



GLOBAL HEALTH CENTRE

ENVISIONING AN INTERNATIONAL NORMATIVE FRAMEWORK
FOR PANDEMIC PREPAREDNESS AND RESPONSE:
ISSUES, INSTRUMENTS AND OPTIONS

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ABBREVIATIONS

CBD	Convention on Biological Diversity
CEPI	Coalition for Epidemic Preparedness Innovations
CITES	Convention on International Trade in Endangered Species
COP	Conference of the Parties
DG	Director-General
EU	European Union
FAO	Food and Agriculture Organization
FCTC	Framework Convention on Tobacco Control
GATT	General Agreement on Tariffs and Trade
GPMB	Global Preparedness Monitoring Board
GSD	Genomic Sequencing Data
GSPOA	Global Strategy and Plan of Action on Public Health, Innovation, and Intellectual Property
ICAO	International Civil Aviation Organization
IHR	International Health Regulations
IMF	International Monetary Fund
INF	International Normative Framework
IOAC	Independent Oversight and Advisory Committee
IPPPR	Independent Panel on Pandemic Preparedness and Response
OIE	World Organization for Animal Health
PHEIC	Public Health Emergency of International Concern
PIP	Pandemic Influenza Preparedness
PPE	Personal Protective Equipment
R&D	Research and Development
SARS	Severe Acute Respiratory Syndrome
SDGs	Sustainable Development Goals
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UN OCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNGA	United Nations General Assembly
WHA	World Health Assembly
WHO	World Health Organization
WTO	World Trade Organization

INTRODUCTION

Covid-19 has made clear that substantial reforms to the global system for pandemic preparedness and response are urgently needed to mitigate the risk of future catastrophes. As political attention to this imperative grows, careful analysis of the types of international instruments that will best strengthen the global system is critical. Calls for a “pandemic treaty”, first proposed by the president of the European Council and since endorsed by 26 heads of state and the Director-General of the WHO, have added some specificity and urgency to this question. This paper offers a concise analysis of the global systemic weaknesses to be addressed, the range of options of international normative instruments for doing so, and the strengths and weaknesses of each. We then turn to the suitability of WHO as the host intergovernmental organization for such an instrument. The paper concludes with three “menus” of options for possible paths forward.

SECTION 1: WHAT WEAKNESSES IN THE GLOBAL HEALTH SYSTEM HAVE BEEN IDENTIFIED?

We summarize here the key weaknesses in the global health system highlighted by Covid-19, identified through a systematic comparison of four international assessments published to date: The Global Preparedness Monitoring Board (GPMB, September 2020), Independent Oversight and Advisory Committee to the WHO Health Emergencies Programme (IOAC, May and November 2020), and Independent Panel on Pandemic Preparedness and Response (IPPPR, 2nd report, January 2021) (see Annex 1 for a table comparing problems identified and recommendations made). Recognizing that several reports have not yet been published, we supplemented these findings with our own analysis of global systemic weaknesses based on data collected since the start of the outbreak.¹

- **Prevention and Preparedness:** Countries at all income levels were inadequately prepared to respond to the emergence of SARS-CoV-2. The existing system for assessing national preparedness was not up to the task, nor did metrics of preparedness accurately predict which countries would fare better or worse. Too little attention was given to reducing the risk of zoonoses by addressing upstream risk factors in the environment and economy.
- **Detection and Response:** Measures to ensure rapid sharing of full information on the emergence and spread of SARS-CoV-2 across countries were not strong or specific enough. While the international sharing of pathogen samples and related genomic sequencing data (GSD) has not yet posed a major problem in the Covid-19 pandemic, due to rapid virus spread, arrangements are unreliable for pathogen, GSD and benefit- sharing (e.g. vaccines) and likely to pose problems in future outbreaks.² Arrangements for declaring a Public Health Emergency of International Concern (PHEIC) were deemed “not fit for purpose”, and many countries did not take adequate action in response to the declaration. Most countries implemented travel restrictions against initial WHO recommendations, and whether their efficacy justifies their costs remains a question of considerable debate.
- **Global access to countermeasures**, such as personal protective equipment (PPE) and drugs, was compromised in the early months of the pandemic as supply chains broke down, producing countries blocked exports, and competition for scarce supply created inequities and national shortages; the same has happened again with vaccines. Lack of arrangements to share technology, for surge manufacturing of countermeasures, and to allocate scarce supplies fairly across countries have further

¹ Bezruki and Moon. 2021. Always fighting the last war? Post-Ebola Reforms, Blindspots, and Gaps in Covid-19. Global Health Centre Working Paper No. 26.

² Rizk et al. 2020. “Everybody knows this needs to be done but nobody wants to do it”: Governing Pathogen and Benefit-Sharing (PBS). Global Health Centre Working Paper No. 23. <https://repository.graduateinstitute.ch/record/298843?ln=en>

hindered equity and the ability to get the pandemic under control.³ Finally, public mistrust in authority was high in many countries, as was widespread disinformation; and too many political leaders failed to take unpopular measures to control the epidemic within their borders, choosing to ignore science and exacerbating risks both for their own countries and others.

