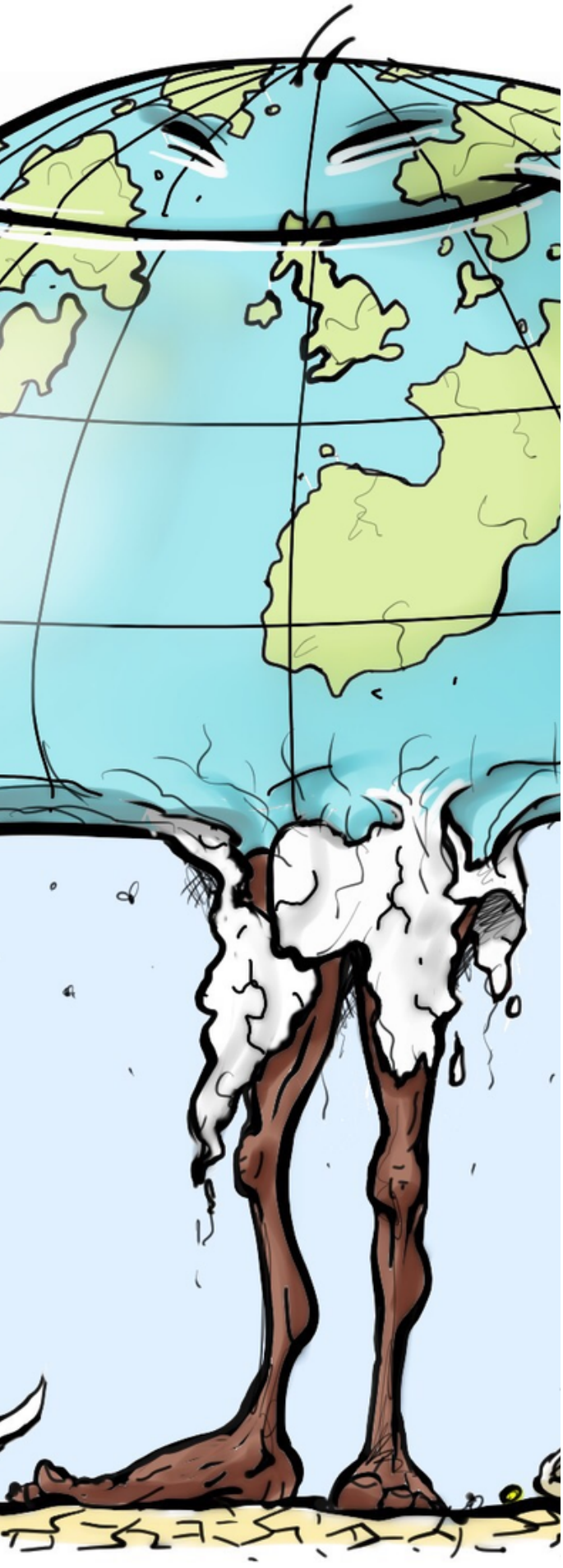

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Where is the Binding International Treaty Negotiated at the WHO Against Future Pandemics Going?

By Germán Velásquez

The idea of an international pandemic treaty is to avoid repeating the failures that occurred during the COVID-19 crisis. Many things did not work, but the most glaring failure was the unequal distribution of, and access to, vaccines, diagnostics and treatments. An international treaty based on the principles of equity, inclusiveness and transparency is needed to ensure universal and equitable access.

The current draft text of the "pandemic treaty" is far from adequately responding to the problems faced during the COVID-19 crisis. Developed countries have weakened the initial version of the draft, and the text is now full of unnecessary nuances. The expression "where appropriate" and other such wordings, typical of voluntary provisions, now appear repeatedly. It is a question of either protecting and ensuring the public interest and the health of citizens as a right, or of defending the interests of an industry that seeks to enrich itself without limits. The treaty against future pandemics will be one of the central topics at the next World Health Assembly of the World Health Organization (WHO) in May 2024. If the countries of the South, accounting for the majority of the WHO membership, unite with a clear and strong public health vision and the countries of the North act lucidly, follow scientific evidence while pursuing safety for all, the treaty will contribute to the well-being of future generations. If in the end a small group of countries oppose a treaty with meaningful provisions, we must not forget that the WHO is a democratic institution where there is the possibility to vote.

