018): 818–27.

viewpoints and circumstances, it may be more pragmatic for treaties to accommodate such differences rather than imposing a one-size-fits-all solution.[19] For instance, in many countries, human rights are deeply intertwined with cultural and religious norms. To foster broader adherence to human rights globally, some human rights treaties allow for limited reservations.[20]

This approach to reservations is primarily governed by Article 19 of the 1969 Vienna Convention on the Law of Treaties (VCLT), which mandates that any reservation must not undermine the primary objectives and purpose of the treaty.[21] Determining whether a reservation defeats the treaty's objectives is not a universal judgment; it requires a case-by-case analysis, considering both the overarching goals of the treaty regime and the specific provisions of the individual treaty.[22]

Environmental treaties are known for their strict approach, often prohibiting reservations to maintain adherence to the principles outlined by Article 19 of the 1969 Vienna Convention on the Law of Treaties (VCLT), which prevents reservations that would defeat the object and purpose of the treaty.[23] The negotiation process for the Kyoto Protocol demonstrated how even slight differences among parties can lead to significant disagreements or weaken the full enforcement of treaty provisions, particularly where there are substantial imbalances among the negotiators.[24] This inflexibility in adapting obligations to a party's capacities can hinder effective participation. As a result, there has been a push for environmental treaties to embrace national differences through time-limited or adaptive reservation clauses, leading to the widespread adoption of the principle of 'common but differentiated responsibilities' (CBDR).[25]

The presence of flexibility in treaty texts significantly affects their ratification, crucial for their entry into force and effective implementation—often more pivotal than the adoption of the treaty text itself. Stringent treaties generally struggle to gain acceptance from national parliaments, especially if the provisions do not align with the economic or other primary interests of the country.[26] In nations like the U.S., where there is a historical skepticism towards international treaties, especially on climate change, ratification can be stalled for years or decades.[27] In response, some presidents have utilized executive agreements to circumvent lengthy parliamentary procedures. However, this method ties the agreement to the specific administration, raising concerns about the long-term enforceability and commitment stability.[28]

1. WHO as the Main Treaty-Making Avenue

As of 2015, the global health landscape includes no fewer than 203 actors ranging from civil society and non-governmental organizations to public-private partnerships and academic institutions.[29] The World Health Organization (WHO), with its 194 member states, stands as the largest and most influential entity due to its comprehensive representation and pivotal role

[19] Rhona Smith, *Textbook on International Human Rights*, 7th ed. (Oxford: Oxford University Press (OUP), 2016), p. 165.
[20] *Ibid*, p. 164.
[21] United Nations, "Vienna Convention on the Law of Treaties," 1969.
[22] International Law Commission, "Guide to Practice on Reservations to Treaties," 2011.
[23] Howard Schiffman, "Reservations in Marine Environmental Treaties: Practical Observations," *Whittier Law Review* 26, no. 4 (2005): 1003–24.
[24] Scott Barrett, "On the Theory and Diplomacy of Environmental Treaty-Making," *Environmental and Resource Economics* 11, no. 3–4 (1998): 317–33.
[25] Iain MacLeod, "Incompatibility of Multilateral Treaty Reservations with International Environmental Law," 2010.
[26] Gabriele Spilker and Vally Koubi, "The Effects of Treaty Legality and Domestic Institutional Hurdles on Environmental Treaty Ratification," *International Environmental Agreements: Politics, Law and Economics* 16, no. 2 (2016): 223–38.
[27] Guri Bang, Jon Hovi, and Detlef F. Sprinz, "US Presidents and the Failure to Ratify Multilateral Environmental Agreements," *Climate Policy* 12, no. 6 (2012): 755–63.
[28] Eugene Kontorovich, "Exiting Paris: What the Climate Accord Teaches about the Features of Treaties and Executive Agreements," *Case Western Reserve Journal of International Law* 51 (2019).
[29] Steven J. Hoffman, Clarke B. Cole, and Mark Pearcey, "Mapping Global Health Architecture to Inform the Future," *Centre on Global Health Security*, 2015, https://www.chathamhouse.org/sites/default/files/field/field_document/20150120GlobalHealthArchitectureHoffmanColePearcey.pdf.

in global public health dynamics.[30] This makes the WHO the primary choice for governments seeking to collaborate on public health initiatives and drive international awareness and change.

