

## **Secretariat background information paper on certain legal and governance considerations**

1. This background information paper, prepared by the WHO Secretariat, discusses selected legal and governance matters relating to the conceptual zero draft (contained in document A/INB/3/3) of the international instrument on pandemic preparedness and response (the “WHO CA+”), including in response to points raised by Member States and relevant stakeholders during the second meeting of the Intergovernmental Negotiating Body (INB) to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response,<sup>1</sup> and through the intersessional processes and activities between the second and third meetings of the INB.

2. The paper is presented bearing in mind that the scope, aims, structure and content of the WHO CA+ are to be finally decided by WHO Member States, through the INB, in their sovereign capacity. The points discussed here are in some cases preliminary and intended to illustrate the many options that Member States have regarding the instrument. The discussion includes hyper-links to other international instruments, and, where possible, focuses on “universally accepted” instruments (those that have been acceded to or otherwise accepted by practically all WHO Member States and additional parties).

### **POTENTIAL OPTIONS ON GOVERNANCE AND/OR INSTITUTIONAL ARRANGEMENTS FOR THE WHO CA+**

3. ***Governing body arrangements.*** The final terms of the WHO CA+, in accordance with standard practice, are expected to include and address detailed governance arrangements, including establishment of a governing body for decision-making and rules of procedure, working methods, possible subsidiary bodies, and inclusion of relevant stakeholders in its deliberations. The conceptual zero draft (in Article 19) presents a conceptual approach for the consideration of the Governing Body of the WHO CA+.

4. A standard approach would be to establish a conference of the parties (COP) as the supreme and primary body in the governing arrangements for the instrument. Should INB members so decide, the governance arrangements for the WHO CA+ could use the “standard” COP arrangement as a point of departure, and further add modalities and mechanisms to ensure opportunities for a rich and robust participation in the instrument by relevant stakeholders and other parties; such broad and deep outreach and engagement would follow the procedural work of the INB, including the detailed engagement of relevant stakeholders (in accordance with the INB modalities, as contained in document A/INB/2/4), and as reflected through the public hearings and informal, focused consultations that have been held.

---

<sup>1</sup> Open to all Member States and Associate Member States, as well as regional economic integration organizations, as appropriate.

5. One such model in that regard could be a three-tiered governing body for the WHO CA+ as reflected in the conceptual zero draft, composed as follows: (a) the Conference of the Parties (COP), as the supreme organ of the governing body; (b) the Officers of the Parties (OP), the administrative organ of the governing body; and (c) the Enlarged Conference of the Parties (E-COP), the polylateral diplomacy venue of the governing body, to promote broad input for the decision-making processes of the COP, as well as normative and programmatic coordination.

6. Under this three-tiered structure, when the governing body is convened in full composition, it would include the COP, OP and E-COP. The COP, as the supreme policy-setting organ of the WHO CA+, would keep under regular review the implementation of the WHO CA+ and any related legal instruments that the COP may adopt, and make the decisions necessary to promote the effective implementation of the WHO CA+. The process, membership and specific roles and responsibilities of the COP, OP and E-COP could be further elaborated in the text of the instrument. Furthermore, should the INB so agree, the COP could be empowered to further develop proposals for the consideration of the WHO Executive Board, including promoting coordination between its Standing Committee on Health Emergency Prevention, Preparedness and Response and the governing body for the WHO CA+ (as well as any other relevant governance bodies that may be established by the Health Assembly or Executive Board).

7. **Additional collaboration modalities within the governing body arrangements.** The INB may also wish to consider additional modalities for technical collaboration within the governance arrangements for the WHO CA+, which could include establishing subsidiary bodies to the supreme body (the COP) of the WHO CA+. An important potential example in that regard is the United Nations Framework Convention on Climate Change, which established two subsidiary bodies to its COP, a Subsidiary Body for Scientific and Technological Advice, whose purpose is to provide the COP and, as appropriate, its other subsidiary bodies “with timely information and advice on scientific and technological matters relating to the Convention”,<sup>1</sup> and a Subsidiary Body for Implementation, to assist the COP in “the assessment and review of the effective implementation of the Convention”.<sup>2</sup>