- **Cross-cutting Issues:** Four cross-cutting issues reach across nearly all of the above problems. First are weak arrangements for ensuring accountability between countries for compliance with commitments. Second, investment in preparedness (e.g. health systems, countermeasure R&D) is difficult to track, and overall financing has not been adequate in scale or reliability. Third, WHO was “underpowered” in terms of its legal and political authority, financing, and organizational capacity to perform all the functions expected of it. Finally, arrangements for coordinated action are tenuous between the human health and non-health sectors (e.g. agriculture, environment, trade, travel, migration or macroeconomic stability).

SECTION 2: WHICH ISSUES COULD BE ADDRESSED THROUGH INTERNATIONAL RULEMAKING?

This paper focuses on the transboundary issues that merit strengthened governance at the international level. We exclude here important issues that, arguably, have either traditionally fallen primarily within the remit of national authorities (e.g. social safety nets), and/or for which detailed international regimes already exist (e.g. international treaties on human rights, broadly, or specifically focused on women, children, minorities).

Furthermore, international rules may be the appropriate instrument to govern some of the weaknesses exposed by Covid-19, but other governance tools (e.g. coordination arrangements, advocacy) may be more appropriate in other cases. We use the broader term “international rules/rulemaking” rather than the more specific “international law/law-making” to encompass the broad range of “hard” and “soft” normative instruments that may be considered (as discussed further below). While much further analysis is merited on which governance tools are most appropriate for which problem, this paper seeks to provide some guidance by identifying the issues that should at least be considered as subjects for international rulemaking because: a) the problem is inherently transnational in nature;⁴ and b) existing rules are too weak; or c) require clarification or specification to address the problem.

Our analytical starting point is the International Health Regulations (2005), as the main international normative framework governing preparedness and response to infectious disease outbreaks that may cross borders. A full review of the IHR (2005) is expected from the IHR Review Committee in May 2021 and is beyond the scope of this paper. Rather, we highlight weaknesses in the IHR (2005) that have already been widely recognized.

It is important to recall that the IHR (2005) are legally binding on nearly all governments (with 196 States Parties), and that their historical roots stretch back to the 1850s. Governments have made significant commitments through the IHR (2005), including to build national core capacities and share information quickly while delegating to the WHO the authority to declare PHEICs, and protecting the rights of travellers affected by outbreak-related restrictions, for example. Key weaknesses in the system are cross-cutting issues, including measures to ensure governments comply with these commitments, inadequate financing to do so, and vesting adequate material and political resources in WHO to fulfil its IHR-mandated roles.

³ Moon et al. 2020. The Global Governance of Access to Countermeasures. Commissioned background paper for the Global Preparedness Monitoring Board. https://apps.who.int/gpmb/thematic_report.html#2020.

⁴ Hoffman, Röttingen, & Frenk. 2015. Assessing Proposals for New Global Health Treaties: An Analytic Framework. *American Journal of Public Health*, 105(8), pp. 1523-1530. <https://ajph.aphapublications.org/doi/10.2105/AJPH.2015.302726>.

There are pros and cons to revising the IHR. On the one hand, opening the IHR in whole or in part for renegotiation creates the risk that the quasi-universal commitments contained therein may be weakened. On the other hand, focusing reform efforts on the IHR may be more politically feasible than negotiating an entirely new international instrument. A key question is whether a renegotiated IHR could feasibly be stretched to incorporate a broad set of additional issues. The last major IHR revision process lasted 10 years, having begun in 1995, it dragged on slowly until the 2003 SARS crisis accelerated political momentum to conclude the revisions in 2005.⁵ While the 2005 revision significantly expanded the scope of the agreement (e.g. disease scope, information sources, WHO authority), it also left many issues unresolved and did little to reach beyond the human health sector. It is unlikely the IHR could be expanded dramatically in scope, implying that reform efforts focused on the IHR could only address a sub-set of the global weaknesses exposed by Covid-19.

To facilitate further analysis on the scope of issues that a particular instrument could cover, we organized the problems identified in Section 2 above according to three categories (summarized in Table 1 below):

- **Category A: IHR:** Issues for which the IHR is the main governing instrument.
- **Category B: IHR + Other Existing International Law:** Issues that are related to the IHR, but which other international rules also govern. These issues may require clarification or revision in more than one legal regime. They may also require the development of new international rules. (More in-depth issue-by-issue analysis is needed to make a determination). In either case, addressing IHR alone is likely to be insufficient.
- **Category C: Beyond IHR:** Issues that, in our judgment, do not fall within the IHR, and for which new state commitments would need to be negotiated in a separate instrument. Other existing international rules may apply and need to be taken into account.

SECTION 3: A SPECTRUM OF OPTIONS FOR INTERNATIONAL RULEMAKING

Having identified the main weaknesses in the global health system that could be addressed through an international instrument and the applicable international legal and policy regimes, we now turn to consider the “form” that such an instrument may take. It may be recalled that, as noted above, various statements have been made in favour of a new “pandemic treaty” as the best way forward.⁶ This, however, is not the only solution – other options exist and they ought to be discussed and weighed. This section aims to explore some of those options and their trade-offs.