La idea de un tratado internacional sobre pandemias es evitar que se repitan los fracasos que se produjeron durante la crisis del COVID-19. Muchas cosas no funcionaron, pero el fracaso más flagrante fue la desigual distribución y acceso a las vacunas, diagnósticos y tratamientos. Se necesita un tratado internacional basado en los principios de equidad, inclusión y transparencia para garantizar un acceso universal y equitativo.

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El actual proyecto de texto del "tratado pandémico" está lejos de responder adecuadamente los retos planteados durante la crisis de COVID-19. Los países desarrollados han debilitado el texto inicial. Los países desarrollados han debilitado la versión inicial del borrador, y el texto está ahora lleno de matices innecesarios. La expresión "cuando proceda" y otras formulaciones típicas de las disposiciones voluntarias aparecen ahora repetidamente. Se trata de proteger y garantizar el interés público y la salud de los ciudadanos como un derecho, o de defender los intereses de una industria que pretende enriquecerse sin límites. El tratado contra futuras pandemias será uno de los temas centrales de la próxima Asamblea Mundial de la Salud de la Organización Mundial de la Salud (OMS) en mayo de 2024. Si los países del Sur, que representan la mayoría de los miembros de la OMS, se unen con una visión clara y fuerte de la salud pública y los países del Norte actúan con lucidez, siguiendo las pruebas científicas al tiempo que persiguen la seguridad para todos, el tratado contribuirá al bienestar de las generaciones futuras. Si al final un pequeño grupo de países se opone a un tratado con disposiciones significativas, no debemos olvidar que la OMS es una institución democrática donde existe la posibilidad de votar.

L'idée d'un traité international sur les pandémies est d'éviter de répéter les échecs qui se sont produits lors de la crise du COVID-19. Beaucoup de choses n'ont pas fonctionné, mais l'échec le plus flagrant a été la distribution inégale des vaccins, des diagnostics et des traitements, ainsi que l'accès à ces derniers. Un traité international fondé sur les principes d'équité, d'inclusion et de transparence est nécessaire pour garantir un accès universel et équitable.

Le projet de texte actuel du "traité sur les pandémies" est loin de répondre de manière adéquate aux défis rencontrés lors de la crise du COVID-19. Les pays développés ont affaibli la version initiale du projet, et le texte est maintenant plein de nuances inutiles. L'expression « le cas échéant » et d'autres formulations typiques des dispositions volontaires apparaissent désormais à plusieurs reprises. Il s'agit soit de protéger et d'assurer l'intérêt public et la santé des citoyens comme un droit, soit de défendre les intérêts d'une industrie qui cherche à s'enrichir sans limites. Le traité contre les futures pandémies sera l'un des sujets centraux de la prochaine Assemblée mondiale de la santé de l'Organisation mondiale de la santé (OMS) en mai 2024. Si les pays du Sud, qui représentent la majorité des membres de l'OMS, s'unissent autour d'une vision claire et forte de la santé publique et que les pays du Nord agissent avec lucidité, en suivant les preuves scientifiques tout en recherchant la sécurité pour tous, le traité contribuera au bien-être des générations futures. Si, en fin de compte, un petit groupe de pays s'oppose à un traité contenant des dispositions significatives, nous ne devons pas oublier que l'OMS est une institution démocratique où il est possible de voter.

The ongoing multilateral negotiations to prevent future pandemics are complex, confusing, and remain heavily influenced by developed countries, and as the Director-General of the WHO, Dr. Tedros Adhanom Ghebreyesus recently put it at Davos in January 2024, “countries risk missing the May [2024] deadline for agreeing a legally binding treaty on the fight against pandemics, which would be a major blow to future generations”.