8. **Permanent secretariat arrangements.** In addition to the modalities for the governing body structure, the permanent secretariat, to provide support to the instrument and its governing body, would be expected to be discussed by the INB. Multiple options exist for such an arrangement, including supporting the secretariat within the structure of WHO, having a separate permanent secretariat administered by WHO, or establishing a new or separate body to act as the permanent secretariat. Each option has resource implications, including human and financial.<sup>3</sup> The conceptual zero draft does not contain detailed provisions on the structure or nature of the permanent secretariat; this could be addressed in the zero draft of the instrument.

---

<sup>1</sup> UNFCCC, Article 9.

<sup>2</sup> UNFCCC, Article 10.

<sup>3</sup> These options were analysed by the WHO Secretariat in its note to the Open-Ended Working Group on the WHO Framework Convention on Tobacco Control entitled “Options for the designation of the permanent secretariat and arrangements for its functioning” (document A/FCTC/IGWG/2/2 (January 2005)); that note contains a summary of a detailed review of permanent secretariat arrangements across a number of other multilateral instruments, including instruments based in the United Nations and in the specialized agencies (accessed 16 November 2022).

## COMPLIANCE, MONITORING AND RELATED POINTS FOR THE WHO CA+

9. Following practice across international legal instruments, including in diverse topics, such as environmental agreements and human rights instruments, INB members may wish to consider addressing compliance and verification as part of the WHO CA+.

10. **Compliance.** The instrument could include a means by which compliance issues could be raised, if applicable, through appropriate modalities and arrangements. Potentially relevant modalities from existing international instruments include the following:

- the Compliance Committee of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, in accordance with its modalities,<sup>1</sup> comprises three parts: a plenary; a “facilitative” branch, responsible for providing advice and facilitation to Parties in implementing the Protocol and for promoting compliance by Parties with their commitments under the Protocol, taking into account the principle of common but differentiated responsibilities and respective capabilities; and an “enforcement” branch, which determines whether Parties are in compliance with specified provisions of the Protocol, in line with established procedures.
- the Compliance Committee of the Paris Agreement to the United Nations Framework Convention on Climate Change, in accordance with its modalities,<sup>2</sup> is expert-based and facilitative in nature, and has been established to function in a manner that is transparent, non-adversarial and non-punitive, and which pays particular attention to the respective national capabilities and circumstances of Parties; it comprises 12 members with recognized competence in relevant scientific, technical, socioeconomic and legal fields, elected by the Conference of the Parties.
- the non-compliance procedure of the Montreal Protocol on Substances that Deplete the Ozone Layer,<sup>3</sup> includes a modality by which a Party can address reservations about another Party’s implementation of its obligations under the Protocol to its Secretariat, which are in turn reviewed by an established Implementation Committee, reporting to the established Meeting of the Parties.

11. **Verification.** The INB may wish to consider establishing a modality within the WHO CA+ for the instrument’s body (COP or otherwise) to assess and verify compliance with the instrument by its parties, through means such as monitoring, fact-finding missions and inspection.

---

<sup>1</sup> See decision 27/CMP.1, Procedures and mechanisms relating to compliance under the Kyoto Protocol, in accordance with the Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session, held in Montreal from 28 November to 10 December 2005.

<sup>2</sup> See decision 20/CMA.1, Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, as contained in the Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at the third part of its first session, held in Katowice from 2 to 15 December 2018 (document FCCC/PA/CMA/2018/3/Add.2).

<sup>3</sup> Adopted on a permanent basis in 1992 by the Fourth Meeting of the Parties of the Montreal Protocol (decision IV/5) and revised in 1998 by the Tenth Meeting of the Parties (decision X/10), pursuant to Article 8 of the Montreal Protocol, which provides “The Parties, at their first meeting shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance.”