Two general points are warranted. The first one concerns the conceptual distinction between so-called “hard” and “soft” normative instruments, which can have a significant impact on how a negotiation takes place, on its outcome as well as the effectiveness and implications of the instrument agreed upon. Whether an instrument is “hard” or “soft” is not, in the political calculations of states, a binary choice depending on its formal legal nature (e.g. a treaty versus a WHA resolution). Relative softness or hardness can be rather determined in accordance with three broad criteria identified in the international relations literature: (1) whether the instrument contains legally binding obligations; (2) the degree of precision of the rules contained in the instrument; and (3) whether any delegation of power is made to a third party (usually an international body) to interpret, monitor, adjudicate or enforce the instrument.⁷

⁵ Fidler. 2005. From International Sanitary Conventions to Global Health Security: The New International Health Regulations. *Chinese Journal of International Law*, 4(2), pp. 325-392. <https://academic.oup.com/chinesejil/article/4/2/325/490058?login=true>

⁶ See, for example, the press release of the EU Council of 30 March 2021 (available at: <https://www.consilium.europa.eu/en/press/press-releases/2021/03/30/pandemic-treaty-op-ed/>). It is our understanding that the GPMB supports this idea.

⁷ G. C. Schaffer and M. A. Pollack, “Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International

Table 1. Issues in Covid-19 and Relevant International Legal Regimes

Category of Problem	Prevention & Preparedness	Detection & Response	Implications
A. IHR	National core capacities	Information-sharing PHEIC declaration	Revise IHR to clarify and strengthen measures for compliance and financing of existing commitments and/or Negotiate new state commitments re: compliance and financing of IHR commitments in separate instrument
B. IHR + Other Existing International Law	Prevention of zoonotic and other environmental risks (CBD, CITES, Convention to Combat Desertification, other environmental treaties) Preparedness for disasters (Sendai Framework)	Pathogen and benefit-sharing (CBD+Nagoya Protocol, PIP Framework) Trade restrictions (GATT and other trade agreements) Travel restrictions (human rights treaties, UN Global Compact on Migration, Refugee Convention, ICAO treaties)	Clarify interpretation and/or revise IHR and other instruments to strengthen governance of issue and/or Negotiate new state commitments in separate instrument, building on pre-existing international legal regimes
C. Beyond IHR		Development and access to countermeasures (TRIPS, CBD+Nagoya, PIP Framework) Global humanitarian and development aid system Global financial, investment and monetary system (IMF Articles of Agreement; bilateral investment treaties; Basel Committee for banking regulation)	Negotiate new state commitments in separate instrument, in some cases, building on pre-existing international rules
Cross-cutting	Financing; Accountability/Compliance; Dispute resolution; Cross-regime coherence; Organizational roles (e.g. WHO [and other health actors: CEPI, Gavi, Unitaid, Global Fund, etc], UN, WTO, FAO, OIE, ICAO, World Bnk, IMF)		

Thus, if an instrument is legally binding (e.g. a treaty), its content is detailed and prescriptive, and power is delegated to a third party for purposes of its interpretation and implementation, the instrument in question may be considered normatively “hard”. In contrast, if the instrument is not legally binding (e.g. a political declaration), or if the rules contained in a legally binding instrument are framed in broad or vague terms, or if

Governance”, Minnesota Law Review, Vol. 94 (2010), p. 714; K. Raustiala, “Form and Substance in International Agreements”, American Journal of International Law, Vol. 99 (2005), pp. 583-585. See also J. Pauwelyn, R. A. Wessel and J. Wouters, “When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking”, in European Journal of International Law, Vol. 25 (2014), pp. 733-763.

there is no delegation of power for purposes of interpretation and implementation of the instrument but all such powers are held by the contracting parties, it may be considered “soft” in these varying degrees.

The distinction between “hard” and “soft” normative instruments is therefore not binary; it must be rather understood as denoting characteristics that may vary on a continuum and which can be combined in a single or various instruments. A treaty may present “soft” law characteristics if some of the rules it contains are non-binding (e.g. Article 6 of the FCTC) or vague (e.g. the Paris Agreement). Similarly, a non-binding instrument may present “hard” characteristics if it has detailed rules or delegates some power for its interpretation and implementation for example to an international body (e.g. the UN Sendai Framework or the WHO PIP Framework).

The choice between “hard” and “soft” normative instruments entails a number of trade-offs. Among the advantages of “hard” law, the following have been identified in the literature:

- “Hard” law instruments give more credibility to the commitments taken by states because a violation may entail legal and reputational consequences. Furthermore, they are likely to have legal effects in national legal systems and bind public and private actors, which enhances the implementation of the obligations.
- They may solve problems of incomplete contracting (i.e. a vaguely worded instrument that leaves much space to unilateral interpretation and requires further elaboration) if authority for their interpretation and application is delegated to a third party in accordance with agreed procedures.
- They may allow a more efficient monitoring and enforcement of commitments.⁸

At the same time, important costs are involved. Notably, inasmuch as “hard” law instruments aim to legally constrain the behaviour of states, the latter may see such commitments as infringing on or unduly limiting their national sovereignty, notably when sensitive areas are at stake. The consequence of this is that states can be expected to behave cautiously, negotiate in a protracted manner and reject arrangements that do not suit their national interest or only agree to general commitments.⁹

“Soft” law instruments also present a number of advantages and disadvantages. Among the advantages, the following may be highlighted:

- “Soft” law instruments are in principle easier and less costly to negotiate and revise.
- They enter into effect immediately without the time lag typical of treaties.
- They impose lower sovereignty costs.
- They may provide more flexibility to deal with uncertainty over time.
- They may allow states to engage in more concrete cooperation or accept bolder commitments without the concern of enforcement.¹⁰

The disadvantages of “soft” law instruments are self-evident: if an instrument is not legally binding, if its content is framed in broad or vague terms, or if it does not delegate any kind of authority to a third party, it lacks some or all the characteristics of “hard” law instruments pointed out above and may be perceived as

⁸ G. C. Schaffer and M. A. Pollack, “Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance”, *Minnesota Law Review*, Vol. 94 (2010), pp. 717-718; K. W. Abbott and D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54 (2000), p. 421.