The WHO Constitution grants it extensive authority, with key provisions such as Articles 2(a), 2(g), and 2(k) enabling it to host and conclude treaty negotiations. Article 19 specifies that the World Health Assembly (WHA) serves as the forum for treaty-making, requiring a two-thirds supermajority vote for the adoption of texts.[31] Although WHO operates both as a political platform and a functional entity through its various divisions, these roles often overlap, potentially leading to inefficiencies that can affect its duties, reputation, and credibility as a global health leader. Decision-making primarily occurs within the WHA and through an Executive Board that advises the Director-General. These bodies are instrumental in developing significant policies that are then implemented by member states and the WHO's regional offices and technical departments. Therefore, it is crucial for any significant proposal at the WHO to be carefully crafted and timed to maximize consensus and minimize dissent, ensuring the smooth progression of global health initiatives.

The WHO Constitution endows the organization with a broad spectrum of authorities, as delineated in Article 2, particularly through clauses 2(a), 2(g), and 2(k). These provisions empower the WHO to facilitate treaty negotiations and their finalization.[32] Article 19 explicitly articulates this capability, stating that the World Health Assembly (WHA) acts as the forum where treaties are deliberated and formulated[33] Importantly, the adoption of treaty texts during the Assembly mandates a two-thirds supermajority vote from members who are present and voting, ensuring a substantial consensus is reached on critical issues.[34]

Designed to function both as a political platform and a practical operator through its various divisions, the WHO often faces challenges in keeping these roles distinct, which can lead to inefficiencies and impact its duties, reputation, and credibility as a global health authority.[35] Decision-making primarily occurs within the WHA and through an Executive Board that advises the Director-General. This structure is critical as it is where significant instruments that advance the global health system are crafted and later implemented by member states and the WHO itself, through its regional offices and technical departments.[36] Therefore, for any proposal of significant importance at the WHO, strategic design and timing are crucial. Proposals must be crafted to garner wide acceptance and minimize dissent, thereby facilitating smooth progress and avoiding setbacks that could hinder global health advancements.[37]

2. Formulating the Ideal Treaty

Treaty-making is indeed a nuanced and intricate process, involving careful selection of words and phrasing of clauses. While the notion of creating the 'ideal' treaty might seem naive, historical successes demonstrate that it is possible to devise agreements that align the political interests of states with the broader needs of humanity. Treaties vary widely, from rigid 'hard law' to more flexible 'soft law', with many falling somewhere in between on this spectrum. This

[30] *Ibid*.
[31] World Health Organization, "Constitution of the World Health Organization" (1946), Art. 2.
[32] World Health Organization, "Constitution of the World Health Organization" (1946), Art. 2.
[33] World Health Organization, "Constitution of the World Health Organization" (1946), Art. 2.
[34] *Ibid*, Art. 60.
[35] Charles Clift, "What's the World Health Organization For? Final Report from the Center on Global Health Security Working Group on Health Governance," *The Royal Institute of International Affairs*, 2014, 37, https://www.chathamhouse.org/sites/default/files/field/field_document/20140521WHOHealthGovernanceClift.pdf.
[36] *Ibid*.
[37] 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.

diversity allows for the nuanced integration of both hard and soft elements within a single treaty, as seen in strategic instruments like the Paris Agreement.[38]

The Paris Agreement exemplifies how harmonizing hard and soft obligations within a treaty can facilitate consensus among negotiating parties and advance the treaty's objectives significantly.[39] This is achieved through meticulously crafted normative content, precise language choices, and even the strategic use of preambulatory clauses that set the tone and context for the agreement. This methodical approach to treaty drafting is a valuable lesson for future global health treaties, which should embody several key qualities.

Firstly, the context in which a treaty is negotiated is crucial. Negotiators must consider various factors such as commercial interests, political ideologies, and potential areas of discord among states or between states and specific treaty provisions.[40] A prime example within global health is the formulation of the Framework Convention on Tobacco Control (FCTC). The success of the FCTC can largely be attributed to how the World Health Assembly utilized empirical evidence from the 2002 World Health Report, which focused on tobacco. This evidence-based approach helped frame the negotiations[41], taking into account the economic dependencies of certain states on tobacco trade. Drafters worked to balance these economic considerations with the convention's primary health goals by setting realistic and achievable obligations that address the problem incrementally, thereby encouraging tangible, albeit gradual, progress.