## **OTHER INTERNATIONAL INSTRUMENTS, AND THEIR RELATIONSHIP WITH THE WHO CA+**

12. In comments on the working draft, the Secretariat was requested to outline key international agreements and instruments relevant to the WHO CA+, and to address the relationship between the new instrument and existing instruments; this section provides an overview of, and background to, the relevant provisions in the conceptual zero draft.

13. The ultimate structure and content of the WHO CA+ will determine its interrelation with other instruments. With that caveat in mind, as a general rule, overlapping rules of international law are not necessarily conflictual; they can also produce duplication in the sense that implementation of the first rule produces an action identical or equivalent to that resulting from implementation of the second rule, or can be “synergistic”, in the sense that implementation of the first rule produces a different or distinct action from implementation of the second rule, with action under both rules serving and/or reinforcing the same specific purpose.

14. Article 2 of the conceptual zero draft addresses the “Relationship with international agreements and instruments”, and contains four subparagraphs reflecting general principles, as well as directly mentioning and discussing three international instruments: the Charter of the United Nations, the WHO Constitution, and the International Health Regulations (2005) and later editions. These provisions are based on earlier WHO instruments – particularly the Framework Convention on Tobacco Control and the International Health Regulations (2005) – as well as input received to date.

15. In view of the proliferation in recent times of global treaties on subject matter that cuts across many areas of international relations, such as health, trade and the environment, two principles of drafting and interpretation for legally binding international instruments that may be relevant for the WHO CA+ are: (1) the principle of mutual supportiveness between treaties and the consequential presumption against conflicts – in other words, where the interpretation of two treaties may lead to different results, the interpretation which better preserves the positions of the parties under both treaties, and which creates synergies rather than conflict between them<sup>1</sup> should be chosen over the others; and (2) the principle of not adding to or diminishing the rights and obligations provided for by other international instruments.<sup>2</sup> Those principles are reflected in the conceptual zero draft, in particular in the text of Article 2(1).

16. Turning to specific international instruments and their potential interrelation with the WHO CA+, the Secretariat has prepared a brief description below, grouped by relevant themes or areas. At this stage, it is largely a descriptive outline and a list of select key instruments; a detailed analysis of how these

---

<sup>1</sup> See, for example, the International Health Regulations (2005) (Article 57(1)); the Nagoya Protocol (Article 4(3)); the International Treaty on Plant Genetic Resources for Food and Agriculture and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (both recognizing, in their respective recitals, that “trade and environment agreements should be mutually supportive with a view to achieving sustainable development”).

<sup>2</sup> See, for example, the International Health Regulations (2005) (Article 57(1)); WHO Framework Convention on Tobacco Control (Article 2(2)); the Nagoya Protocol (Article 4(1), excepting the exercise of rights or obligations from an existing international agreement would “cause a serious damage or threat to biological diversity”); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Article XIV); and the United Nations Convention on the Law of the Sea (Article 311).

instruments interact and/or potentially conflict with the WHO CA+ could be prepared in due course, for example, in conjunction with the circulation of a zero draft.<sup>1</sup>

### International health instruments

17. The International Health Regulations (2005) represent a critical instrument in the field of international health.<sup>2</sup> The conceptual zero draft directly addresses the interrelation between the International Health Regulations in Article 2, Paragraph (2), with reference to Article 57 of the International Health Regulations (2005), pursuant to which States Parties recognize that the International Health Regulations (2005) and other relevant international agreements should be interpreted so as to be compatible. Other relevant instruments include the Pandemic Influenza Preparedness (PIP) Framework<sup>3</sup> and the Framework Convention on Tobacco Control<sup>4</sup> (primarily, the latter, as the existing international instrument adopted under Article 19 of the WHO Constitution).

### Environmental instruments

18. The field of international environmental law is broad and robust. Within the field, the objectives of the Convention on Biological Diversity<sup>5</sup> include the fair and equitable sharing of benefits arising from the utilization of genetic resources; its Nagoya Protocol<sup>6</sup> provides further detail in that regard, noting the International Health Regulations (2005) and the importance of ensuring access to human pathogens for public health preparedness and response purposes. Other potentially relevant instruments include the International Treaty on Plant Genetic Resources for Food and Agriculture,<sup>7</sup> the Montreal Protocol on

---

<sup>1</sup> The Secretariat also addressed this topic during the revisions to the International Health Regulations (2005); the report is contained in document A/IHR/IGWG/INF.DOC//1, and while much of the content is specific to the technical scope of the Regulations, it may also provide relevant background and analysis in the context of the WHO CA+.