⁹ G. C. Schaffer and M. A. Pollack, “Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance”, *Minnesota Law Review*, Vol. 94 (2010), pp. 718-719; K. W. Abbott and D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54 (2000), p. 422.

¹⁰ G. C. Schaffer and M. A. Pollack, “Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance”, *Minnesota Law Review*, Vol. 94 (2010), p. 719.

less credible and effective, or purely hortatory.

The second general point relates to the relationship between binding and non-binding instruments and the degree of compliance with them. The fact that an instrument is legally binding does not necessarily entail that it will be effectively complied with by all the states that are parties to it, especially when incentives and deterrents have been miscalculated or there are no available mechanisms for monitoring or accountability. Furthermore, an instrument that is formally not binding may be largely complied with by states in spite of the fact that they are not legally bound to do so. This may happen, for instance, when the instrument responds to actual and widespread needs, when it is perceived as authoritative and legitimate, and when there is strong and coordinated civil society movement behind the instrument in question pushing states to abide by it.¹¹

With this in mind, we now turn to the possible forms that an instrument on pandemic emergency preparedness and response may take. These models and forms are not mutually exclusive as will be discussed below.

A first option, as noted above, is **the review or amendment of existing instruments**, such as the IHR, the 1992 Convention on Biological Diversity (CBD), the 2014 Nagoya Protocol to the CBD on Access and Benefit-sharing and trade agreements, to fill the gaps and needs that the current pandemic has put in evidence in those particular areas. Opting for this approach may have the benefit of using already existing frameworks and procedures to address the issues at hand and not starting from scratch. At the same time, there may be a risk of having a too fragmented approach, with different institutions and constituencies working separately without sufficient coordination, which may lead to unsatisfactory or inconsistent results.

Another option, currently gathering momentum, is negotiating a new treaty dealing with preparedness and response to pandemics. The question here is what kind of treaty would be appropriate to deal with the various issues at stake. A treaty may be prescriptive and relatively detailed, similar, for example, to human rights treaties, the Minamata Convention on Mercury in the environmental field, arms control agreements or the conventions against various forms of terrorism, and include monitoring, review, and dispute settlement mechanisms. However, as noted above, such a comprehensive, “hard” law instrument is likely to involve very high costs and protracted negotiations. Moreover, not all issues that may be included in a pandemic treaty lend themselves to prescriptive and detailed regulation; some of them may be heavily science-dependent while others may be formulated as contingency arrangements to be triggered by unpredictable events. To mitigate those costs and uncertainties, instruments that take the form of “framework conventions” (with not so much of a prescriptive and detailed content) that can then be complemented by additional instruments (such as protocols, guidelines or standards) to be adopted by the governance bodies created by the treaties can be considered.¹² This mixed method is not new, and similar approaches may be found, for example, in many environmental conventions such as the UN Framework Convention on Climate Change and its 2015 Paris Agreement, or the 2003 WHO Framework Convention on Tobacco Control supplemented by guidelines and a protocol on illicit trade. However, even negotiating a framework convention may take significant time, and if no issue-specific commitments are agreed, there is a risk the framework remains an empty vessel while political momentum to tackle the difficult issues has dissipated.

The specific form of the instrument can also have political implications at national level. For example, it is unclear whether the US could join any pandemic treaty if it required jumping the high hurdle of Senate advice and consent. At the same time, the EU may see an advantage to pursuing a legal instrument that would authorize the European Commission to negotiate on behalf of EU Member States.

A third option is opting for a “softer” instrument,¹³ such as a **political declaration** setting principles, priorities

¹¹ See J. Pauwelyn, R. A. Wessel and J. Wouters, “When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking”, in *European Journal of International Law*, Vol. 25 (2014), pp. 746-747. See also O. Schachter, “Towards a Theory of International Obligation”, in *Virginia Journal of International Law*, Vol. 8(2) (1968), pp. 300-322.

¹² It may be recalled that, according to Article 2, paragraph 1(a), of the 1969 Vienna Convention on the Law of Treaties, “treaty” means “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

¹³ See also the paper on process towards a UN summit submitted to the GPMB on 11 December 2020.

and agreed strategic directions to guide states and other actors (e.g. the 1970 UN General Assembly Friendly Relations Declaration, the 1992 Rio Declaration on Environment and Development).

A fourth option is a **more complex political framework** (sitting between “hard” and “soft” law) with goals, targets, commitments and indicators addressed to all actors involved (including international organizations and non-state actors), coordination requirements as well as review and follow-up mechanisms that are often delegated to the competent international organizations (such as the WHO PIP Framework, the WHO Global Code of Practice on the International Recruitment of Health Personnel, the Sendai Framework, the UNGA HIV/AIDS declarations and review cycles, the SDGs and the UN Global Compact on Migration).