The global management of the COVID-19 pandemic revealed that many responses did not work effectively, with countries not always following WHO guidelines and directives on protective measures and isolation practices, for example, or on standardized protocols for intensive care. But the most glaring failure was the unequal access to, and distribution of, diagnostics, vaccines and treatments. The hoarding of vaccines by northern countries — beyond their real needs — who ended up destroying unused vaccines because they had expired while stationed in northern warehouses - contributed to the lack of availability. Little has been spoken about this. Vaccines, diagnostics and treatments developed largely with public funds ended up being monopolized in the hands of the private industry.

The idea of the pandemic treaty was to address these failures in case of similar situations appearing in the future. The COVID-19 pandemic demonstrated that joint and organized action, in which the public interest and global equity remain paramount, is the need of the hour. As we know today, this did not happen. Meanwhile, the WHO and scientific bodies continue to announce the imminent arrival of similar disasters in the future.

On 30 March 2021 (at a time when many people still hoped that even after the violent blow of COVID-19 we would be able to build a better world), twenty-five heads of State from around the world joined the President of the European Council, Charles Michel, and the Director-General of the WHO, Dr. Tedros, in calling for an international treaty on pandemics, based on lessons learnt during the COVID-19 pandemic.

According to the communiqué issued after this meeting, it is presumed that there will be future pandemics and major health emergencies. The question is not whether, but when. We must be better prepared to predict, prevent, detect, assess and respond effectively to pandemics in a coordinated manner. To achieve this, according to the communiqué, a new international pandemic preparedness and response treaty is needed.

Once again, and tellingly, the 2020-2023 health crisis demonstrated that the WHO does not have —or is not allowed to use— the necessary legal instruments and mechanisms to implement its rules and guidance in responding to pandemics.

An international treaty at the WHO

The COVID-19 pandemic was a global challenge that no single government could address on their own, as will also be the case in any anticipated future pandemics. This explains the importance of an international, binding treaty adopted within the WHO framework, which would enable countries around the world to have equitable and timely access to all means necessary to address such exceptional global health crises.

A treaty based on principles of equity, inclusiveness and transparency is needed to ensure universal and equitable access to diagnostics, vaccines and medicines, under a robust international health framework, to facilitate the WHO in exercising its role as the governing authority on global health. We would thus be talking about a fundamental reform of the way international health is currently managed.

This was the basis that led to start a cycle of negotiations to arrive at a binding treaty in December 2021. At its second special session on the subject, the World Health Assembly established an intergovernmental negotiating body (INB) to draft and negotiate a convention, agreement or other international instrument within the framework of the WHO Constitution to strengthen pandemic prevention, preparedness and response, with a view to its adoption under article 19 or other such provisions of the constitution, as the INB may deem appropriate. The INB would work on the basis of the principles of inclusiveness, transparency, efficiency, Member State leadership and consensus.[1]

In the decision establishing the INB, the World Health Assembly also requested the WHO Director-General to support the work of the INB by holding public hearings and to report on its deliberations, in line with WHO practice.

In parallel to the negotiation on this international treaty, the revision of the International Health Regulations (2005) was also initiated. The respective scope and objectives of these parallel processes are not always clear leading to overlapping and often confusing processes throughout the treaty negotiation frameworks.

[1] WHO, The World Together: Establishment of an intergovernmental negotiating body to strengthen pandemic prevention, preparedness and response, World Health Assembly Second Special Session Resolution SSA2(5), 1 December 2021.

The contents of the treaty

The WHO Secretariat prepared a draft consolidated synthesis document of the substantive elements, as a basis for consideration and discussion, in order to arrive at a zero draft on which negotiations could finally commence. The document contained 74 elements for discussions, which in many cases confused rather than assisted, and thus complicated the processes.