<sup>2</sup> The International Health Regulations (IHR) 2005 entered into force on 15 June 2007 and have 196 Parties. Full text of the instrument, as well as additional information, is available at: [https://www.who.int/health-topics/international-health-regulations#tab=tab\\_1](https://www.who.int/health-topics/international-health-regulations#tab=tab_1) (accessed 16 November 2022).

<sup>3</sup> Pandemic influenza preparedness framework for the sharing of influenza viruses and access to vaccines and other benefits, 2nd edition (who.int), adopted by the Sixty-fourth World Health Assembly in resolution WHA64.5 (2011).

<sup>4</sup> The WHO Framework Convention on Tobacco Control entered into force on 27 February 2005 and has 182 parties. Full text of the instrument, as well as additional information, is available at: [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IX-4&chapter=9&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IX-4&chapter=9&clang=_en) (accessed 16 November 2022).

<sup>5</sup> The Convention on Biological Diversity entered into force on 29 December 1993 and has 196 parties. Full text of the instrument, as well as additional information, is available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-8&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8&chapter=27&clang=_en) (accessed 16 November 2022).

<sup>6</sup> The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity entered into force on 12 October 2014 and has 138 parties. Full text of the instrument, as well as additional information, is available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-8-b&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8-b&chapter=27&clang=_en) (accessed 16 November 2022).

<sup>7</sup> The International Treaty on Plant Genetic Resources for Food and Agriculture entered into force on 29 June 2004 and has 149 contracting parties. Full text of the instrument, as well as additional information, is available at: <https://www.fao.org/plant-treaty/overview/en> (accessed 16 November 2022).

Substances that Deplete the Ozone Layer,<sup>1</sup> the United Nations Convention to Combat Desertification<sup>2</sup> and the United Nations Framework Convention on Climate Change,<sup>3</sup> including its Paris Agreement<sup>4</sup> and Kyoto Protocol.<sup>5</sup> Also of note is the Vienna Convention for the Protection of the Ozone Layer,<sup>6</sup> and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>7</sup> INB members may note that several of these instruments recognize the potential harmful impact of environmental destruction on human and public health.

### ***Weapons (biological and chemical) and arms control instruments***

19. The Biological Weapons Convention<sup>8</sup> relates to biological weapons, as well as their potential consequences. Other potentially relevant instruments with a similar nature include the Chemical Weapons Convention,<sup>9</sup> and the Treaty on the Prohibition of Nuclear Weapons.<sup>10</sup> In the same vein, the United Nations Secretary-General's Mechanism for Investigation of Alleged Use of Chemical and

---

<sup>1</sup> The Montreal Protocol on Substances that Deplete the Ozone Layer entered into force in 1989 and has 198 parties. Full text of the instrument, as well as additional information, is available at: <https://ozone.unep.org/treaties/montreal-protocol> (accessed 16 November 2022).

<sup>2</sup> The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa entered into force on 26 December 1996 and has 197 parties. Full text of the instrument, as well as additional information, is available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=XXVII-10&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-10&chapter=27&clang=_en) (accessed 16 November 2022).

<sup>3</sup> The United Nations Framework Convention on Climate Change entered into force on 21 March 1994 and has 198 parties. Full text of the instrument, as well as additional information, is available at: [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg\\_no=XXVII-7&chapter=27&Temp=mtmsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXVII-7&chapter=27&Temp=mtmsg3&clang=_en) (accessed 16 November 2022).

<sup>4</sup> The Paris Agreement entered into force on 4 November 2016 and has 194 parties. Full text of the instrument, as well as additional information, is available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-7-d&chapter=27&clang=_en) (accessed 16 November 2022).

