SECOND MEETING OF THE INTERGOVERNMENTAL NEGOTIATING BODY TO DRAFT AND NEGOTIATE A WHO CONVENTION, AGREEMENT OR OTHER INTERNATIONAL INSTRUMENT ON PANDEMIC PREVENTION, PREPAREDNESS AND RESPONSE
Geneva, 18–21 July 2022

A/INB/2/INF./1
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Background information related to the identification by the Intergovernmental Negotiating Body of the provision of the WHO Constitution under which the instrument should be adopted

1. In December 2021, the Second special session of the World Health Assembly adopted decision SSA2(5).[1] Pursuant to paragraph 1(1) of that decision, the Health Assembly decided "to establish, in accordance with Rule 41 of its Rules of Procedure, an intergovernmental negotiating body open to all Member States and Associate Members[2] (the "INB") to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response, with a view to adoption under Article 19, or under other provisions of the WHO Constitution as may be deemed appropriate by the INB".

2. Further, pursuant to paragraph 1(3) of the decision it decided "that as part of its working methods, the INB shall determine an inclusive Member State led process, to be facilitated by the co-chairs and vice-chairs, to first identify the substantive elements of the instrument and to then begin the development of a working draft to be presented, on the basis of progress achieved, for the consideration of the INB at its second meeting, to be held no later than 1 August 2022, **at the end of which the INB will identify the provision of the WHO Constitution under which the instrument should be adopted** in line with paragraph 1(1)" (emphasis added).

3. In the decision, the Health Assembly also requested the Director-General to support the work of the INB, as specified therein. Following guidance from the Bureau of the INB, the Secretariat has prepared this information document on the relevant provisions of WHO's Constitution in order to support the INB's identification of the provision under which the instrument should be adopted.[3]

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[1] Decision SSA2(5) on The World Together: Establishment of an intergovernmental negotiating body to strengthen pandemic prevention, preparedness and response.

[2] And regional economic integration organizations as appropriate.

[3] This report paper draws from, and elaborates on, the Secretariat's earlier information paper (document A/INB/1/INF./1, Secretariat information paper on the provisions of the WHO Constitution under which the instrument could be adopted) and reproduces the tabular Annex from that previous document.

RELEVANT PROVISIONS OF WHO'S CONSTITUTION

4. As mentioned above, pursuant to decision SSA2(5), the INB is to "identify the provision of the WHO Constitution under which the instrument should be adopted". In that regard (with emphasis added):

- under Article 19 of WHO's Constitution, the Health Assembly may adopt legally binding ***conventions or agreements***;
- under Article 21 of WHO's Constitution, the Health Assembly may adopt legally binding ***regulations***; and
- under Article 23 of WHO's Constitution, the Health Assembly may make ***recommendations***, which are not legally binding.

5. For ease of reference, a descriptive table of the three types of instrument (namely: conventions or agreements; regulations; and recommendations) along key axes is provided in the Annex to this document.

POTENTIAL CONSIDERATIONS REGARDING THE IDENTIFICATION OF THE CONSTITUTIONAL PROVISION

6. As a general matter, the Health Assembly may establish more than one instrument, using one or more of the three instrument types under WHO's Constitution, to address a health topic, including pandemic preparedness and response. For the particular case of the INB, the text of the decision of the Health Assembly at its Second special session implies that the INB would identify one, singular provision of the Constitution for the instrument – "*the* provision of the WHO Constitution under which *the* instrument should be adopted".

7. In that regard, the Health Assembly could adopt a legally binding instrument (under either Article 19 or 21 of the Constitution), and that instrument could contain *both* legally binding and non-legally binding provisions, with the non-binding provisions being, for example, recitals, principles, recommendations or aspirations. This practice is, in fact, standard both in WHO[1] and with other international instruments.[2] On the other hand, by definition, if the instrument is adopted under Article 23 of the Constitution, in other words as a recommendation, it could not contain *any* legally binding provisions on Member States.

