



# POLICY BRIEF

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## The WHO Intergovernmental Negotiating Body process and the revised draft of the WHO Pandemic Agreement (A/INB/9R/3)

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### ABSTRACT

This Policy Brief considers the negotiating process conducted so far by the Intergovernmental Negotiating Body (INB) for an instrument on pandemic prevention, preparedness and response under the World Health Organization (WHO), and some aspects of the draft text for the Resumed Ninth meeting of the Intergovernmental Negotiating Body (INB9R), as well as of the draft proposed resolution for consideration by the World Health Assembly in May 2024. The Policy Brief provides recommendations to assist member States in their negotiations during the INB9R to be held from April 29 to 10 May 2024.

**KEYWORDS:** Intergovernmental Negotiating Body (INB), Pandemic Agreement, Pandemic, Pandemic prevention, preparedness and response, World Health Organization (WHO), World Health Assembly (WHA)

*Le présent Rapport sur les politiques examine le processus de négociation mené jusqu'à présent par l'Organe intergouvernemental de négociation en vue d'un instrument sur la prévention, la préparation et la riposte en cas de pandémie sous l'égide de l'Organisation mondiale de la santé (OMS), et certains aspects du projet de texte pour la reprise de la neuvième réunion de l'Organe intergouvernemental de négociation (INB9R), ainsi que du projet de résolution proposé pour examen par l'Assemblée mondiale de la santé en mai 2024. Le rapport fournit des recommandations pour soutenir les États membres dans leurs négociations au cours de l'INB9R qui se tiendra du 29 avril au 10 mai 2024.*

**MOTS-CLÉS:** Organe intergouvernemental de négociation, Accord sur les pandémies, Pandémie, Prévention, préparation et réponse aux pandémies, Organisation mondiale de la santé (OMS), Assemblée mondiale de la santé

*El presente Informe sobre Políticas examina el proceso de negociación llevado a cabo hasta la fecha por el Órgano Intergubernamental de Negociación (INB) para un instrumento sobre prevención, preparación y respuesta ante pandemias en el marco de la Organización Mundial de la Salud (OMS), y algunos aspectos del proyecto de texto para la Novena Reunión Reanudada del Órgano Intergubernamental de Negociación (INB9R), así como del proyecto de resolución propuesto para su consideración por la Asamblea Mundial de la Salud en mayo de 2024. El informe ofrece recomendaciones para ayudar a los Estados miembros en sus negociaciones durante la INB9R, que se celebrará del 29 de abril al 10 de mayo de 2024.*

**PALABRAS CLAVES:** Órgano Intergubernamental de Negociación (INB), Acuerdo sobre Pandemias, Pandemia, Prevención, preparación y respuesta ante pandemias, Organización Mundial de la Salud (OMS), Asamblea Mundial de la Salud

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### KEY MESSAGES

The draft negotiating text for INB9R does not optimally reflect the interests of developing countries.

Member States retain the right to make proposals on the text during the INB9R and cannot be prevented from requesting changes to the negotiating text.

Member States can request to continue the INB negotiations to a set date, and set a provisional date for an extraordinary WHA to adopt the treaty, i.e. December 2024.

## I. Background

On 30 March 2021, twenty-five Heads of Government joined the European Council President, Charles Michel, and the World Health Organization (WHO) Director-General, Tedros Adhanom Ghebreyesus, through a communique calling to negotiate an international treaty on pandemics, based on lessons learned during the COVID-19 emergency. Alongside this communique, by mid-2021, several reports were produced by internal WHO bodies and an independent body was established to carry out a comprehensive review. These reports examined the role of WHO as the lead international agency for global health cooperation and the extent to which countries were prepared to respond to the public health emergency and acted collectively to address a pandemic. The reports produced numerous recommendations.<sup>1</sup> WHO Member States agreed in the WHA in May 2021 on a process to review the recommendations stemming out from various reports and to prioritize assessment of the potential benefits of developing a WHO convention, agreement or other international instrument on pandemic preparedness and response, for decision in a Special Session of the WHA. Following this, the WHA Special Session held from 29 November 2021 to 1 December 2021, decided to launch negotiations for a new WHO convention, agreement or other international instrument in an intergovernmental negotiating body (INB) and set the ambitious target to conclude a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response (hereafter ‘the pandemic instrument’), by 2024.<sup>2</sup>