Second, leveraging this knowledge, treaties should accommodate the diverse capacities of countries to fulfill their obligations. The Paris Agreement exemplifies this approach by tailoring obligations to the varying levels of contribution that parties can realistically offer, embodying the principle of Common but Differentiated Responsibilities (CBDR).[42] It introduces a pledge-and-review mechanism that allows states to set their own commitment levels and report progress independently. This strategy minimizes the burden on states, facilitating ratification and maintaining engagement without imposing excessive demands.[43] Despite concerns about its effectiveness, this method indirectly enforces compliance through a 'name-and-shame' tactic, which has proven to be a potent motivator. This was notably demonstrated by the global backlash against the U.S. when it announced plans to withdraw from the Agreement.[44]

Furthermore, the flexibility offered by reservations is another tool that can ensure broader participation in treaties, especially in areas like human rights and health that require extensive international collaboration. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) stands as a significant example, with numerous reservations made by countries, particularly those in the Middle East and North Africa, reflecting their unique socio-religious contexts.[45] While these reservations have been contentious, they have also been pragmatically accepted because engaging these countries in the treaty framework—even with limitations—is preferable to their complete absence. This approach underscores the importance of inclusivity and practicality in treaty enforcement, recognizing that perfect alignment with idealistic treaty goals is less critical than achieving widespread adherence and incremental progress towards collective objectives.[46]

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[38] Gregory C Shaffer and Mark A Pollack, "University of Minnesota International Governance," *Legal Studies*, no. 09 (2000).
[39] *Ibid*.
[40] Lavanya Rajamani, "The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations," *Journal of Environmental Law* 28, no. 2 (2016): 337–58.
[41] Kenji Shibuya et al., *supra* note 8.
[42] Lavanya Rajamani, *supra* note 39.
[43] Jennifer Jacquet and Dale Jamieson, "Soft but Significant Power in the Paris Agreement," *Nature Climate Change* 6, no. 7 (2016): 643–46.
[44] Eugene Kontorovich, *supra* note 28.
[45] Livia Solaro, "The Problem of Reservations to Human Rights Treaties : A New Challenge to the Traditional Concept of International Law," *Trento Student Law Review* 1, no. 2 (2019): 65–76.
[46] Michele Brandt and Jeffrey A. Kaplan, "The Tension between Women's Rights and Religious Rights: Reservations to Cedaw by Egypt, Bangladesh and Tunisia," *Journal of Law and Religion* 12, no. 1 (1995): 105–42.

Third, the specific language used in treaty provisions is crucial. During the drafting of the pandemic treaty, there was significant debate over the use of permissive language, such as "as appropriate," versus obligatory terms like "shall." This shift towards optionality can dilute the treaty's force, introducing subjectivity that may allow states more leeway in compliance[47] However, incorporating such flexibility can be strategic, aiming to maximize participation by reducing potential resistance from states.[48]

Fourth, the efficiency of treaties is also tied to their enforcement mechanisms. While legal instruments vary in complexity, from oversight and reviews to mechanisms for complaints and dispute resolution, the effectiveness of these mechanisms often differs by field. For instance, in trade agreements, robust enforcement mechanisms are crucial and effective. However, incorporating too many such mechanisms in other types of treaties can lead to redundancy, enforcement challenges, and even discord during the negotiation phase.[49] Treaty drafters should find the right balance in mechanism clauses, weighing the breadth of issues covered against the depth of enforcement measures. The goal should be to create strong enough incentives to deter non-compliance, without making the obligations that are burdensome that states are discouraged from participating. This balance is essential to ensure that treaties are not only signed but are also actively upheld by their parties.[50]

C. Conclusion

The creation of treaties, especially in domains like global health, is deeply intertwined with political dynamics that can be influenced by various factors including economic interests. As the leading global authority on health, the World Health Organization (WHO), particularly through the World Health Assembly (WHA), serves as a pivotal platform for forging international legal frameworks that address significant health challenges such as pandemics and endemics. The processes within the WHA highlight the critical interplay between idealism and pragmatism in treaty design—a dynamic that requires balancing to ensure the broadest possible consensus among member states.

From a theoretical standpoint, there are several key strategies to crafting an effective global health treaty. First, such treaties should be designed to complement rather than contradict existing realities and frameworks, thereby enhancing their practical applicability and acceptance. Second, they should accommodate varying levels of commitment among states, which could be facilitated through mechanisms like reservations or by implementing the principle of "common but differentiated responsibilities" (CBDR). Third, the drafting of treaty text must be deliberate, with careful consideration given to the language used to articulate obligations and permissions, ensuring clarity and reducing room for subjective interpretation. Finally, while enforcement mechanisms are essential to ensure compliance and effectiveness, it is equally important to avoid overcomplication; a treaty burdened with too many procedural provisions risks becoming unenforceable and contentious during negotiations. These elements combined could significantly contribute to the development of a global health treaty that is both inclusive and enforceable, ultimately advancing global health governance in a substantial way.

[47] Luke Taylor, "Covid-19: WHO Treaty on Future Pandemics Is Being Watered down, Warn Health Leaders," *BMJ (Clinical Research Ed.)* 381 (2023): 1246.
[48] Gabriele Spilker and Vally Koubi, *supra* note 26.
[49] Gabriele Spilker and Vally Koubi, *supra* note 26.
[50] *Ibid*.

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