It should be noted that these options are not necessarily mutually exclusive, and a flexible approach may be required to deal with the complex multi-sectoral issues relating to pandemic preparedness and response. Indeed, instead of focusing on the negotiation of, for example, one single and all-encompassing treaty, it is also possible to conceive a combination of a range of instruments, “hard” and “soft” adopted together or sequentially. This “menu” could consist, for example, of a political declaration, a strategic non-binding framework on financing and coordination, a treaty dealing with issues that lend themselves better to binding regulations, and possibly also a revamping of the IHR. In all cases, it will be necessary to ensure a degree of coordination between the new instrument or instruments and already existing rules, including the IHR, to avoid duplications and inconsistencies.

Another factor to consider is the number of countries that would commit themselves, as noted in the below discussion of “minilateral” or plurilateral “clubs.” This could address the increasing reluctance of states to conclude universal prescriptive treaties, preferring instead softer or more informal forms of commitment or relying on smaller “coalitions of the willing.”¹⁴ Club models can take the legal form of additional protocols to a treaty, for example, or entirely separate agreements along regional or functional bases. A precedent (albeit in a very different field) is the UN Covenant on Civil and Political Rights, which has two optional protocols on the prohibition of the death penalty and individual complaints, respectively. In addition to allowing for more ambitious agreement among willing countries, this kind of flexibility can also help establish international norms, even if such norms are not legally binding on all countries.

SECTION 4: ROLE OF THE WHO – FRAMING, LEGAL AND OTHER CONSIDERATIONS

We respond here to the GPMB’s request for a specific analysis to review the implications of a decision to negotiate an international convention for pandemic preparedness and response within the constitutional framework of WHO.

Many of the general considerations in the preceding sections would also apply to a WHO treaty. What follows are some specific considerations related to WHO’s constitutional mandate, procedural and governance framework and institutional capacities. The only precedent of a WHO treaty is the FCTC, thus the available practice to draw upon is limited.

A. WHO’s Constitutional Basis and Mandate

The basis for concluding a treaty within WHO is Article 19 of its Constitution, which grants to the Health Assembly the authority to adopt conventions or agreements “with respect to any matter within the competence of the Organization.”

¹⁴ See J. Pauwelyn, R. A. Wessel and J. Wouters, “When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking”, in *European Journal of International Law*, Vol. 25 (2014), pp. 746-747. See also O. Schachter, “Towards a Theory of International Obligation”, in *Virginia Journal of International Law*, Vol. 8(2) (1968), pp. 300-322.

The main issue from this perspective is the link in Article 19 to WHO's competence. International organizations are functional entities, endowed by their creators with authority to pursue a defined range of functions as provided in their constitutions and developed through their practice. Article 2 of the Constitution gives WHO a very broad mandate that has also expanded as a consequence of the evolving vision of health. A test of that breadth was the adoption of the FCTC since it deals with issues that were regarded by some as going beyond health, such as taxation, illicit trade, and advertising. Even though a number of states had initially expressed doubts as to WHO's competence, the imperative to treat tobacco as a health rather than an exclusively economic or trade question prevailed. Political consensus in the governing bodies can therefore legitimize a broad interpretation of constitutional authority. At the same time, such authority is not unlimited. In 1996, the International Court of Justice refused to respond to a question by the WHA on the legality of nuclear weapons, arguing that it did not fall within WHO's competence and stating that the mandate of specialized agencies followed a "principle of speciality" as opposed to the general competence of the UN. That decision did not pre-empt the adoption of the FCTC, but it could be used to raise objections to WHO's competence or to the inclusion of specific topics in the treaty.

In the case of a WHO treaty on pandemics, it can be argued that the health "framing" is evident since the purpose is to better prepare the world to prevent or control future pandemics. However, many of the "upstream" or "downstream" issues currently being discussed may be seen as transcending health since they deal for example with environmental management, financing, trade, intellectual property, and human rights. All those issues (category B and C in our Table 1) are regulated by separate normative instruments and managed by international organizations reflecting different interests and political priorities within their member states. We can anticipate resistance to "subsume" those issues and interests under a health frame, even more if a pandemic treaty is managed by a technical agency of limited competence such as WHO.

The competence of WHO to negotiate, conclude and support a pandemic treaty will therefore depend on the outcome of political deliberations by member states and whether, with regard to topics that seem unrelated to the immediate constitutional mandate of the organization, there will be a consensus that their overarching health framing should prevail. It is likely that the WHA will not define from the start what the specific content of the treaty will be, in which case a consensus on its acceptable scope will need to be reached during the negotiations.

B. Negotiation and adoption of the treaty¹⁵

The negotiation of a WHO pandemic treaty would be launched by the WHA through a resolution defining – at least in general terms – the main features of the negotiation process and its timeline. Relying on previous experiences of extended WHO negotiations (e.g. the FCTC, the revision of the IHR, the GSPOA and the PIP Framework), the WHA can be expected to deal with some or all of the following issues:

- Establishment of a dedicated open-ended negotiating body and possibly the dates of its first session;
- establishment of a bureau and designation of the number of chairpersons and other officers;
- participation in the negotiations (e.g. EU, international organizations, non-state actors);
- support and technical input by the Secretariat;
- possible involvement of the EB in the process (e.g. to comment on drafts or agree on further sessions);
- regional and inter-agency consultations to facilitate political consensus and operational coordination;
- possible reporting on progress to the WHA.