Since its first session in February 2022, nine sessions of the INB have been held till March 2024. The Bureau of the INB, composed of two co-chairs and four vice chairs of the INB, was entrusted with developing the zero draft text of the instrument. The zero draft was discussed in the 4th and 5th sessions of the INB in February-March and April 2023. A consolidated text was developed compiling the textual proposals made on the zero draft by member States. However, in parallel INB5 had also requested the INB Bureau to provide a Bureau’s text including options where feasible, based on all submissions received and included in the compilation document, in order to facilitate the work of the drafting group, on the continued understanding that nothing is agreed until everything is agreed. This led to a process where subsequent sessions of the INB drafting group discussions were based on the Bureau’s text rather than the compilation text containing member States’ textual proposals on the zero draft.<sup>3</sup>

1 See Germán Velásquez and Nirmalya Syam, A New WHO International Treaty on Pandemic Preparedness and Response: Can It Address the Needs of the Global South?, South Centre Policy Brief 93, May 2021, at <https://www.southcentre.int/policy-brief-93-may-2021/>.

2 Decision SSA2(5), available from [https://apps.who.int/gb/ebwha/pdf\\_files/WHASSA2/SSA2\(5\)-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/WHASSA2/SSA2(5)-en.pdf).

3 See Viviana Muñoz Tellez, Assessing the State of Play in the WHO Pandemic Instrument Negotiations, South Centre Policy Brief 121, 18 July 2023, at <https://www.southcentre.int/policy-brief-121-18-july-2023/>.

The 8th session of the INB entrusted the INB Bureau to produce a new draft negotiating text to serve as the basis for subsequent text-based negotiations.<sup>4</sup> This text served as the basis for negotiations at the 9th session of the INB in March 2024, with little time left for substantive discussions on the whole draft. The 9th session of the INB was the first time that member States actually engaged in text-based negotiations. Prior to this, they member States held informal discussions in specific sub-groups on elements in the Bureau’s text, but there has been no agreed draft negotiating text.

## II. Negotiating modalities

One of the critical issues in the INB process has been the modality of the negotiations. Unlike in other treaty negotiations where negotiating States provide textual suggestions on the zero draft and place square brackets where consensus needs to be achieved and member States decide between themselves whether to accept a proposed textual suggestion or not, the INB process has involved the Bureau acting as a filter of comments received from member States on the text to produce a Bureau’s text reflecting areas where there is apparent consensus. Before the start of INB9, the Bureau had also suggested that member State suggestions on the draft negotiating text will be projected on-screen, separately below the relevant provisions of the draft negotiating text. The textual suggestions would be part of the draft negotiating text only if it enjoys a broad consensus.

Nevertheless, at INB9 member States did not agree to this approach and a large number of textual suggestions were made on various articles of the draft negotiating text. This obviously did not enable any narrowing of the divergences to reach consensus. In this context, it was agreed that the INB9 session would resume in April 2024 with a view to concluding the negotiations and making a recommendation on the outcome text to the World Health Assembly (WHA) in May 2024. For the resumed INB9 session, the Bureau has presented a new text (A/INB/9/R3) that does not reflect the textual proposals made at INB9 by member States.

There is no clarity on how the new streamlined negotiating text was developed. It merely states in its title “Proposal for the WHO Pandemic Agreement.” While ostensibly this text has been prepared by the Bureau of the INB as requested by the INB9, the document does not state so. Nor does it explain how this text, without any brackets showing different textual proposals made by member States, was drafted. In the absence of such elements, the text gives the impression of being the outcome of a consensus among member States in contrast to the large differences apparent from the proposals made at INB9. It

4 See German Velásquez, Where is the Binding International Treaty Negotiated at the WHO Against Future Pandemics Going?, *SouthViews* 259, 15 March 2024, at <https://www.southcentre.int/southviews-no-259-15-march-2024/>.

is noteworthy here that in the parallel process of negotiations on amendments to the International Health Regulations (2005), the Bureau of the Working Group on IHR (WGIHR) has issued an explanatory document on the process through which the text submitted for the WGIHR was developed.

There is a possibility that the INB Bureau could suggest that member States do not make textual insertions at the resumed INB9 session and only engage in informal discussions to reach agreement on the text. This process would mean that very few changes could be made to the text proposed for the INB9R. It is also not clear whether the informal negotiations in working groups will be structured with facilitators leading each group of articles being discussed, or whether the informal negotiations will be unstructured. Therefore, it will be important for member States to aim to adopt a process that allows live drafting in the various groups. In the parallel process in the WGIHR, member States have agreed to undertake live drafting of the text.