The substantive elements, which some countries have highlighted as important could be grouped around five central axes:

a) Governance: The treaty's primary objective is to strengthen the capacity of WHO to address and manage future pandemics, and the treaty should therefore be binding and administered by the WHO. WHO Member States would be the parties to the new treaty.

b) Research and Development (R&D) and technology transfer: Strengthening open research and innovation, free of intellectual property rights so that the use of research results can be accelerated, at non-speculative costs. Designing mechanisms that would allow pandemic-related health supplies to be considered as global public goods, and therefore more affordable.

c) Financing: Coordination and transparency of international public funding of research relating to pandemics, including pooling of funding through a global R&D fund to support research and sharing of results under the concept of open science, with the participation of developing country institutions and researchers.

d) Laboratory capacity, clinical testing and data exchange: Increasing laboratory and surveillance capacity to identify animal diseases in all countries, and increased collaboration between health research centres worldwide. Clinical trials should be transparent and independent, including mechanisms to ensure sharing of pathogens, biological samples and genomic data.

e) Communication and information: Ensuring scientific communication to be independent, reliable and accurate, accessible by digital technologies for the collection and sharing of pandemic-related data.

Several drafts of the treaty provisions were considered in a series of negotiation rounds between 2022 and 2023. The eighth round took place in February 2024. The discussions were held in thematic country groups while informal consultations were held by the INB secretariat, with support from the WHO Secretariat.

The prestigious journal, *The Lancet* in its editorial on 2 March 2024, called the current draft treaty text “shameful and unfair”. It lamented on the fact that even though hundreds of hours were already spent “the political momentum is dead”. After eight rounds of negotiations over two years, the INB will meet for its ninth and final session on 18-29 March 2024, just prior to the submission of the draft for approval at the World Health Assembly in May 2024. Developed countries have been successful in weakening the draft from the initial version, with the text now full of nuances, cautious caveats and the expression “where appropriate” and other wording typical of voluntary provisions, far from establishing binding obligations as originally intended. It is clear that the current version of the draft is far from effectively responding to the problems that came to light during the COVID-19 pandemic, so as to avoid repeating the same mistakes.

The treaty should ensure that developed countries and the private companies in their jurisdiction act in a fair and transparent manner - not stockpile millions of doses, not refuse to share know-how or not enforce intellectual property rights on life-saving products - that history does not repeat itself and that countries are not pitted against each other.

The word "equity", according to *The Lancet* editorial, appears nine times in the October 2023 negotiating text as a guiding principle for the entire treaty. But in reality, article 12 of the draft under negotiation stipulates that the WHO would only have access to 20 per cent of "pandemic-related products for distribution on the basis of risk and public health needs". The remaining 80 per cent —whether vaccines, treatments or diagnostics— would be sold to the highest bidder. The editorial correctly notes that, "The majority of the world's population lives in countries that could not afford these products, but it seems that high-income countries were only willing to accept 20 per cent. This is not only shameful, unfair and inequitable, but also ignorant. Creating and signing up to a robust and truly equitable set of conditions on access and benefit sharing is not an act of kindness or charity. It is an act of science, an act of security and an act of self-interest. There is still time to right this wrong".

Civil society representatives have warned that limiting the time for negotiations on the treaty risks marginalising developing countries' equity-related proposals, especially those on intellectual property and the use of patents, which grant exclusivity in times of pandemics. [2] The draft of several provisions under consideration confirms such risks:

- Articles 10, 11 and 13 of the current draft focus on production, technology transfer and the supply chain. They have been addressed through multiple consultations in a sub-group dedicated to these issues, but so far the language falls short.

- Article 11 on technology transfer does not contain a binding provision mandating technology transfer and suggests mutually agreed terms, i.e., transfers of a voluntary nature. This is the preferred approach of developed countries and is surely one of the major sources of North-South tensions in the negotiation.

The current draft also hesitates to "reaffirm" the TRIPS flexibilities (flexibilities of the Agreement on Trade-related Aspects of Intellectual Property Rights); instead, it uses the word "recognise". This would be a step backwards in relation to all the texts adopted in the last fifteen years in the context of the United Nations.