¹⁵ On this topic, the GPMB may also want to consult the report on process submitted by Gian Luca Burci and Alfredo Crosato Neumann in December 2020.

At the end of the negotiations, the treaty would be adopted by the WHA through a resolution that may also decide on next steps. If the treaty establishes its own separate governance, e.g. in the form of a conference of the parties (COP), the WHA may establish another open-ended intergovernmental body to prepare for its entry into function. As in the case of the FCTC, the main topics would include drafting rules of procedure for the COP and proposing arrangements for a permanent secretariat and its financing.

C. Governance of the convention

It is a common practice for most contemporary multilateral treaties to be supported by a secretariat responsible, inter alia, for convening and servicing meetings of the parties or of expert bodies, providing technical cooperation to states parties, carry out studies, cooperate with other stakeholders and proposing topics for discussion. The international organization that has launched and supported the negotiation and that has constitutional competence over the subject matter of the convention is normally expected to perform those functions.

An analysis of the practices followed by the UN and specialized agencies reveals a number of possible models that can apply to WHO. For the purpose of brevity, three models seem most likely:

1. The convention expressly assigns secretariat functions to WHO. The secretariat is integrated in WHO's structure and its expenses consequently fall within the budget of WHO. An objection raised by this approach may be that the whole membership is expected to fund (through assessed contribution) activities that may concern only a sub-set of member states that have become parties to the treaty.
2. The convention entrusts the COP at its first session with the designation of the permanent secretariat, while WHO provides the interim secretariat until then. The COP can then either designate WHO as its secretariat, or it can establish a dedicated secretariat, housed administratively in WHO but not integrated in its structure and programme; in either case, the WHA has to approve the COP's request because the latter is not a governing body of WHO. In the latter case, the expenses of the secretariat are financed through a budget adopted by the COP and separate from that of WHO. This is the approach followed by the FCTC.
3. In cases in which the subject matter of the convention falls under the competence of two international organizations that support the negotiation of the treaty, both can be designated as joint secretariat. This is the case of the 1999 Protocol on Water and Health, with a joint secretariat provided by WHO/EURO and the UN Economic Commission for Europe.

One of the implications of a functionally separate secretariat (option 2), as shown by the FCTC as well as some environmental treaties like those on climate change and biodiversity, is that they may grow separate from the governance and policies of their "mother organizations". In the case of the FCTC, for example, the governing body of the secretariat is the conference of the parties (COP) rather than the WHA, the budget and programme of work are established by the former, and the executive secretary is appointed by the DG on the recommendation of the bureau of the COP. On the one hand, this can help protect the integrity of the treaty from the influence of powerful but hostile states that are not parties to it and that can try to use the governing bodies of the mother organization to weaken the implementation of the treaty, e.g. by reducing funding. On the other hand, however, it may create tensions between secretariats, inconsistencies between policies and increase transaction costs.

D. Relations with the IHR

There are obvious benefits to ensure complementarity and synergies between a WHO pandemic treaty and the IHR and to avoid conflicts of obligations or unnecessary overlaps. This of course depends on the subject matter of the treaty, but several statements so far point to an interest in strengthening through the treaty aspects of the IHR such as core capacities, information sharing and early warning as well as accountability for compliance.

Relevant provisions of the treaty can consequently be formulated in a way to establish linkages with the corresponding provisions of the IHR, such as priority in the application of either instrument or defining their respective scope of application. This exercise in normative coherence is facilitated by Article 57 of the IHR. That provision defers to the rights and obligations deriving for any state party from other international agreement, and as importantly it recognizes that states parties having certain interests in common can conclude special treaties or arrangements “in order to facilitate the application” of the IHR.

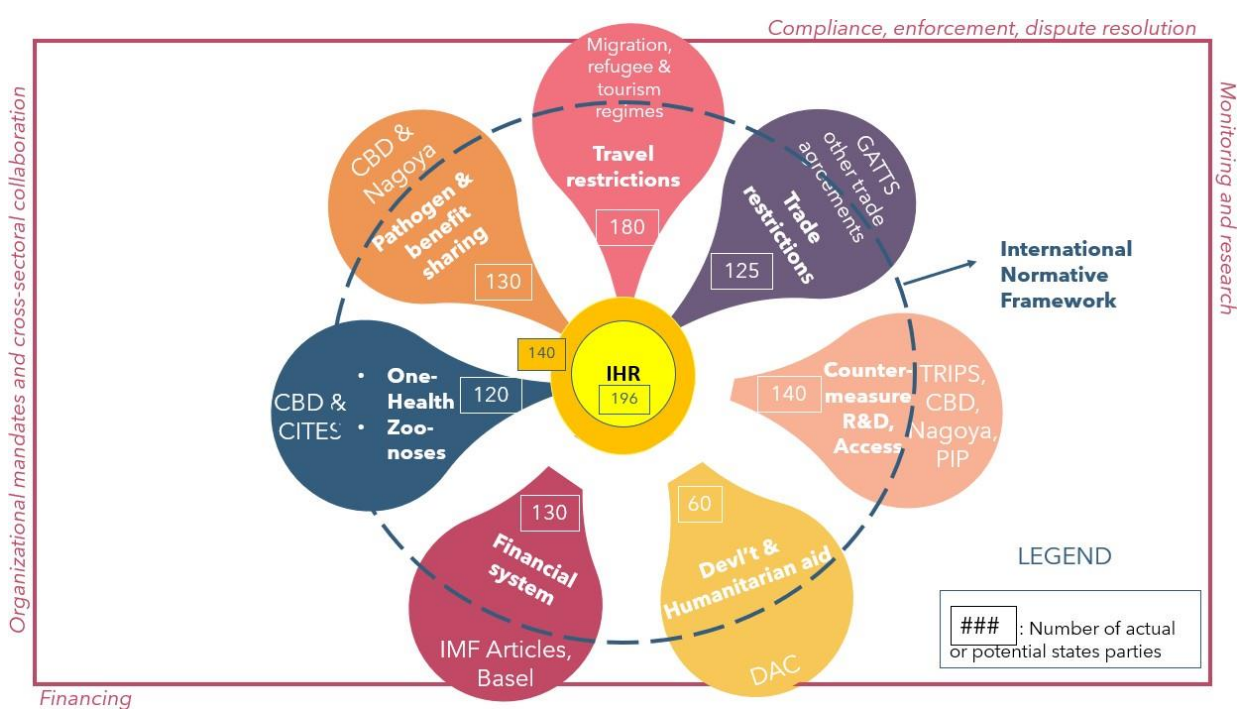
The current proposals to include IHR-related issues (Category A in Table 1) in a WHO pandemic treaty warrants two additional considerations:

1. Using a separate legal instrument to strengthen certain aspects of the IHR, rather than revising or clarifying directly the latter, seems counterintuitive and may lead to uncertainties and complications, both for states parties that have to apply two separate instruments to the same fact patterns, as well as to WHO that will have to manage concurrently two separate instruments and integrate them in its workplan.
2. A pandemic treaty will only be applicable to states parties to it in their relations with one another and with the secretariat. Legal relations between this group and states non-parties, as well as among the latter, will continue to be regulated only by the IHR as the sole common instrument. This will inevitably lead to the coexistence of two separate legal regimes on certain issues, and to the fact that either one or both of them will apply to certain facts and between different pairs of states until and unless the treaty becomes universally applicable. This situation may be seen as an application of the “club approach” and allow a group of states to accept more stringent obligations (e.g. accept WHO inspections). However, it may also lead to uncertainties and fragmentation if the same issue is divided up between two instruments (e.g. strengthening national core capacities).

SECTION 5: COMBINING FUNCTION AND FORM OF AN INTERNATIONAL INSTRUMENT

Having considered the contents and form of an international instrument separately, as well as the possible role of WHO, we now combine these elements into a whole, depicted in Figure 1 below. In Figure 1, the Category A (IHR) issues are represented in the middle of the “flower” diagram, Category B (IHR plus) issues are “petals” of the flower attached to the IHR, and Category C (Beyond IHR) issues are “petals” without a clear connection to IHR and therefore detached in the diagram.

Figure 1. Options for the function and form of a new international normative framework



For the purpose of further discussion, a practical way to conceptualize and simplify the preceding analysis is to offer three “menus” of options in order to consider ways forward:

- **BASIC MENU:** Focus on revising and strengthening the IHR as the bedrock of global health security, and strengthen, empower and resource WHO as the “manager” of that system. Previous and current reviews give a rather consistent diagnosis of the main flaws and weaknesses. Further reforms would add an additional layer (the orange circle surrounding the yellow centre in Figure 1) of arrangements covering organizational capacity of WHO, compliance, monitoring and financing. (Category A only).
- **DELUXE MENU:** Given the political momentum, aim at addressing and appropriately regulating all issues highlighted in the preceding analysis, summarized in Table 1 and represented graphically in all the petals of the flower (Categories A, B and C). Many pandemic-related challenges intersect with other international legal regimes (Categories B and C), identified on the outer edge of each petal. A key question is the extent to which these other international rules would need to be clarified, or even revised, to address the problems that Covid-19 has highlighted. One option is to deal with this legal

spaghetti bowl issue by issue. Another is to develop a framework or umbrella International Normative Framework (INF) within which these issues could be addressed more coherently (dotted-line circle in Figure 1) -- not a simple or easy option, but one that merits consideration. There are many options for the specific form that the instrument(s) could take, but most likely it would not be a single treaty.

- **BUSINESS MENU:** Given how challenging it will be to deal with so many diverse issues at the same time, prioritize a limited number of issues (a selection of the petals in Figure 1). The prioritization of a sub-set of issues will be a political process in its own right. The final set of issues addressed may not be fully effective in addressing the risk of pandemics but may be all that is within reach politically. In addition to political considerations, governments should consider what are the largest gaps in prevention and response and what is needed for a minimum level of effectiveness and coherence.