Informal sessions happening in parallel will seriously stress small delegations from developing countries and restrict their effective participation in the negotiations. Delegations should also be aware of the possibility that Ambassadorial level engagement could be proposed to arrive at a compromise on certain issues. In such a scenario, developing countries should weigh whether the text sufficiently addresses their interests. As discussed below, in its current form, the draft negotiating text for INB9R does not optimally reflect the interests of developing countries.

### III. WHA draft resolution

The INB9R will also discuss a draft resolution recommending the WHA to adopt the WHO Pandemic Agreement and the establishment of three separate open-ended Intergovernmental Working Groups to 1) prepare for the Conference of the Parties (COP) under Article 21 of the WHO Pandemic Agreement, 2) to draft and negotiate an international instrument to define the modalities, terms and conditions, and operational dimensions of the WHO Pathogen Access and Benefit-Sharing System under Article 12 of the Agreement with a view to adoption by the WHA under Article 21 of the WHO Constitution or under relevant provisions of the Agreement, and 3) to draft and negotiate international instrument/s to define the modalities, terms and conditions, and operational dimensions of a One Health approach, with a view to adoption under relevant provisions of the WHO Constitution or the Agreement.

In this regard, it is important that member States only establish a single track for negotiations on these three elements through a *single* open-ended Intergovernmental Working Group as otherwise small delegations from developing countries will be at a disadvantage in engaging in

parallel negotiations. Also, it is critical to note that the INB did not have a mandate to discuss adoption of a separate instrument on One Health.

As noted, the draft WHA resolution adopting the Pandemic treaty proposes establishment of 3 separate processes under Rule 41 of the Rules of Procedure (RoP) of the WHA. However, Rule 41 of the WHA Rules of Procedure only addresses appointment of rapporteurs:

#### *Rule 41*

*Any committee, sub-committee or other subdivision may appoint from among its members one or more rapporteurs as required.*

Therefore, the proposed procedure cannot be founded under WHA RoP Rule 41. Moreover, it is fundamentally incorrect to establish a procedure for further negotiations on substantive elements of specific treaty provisions -Article 5 and 12, One Health and Pathogen Access and Benefit-Sharing System (PABS System, respectively- under a treaty in a separate forum that is not reporting to the Governing Body of the Treaty - the Conference of the Parties.

Moreover, if the texts of Articles 5 and 12 are not completed at the time of adoption of the Treaty, the WHA resolution should make it clear that the outcome of the negotiations shall be incorporated in the text of the treaty itself as Annexes or as Regulations under article 21 of the WHO Constitution with cross-referencing in the relevant provision of the Treaty, and not otherwise, such as in the form of a protocol. A protocol has the status of a separate legal instrument that would have to be separately signed and ratified by each member State. A Party to the Pandemic treaty could then opt not to be bound by the details of the PABS system for example by not ratifying a protocol that lays down the Parties' obligations.

### IV. Recommendations

The following is a summary of the South Centre recommendations on process and provisions that are of particular importance for developing countries:

1. Concerning the process, member States **retain the right to make proposals** on the text during the reconvened session of the INB9 and cannot be prevented from requesting changes to the negotiating text. If the text is not agreed by all, it should be left in brackets. A decision by the INB9 eventually recommending the negotiating text for adoption by the WHA should be made by consensus. **If there is no consensus, then a vote for approval during the WHA may be requested by any WHO member State.**

2. With regard to the guidance for the decision by the WHA in May, two options are suggested:

1) the WHO member States can decide to present a progress report to the WHA in May together with the progress made on the negotiating text, **requesting to continue the INB negotiations to a set date, and set a provisional date for an extraordinary WHA to adopt the treaty**, i.e. December 2024. This is the preferred option as it would be unprecedented to adopt a treaty with key unfinished provisions. Moreover, there is a risk that further negotiations do not conclude within the expected time framework or, worse, that an agreement will never be reached on issues of particular importance for developing countries.

2) Alternatively, the WHO member States can decide to **present the treaty text to the WHA for adoption**, that includes as part of the treaty process the establishment of a subsequent negotiating body (i.e. intergovernmental working group) to finalize negotiations on any areas that require further elaboration, as may be agreed. In this scenario, **a single negotiating body** rather than two or more bodies, is preferable. The negotiating body should be composed of member States, with admission of observers. **No independent expert bodies** should be established as these would not be in line with the mandate for member State negotiations and could further delay the conclusion of the negotiations.