8. In addition, as a structural matter, it is noted that the instrument could be adopted in a "framework" structure, which could provide for a stepwise approach, with the first step of establishment of the agreement itself, setting out general terms and principles, which could be finalized by the Seventy-seventh World Health Assembly, thereby completing the INB's mandate pursuant to the decision of the Second special session of the Health Assembly;[3] and, in subsequent steps, additional

[1] See, for example, the WHO Framework Convention on Tobacco Control, with its varying use of "shall" (legally binding) and "should" (non-legally binding) terms for specific clauses, for instance in Articles 6 and 16.

[2] See, for example, the Paris Agreement under the United Nations Framework Convention on Climate Change (entry into force 4 November 2016) with its varying use of "shall" (legally binding) and "should" (non-legally binding) terms for specific clauses, for example in Articles 4 and 5.

[3] Decision SSA2(5), paragraph 1(5).

components of the instrument, such as protocols, guidelines, processes and best practices, could be adopted in due course. Such additional components could also be legally binding, non-legally binding or mixed, as is the case, for example, with the additional components of the WHO Framework Convention on Tobacco Control.

9. Furthermore, WHO's Constitution itself illustrates both the above points. It contains both legally binding and non-legally binding provisions.[1] It also has "framework" aspects where it sets out a general obligation and establishes a requirement to work out further agreement to implement the general obligation.[2]

[1] Examples of non-binding provisions include Article 8 (which specifies that "representatives of Associate Members to the Health Assembly should be qualified by their technical competence in the field of health and should be chosen from the native population"); Article 11 (which states "delegates should be chosen from among persons most qualified by their technical competence in the field of health, preferably representing the national health administration of the Member"); Article 24 (which indicates that Members of the Executive Board "may be accompanied by alternates and advisors"); Article 38 (which states that the Board "may establish any other committees considered desirable to serve any purpose within the competence of the Organization").

[2] See, for example, Article 68 (which stipulates that the legal capacity, privileges and immunities of the Organization "shall be defined in a separate agreement to be prepared by the Organization in consultation with the Secretary-General of the United Nations and concluded between the Members").

ANNEX

SUMMARY OF HEALTH INSTRUMENTS UNDER WHO'S CONSTITUTION

Instrument (and legal basis)	**Process for establishment / entry into force**	**Material scope**	**Legally binding or non-binding character**	**Amendments**	**Example(s)**
Conventions or agreements (Articles 19, 20)	Adopted by the Health Assembly through a two-thirds vote (though adoption by consensus is possible); Come into force for each Member State when accepted by it in accordance with its constitutional processes	Any matter within the competence of the Organization	Legally binding on States Parties	Formal amendment process	WHO Framework Convention on Tobacco Control
Regulations (Articles 21, 22)	Adopted by the Health Assembly through a simple majority (though adoption by consensus is possible); Come into force for all Member States after due notice has been given of their adoption by the Health Assembly, except for such Member States as may notify the Director-General of rejection or reservations within the period stated in the notice.	(a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; (b) nomenclatures with respect to diseases, causes of death and public health practices; (c) standards with respect to diagnostic procedures for international use; (d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce; (e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce.	Legally binding on States Parties	Formal amendment process	International Health Regulations (2005) WHO Nomenclature Regulations
Recommendations (Article 23)	Adopted by the Health Assembly through a simple majority (but well-established practice is adoption by consensus)	Any matter within the competence of the Organization	Not legally binding on Member States (noting, however, the political effects of expected implementation and compliance by Member States); binding on the WHO Secretariat	Adoption of a new resolution or decision	Pandemic Influenza Preparedness (PIP) Framework (resolution WHA64.5) Global Code of Practice on the International Recruitment of Health Personnel (resolution WHA63.16) International Code of Marketing of Breast-milk Substitutes (resolution WHA34.22)