<sup>5</sup> The Kyoto Protocol to the UNFCCC entered into force on 16 February 2005 and has 192 parties. Full text of the instrument, as well as additional information, is available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XXVII-7-a&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXVII-7-a&chapter=27&clang=_en) (accessed 16 November 2022).

<sup>6</sup> The Vienna Convention for the Protection of the Ozone Layer entered into force on 22 September 1988 and has 198 parties. Full text of the instrument, as well as additional information, is available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=XXVII-2&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-2&chapter=27&clang=_en) (accessed 16 November 2022).

<sup>7</sup> The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) entered into force on 1 July 1975 and has 184 parties. Full text of the instrument, as well as additional information, is available at: <https://cites.org/eng/disc/what.php> (accessed 16 November 2022).

<sup>8</sup> The Biological Weapons Convention entered into force on 26 March 1975 and has 184 parties. Full text of the instrument, as well as additional information, is available at: <https://www.un.org/disarmament/biological-weapons/> (accessed 16 November 2022).

<sup>9</sup> The Chemical Weapons Convention entered into force on 29 April 1997 and has 193 parties. Full text of the instrument, as well as additional information, is available at: <https://www.opcw.org/chemical-weapons-convention> (accessed 16 November 2022).

<sup>10</sup> The Treaty on the Prohibition of Nuclear Weapons entered into force on 22 January 2021 and has 68 parties. Full text of the instrument, as well as additional information, is available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=XXVI-9&chapter=26&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVI-9&chapter=26&clang=_en) (accessed 16 November 2022).

Biological Weapons<sup>1</sup> authorizes the Secretary-General to investigate the alleged use of chemical, biological and toxin weapons in accordance with guidelines and procedures endorsed by the United Nations General Assembly. Commitment at the international level aimed at strengthening disaster risk governance is galvanized by the Sendai Framework for Disaster Risk Reduction.<sup>2</sup>

### ***Human rights instruments***

20. There are a significant number of international human rights instruments of relevance for the work of the WHO CA+, including the Universal Declaration of Human Rights and the nine “core” instruments, each of which has established a committee of experts to monitor implementation of the treaty provisions by its States Parties.<sup>3</sup>

### ***Trade and intellectual property instruments***

21. The rules of the World Trade Organization (WTO), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)<sup>4</sup> relate to trade and intellectual property concerns and health considerations. Similarly, the Doha Ministerial Declaration on the TRIPS Agreement and Public Health<sup>5</sup> involves the interpretation of the TRIPS Agreement in a way that supports public health through the lowering of trade barriers and revised trade rules. Additionally, relevant instruments include the many international instruments administered by the World Intellectual Property Organization (WIPO), among others, the Patent Cooperation Treaty.<sup>6</sup>

= = =

---

<sup>1</sup> Resolution A/42/37 C (1987) of the United Nations General Assembly establishes the Secretary-General’s Mechanism (UNSGM) to carry out prompt investigations in response to allegations of the possible use of chemical and bacteriological (biological) and toxin weapons that may constitute a violation of the 1925 Geneva Protocol or other relevant rules of customary international law.

<sup>2</sup> The Sendai Framework for Disaster Risk Reduction 2015–2030 was adopted by United Nations Member States on 18 March 2015. Full text of the framework, as well as additional information, is available at: <https://www.preventionweb.net/sendai-framework/sendai-framework-for-disaster-risk-reduction> (accessed 16 November 2022).

<sup>3</sup> The relevant core instruments are the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Covenant on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child. Additional information on the instruments is available at: <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies> (accessed 16 November 2022).

<sup>4</sup> The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994, which came into force on 1 January 1995. The text of the Agreement is available at: [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (accessed 16 October 2022).

<sup>5</sup> Information on the Doha Ministerial Declaration is available at: [https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm#declaration](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm#declaration) (accessed 16 November 2022).

<sup>6</sup> The Patent Cooperation Treaty entered into force on 24 January 1978 and has 156 Contracting States. Full text of the instrument, as well as additional information, is available at: <https://www.wipo.int/pct/en> (accessed 21 November 2022).