In the current A/INB/9R/3 the main issues that may require further negotiation are **Access and Benefit Sharing – Article 12, transfer of technology and know-how for the production of pandemic-related health products – Article 11, Supply Chain and Logistics Network – Article 13, and the sustainable financing – Article 20**. All these provisions are of particular importance from a public health perspective, especially for developing countries, in order to ensure that the new instrument is effective in addressing a new pandemic.

The outcome of the negotiations on these provisions should become an integral part of the Pandemic Treaty, not separate instruments or protocols allowing non-Parties to only join them without becoming a Party to the Treaty, as suggested in Article 31 of the A/IB/9R/3. The procedure to achieve this objective would need to be carefully crafted. There should not be negotiations for an instrument on One Health as part of the pandemic treaty.

3. With regard to the substantive aspects of the negotiating text A/INB/9R/3:

a. WHO member States should agree in INB9 that the outcome will be a **treaty** (not using the term ‘agreement’) under **Article 19** of the WHO Constitution.

b. **Prevention & Preparedness under a One Health Approach: Article 4 and Article 5(1) – (2) are comprehensive** and sufficient. Key aspects of pandemic prevention and preparedness with a One health approach are already

covered in Article 4.2 (i.e. collaborative surveillance, zoonotic spillover and spillback prevention, and importantly, **antimicrobial resistance**). Article 4 also provides that regulations and other guidance may be further developed. The One health approach is also covered in Article 5.1 and 5.2. The protection of animal and plant health is outside of the scope of WHO and therefore should not be made an obligation in 5.3. Moreover, there is no mandate nor consensus towards negotiating a separate instrument on a One health approach. Developing an instrument comprehensively covering all the aspects involved in such an approach will require addressing issues that are beyond the remit of a pandemics instrument.

c. The monitoring and evaluation system to be developed, implemented and assessed should be established for the whole Treaty provisions, and not only for preparedness – Article 6, as suggested in A/INB/9R/3, towards enhancing overall **accountability**.

d. Provisions in **government funded research and development agreements** to support equitable access to research and pandemic-related products should be specified in Article 9.4.

e. **Transfer of technology and know-how** should not be qualified by terms such as “voluntary” and “on mutually agreed terms.” The concept of technology transfer in regular business is also used without such qualifiers. There are multiple mechanisms for technology transfer, in addition to licenses concerning proprietary technology and know-how, and the treaty should not limit the scope of technology transfer that the Parties may be willing to engage in and support (Article 9.4, Article 10.1, Article 11).

f. The treaty should provide for the **temporary suspension of intellectual property rights during pandemic emergencies or pandemics**, and require all Parties to refrain from any actions that could undermine the use of TRIPS flexibilities by WTO members to address pandemic emergencies and pandemics (Article 11).

g. The treaty may establish **a multilateral system for sharing pathogens with pandemic potential and their related information** under the principles of facilitated access on equal footing with benefit sharing reflected in equitable access to pandemic-related products and other benefits, consistent with existing international agreements on biodiversity conservation and access and benefit sharing, and a clear system for tracing and monitoring use to ensure benefit sharing (Article 12).

h. The principles for **governance, operation and funding for the Global Supply Chain and Logistics Framework** to deliver on equitable access and support regional production must be established by the treaty; currently it is not sufficiently specified in Article 13.

i. Clear provisions on **national procurement and distribution** are critical towards ensuring equitable access to pandemic-related products (Article 13bis). The provision should provide examples of the terms in purchase agreements with manufacturers that should be included to ensure equitable access (13bis.1).

j. **Sustainable financing** is critical for Parties to be able to implement the Pandemic treaty effectively, particularly developing countries. The proposal for a pooled fund should be reintroduced, and differentiate between funding for strengthening capacity for pandemic prevention, preparedness and response, from needed surge financing in case of a pandemic (Article 20).

## V. Final remarks

The INB9R session to be held from April 29 to 10 May 2024 is planned as the last negotiation instance among member States prior to submitting a recom-

mendation to the WHA in May 2024. The INB9R will need to adopt negotiation procedures that strike a balance between ensuring inclusivity in considering member State proposals, and the goal to complete the work on a pandemic treaty at the WHA 2024, with a critical role for the Bureau and co-chairs in fairly steering the negotiation process.

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