As stated by Viviana Muñoz of the South Centre, "The current draft text of article 11 that refers to intellectual property and the use of patents would not introduce any change in the status quo".[3] This was a central issue explaining the failure in managing the response to COVID-19.

Tensions, progress and setbacks

Negotiating the treaty is not an easy task, and the divergences between developing and developed countries on key issues remain huge.

[2] Geneva Health Files, "Equity Provisions in the IHR: A Race Against Time", Newsletter No. 63, 10 February 2024.

[3] Viviana Muñoz Tellez, "How Should the WHO Pandemic Treaty Negotiations Tackle Intellectual Property?", *SouthViews* No. 256, 22 February 2024 (South Centre).

According to the current Director-General, the WHO Secretariat should always be in favour of the developing countries, the poor and the suffering. This is a very interesting, new and coherent position that contrasts with previous directors-general who defended a "neutrality" that unfortunately has not existed since the 2000s when Gro Harlem Brundtland was director. In practice, what often happens is that some staff in the WHO Secretariat who assist countries in these types of negotiations often defend the interests of the developed world, or more precisely, the interests of the large pharmaceutical industries located in these countries. The presence of civil society is active, but their views have been minimally taken into account.

The United States of America delegation's efforts to remove anything that does not suit its pharmaceutical industry interests are insistent and heavy-handed. Moreover, as has happened in the past with the negotiation on other binding international treaties, the US often negotiates till the end with the aim to weaken the text and then once it is adopted, does not ratify it, as was the case for example with the Framework Convention on Tobacco Control negotiated at the WHO.

The impact of intellectual property on access to medicines, the barriers to access that patents can represent, are issues that were already recognised in the "Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property", approved in 2008 by the WHO. If we are discussing the same things even today, fifteen years later, it only means that there has been little progression, or even regression.

A European ambassador in a private conversation remarked recently, "let's be realistic, let's approve what we have"... But it seems that "what we have" is a far cry from what we thought a binding treaty could equip us to have – a coherent response to potential future pandemics. What we have, as some say, is a step backwards from what we had. The concerns of developing and developed countries largely differ. Either it is about protecting the public interest and the health of citizens as a right, or defending the interests of the industry to enrich itself without limits, as they did during the COVID-19 pandemic.

Lack of optimism and ambition, and above all, lack of solidarity from the developed countries, busy engaging in senseless armed conflicts, continues to be a global challenge. Destructive and costly conflicts in various parts of the world waste resources that could not only have been used to prevent new pandemics, but which would have been sufficient to eradicate poverty and guarantee the well-being of the planet. Peace is a condition for development, and when the whole world loses, developing countries lose the most. As the United Nations Secretary-General António Guterres put it at the opening of COP27 (27th meeting of the Conference of the Parties of the United Nations Framework Convention on Climate Change), "We are in the fight of our lives, and we are losing". Although he was referring to the climate change crisis, the same warning remains pertinent to most development issues including responding to any future pandemics.

According to *The Lancet* editorial, "The INB may be doing its best, but ultimately it is the politicians of the G7 countries who must put aside the vested interests of industry and finally understand that in a pandemic you cannot protect only your own citizens: the health of one depends on the health of all."

The treaty to respond against future pandemics will be one of the central issues at the next WHO World Health Assembly in May this year, where it is expected to be adopted. If the countries of the South, which constitute the majority of the WHO membership, unite with a clear and strong public health vision while the countries of the North act with lucidity and follow the science by pursuing safety for all, we can successfully contribute to the well-being of future generations. And if in the end a small group of developed countries, defending the agenda and interests of their industries, oppose to the adoption of a treaty that is able to effectively serve the global public health with equity, it will be useful to remind ourselves that the WHO is a democratic institution where there is the possibility to vote.

Author: Germán Velásquez is Special Adviser on Policy and Health of the South Centre.

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For more information, please contact Anna Bernardo of the South Centre:
Email abernardo@southcentre.int, or telephone +41 22 791 8050.

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