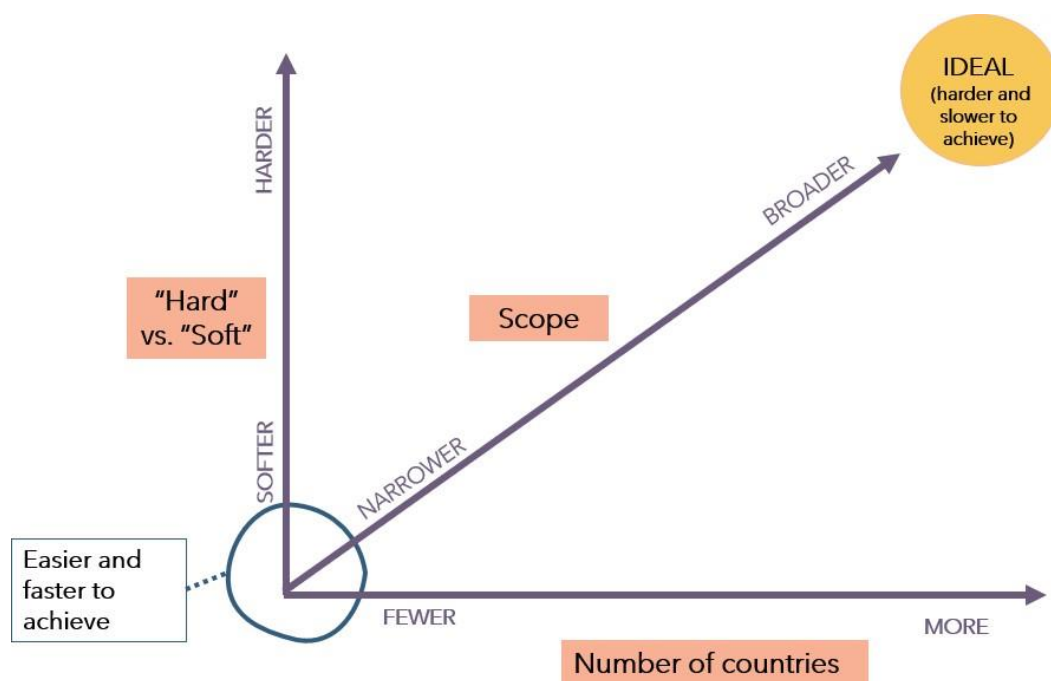
Within each of these “menus” there are further possible configurations. The willingness of countries to make international commitments is likely to vary in terms of strength, specificity, and depth of commitments. It will be important, therefore, to consider how to allow for enough flexibility to ensure a critical mass of countries joins the international framework, without watering down commitments to the lowest common denominator or blocking reforms altogether. In light of the currently fragmented geopolitical landscape, allowing for “minilateral” or “plurilateral clubs” of countries to make stronger commitments -- rather than requiring global consensus -- could make the overall agreement easier to achieve and more effective, even if not all countries participate. For example, for the Basic Menu, it is possible that not all 196 IHR States Parties agree to strengthen financing and compliance mechanisms for the IHR, but perhaps a sub-set would (represented in the boxed numbers in Figure 1). For each of the petals, similarly, a varying number of States Parties may choose to commit themselves. A key question then becomes which countries -- and how many -- must agree in order to render the agreement minimally effective. This will vary by issue area. For example, for an agreement on countermeasures it will be critical to secure participation from enough countries with the capacity to research, develop and/or manufacture these goods. For development assistance, it may be adequate to include the countries that generally provide or receive significant volumes of development assistance, while the many middle-income countries that do neither may opt-out without compromising overall effectiveness.

Whatever the number of “petals” that is ultimately agreed, cross-cutting issues will need to be addressed: financing; compliance, enforcement & dispute resolution; monitoring & research; and organizational mandates and cross-sectoral coordination (the outer frame of Figure 1). Given the broad range of issues that could be addressed, many intergovernmental organizations and multistakeholder partnerships will need to be engaged, including in the health sector (e.g. WHO, CEPI, Gavi, Global Fund, Unitaids, others) and outside it (e.g. UN and its funds and programmes, FAO, OIE, ICAO, World Bank, IMF, WTO, others). This important consideration suggests that softer instruments can make such engagement and participation easier, and its commitments can then be translated into specific policies by the relevant organizations. It may be complicated to have a treaty open not only to states but also to international organizations in their own right, since they have their own international legal personality separate from their member states. Moreover, important actors such as public- private partnerships are not international legal persons and could not formally participate in treaties.

CONCLUSIONS

The COVID-19 pandemic has had devastating effects on virtually all aspects of human life and international relations. It has revealed and amplified gaps and needs affecting our ability to prevent, contain and respond to health crises of this magnitude while at the same time upholding values of equity, solidarity, and protection of human rights.

Figure 2. Trade-offs across three dimensions of an international instrument



The commitment of the international community to address such gaps and needs, and the current political momentum for bold political decisions, creates opportunities but also challenges in how to manage such a broad agenda without spreading political capital thin, and raises questions about who should be in charge of what. An additional challenge is the tension between creating a universal framework of commitment but at the same time navigating current geopolitical tensions and divisions that may point to smaller groups of like-minded states taking the initiative or creating “clubs”. It is impossible for the purpose of this report to give justice to all these layers of complexity and political decision-making and their permutations.

The trade-offs necessary to reach agreement and the ultimate point at which consensus may be achieved is represented graphically in Figure 2, where the three axes represent in a simplified manner the main considerations that states may take into account when collectively seeking a point that represents the best achievable compromise between satisfying national priorities and adopting a workable and effective international normative framework.

Finally, the Deluxe and Business Menus raise some additional cross-cutting options to sketch a possible way forward:

1. The relationship between future normative instruments and the IHR should be taken into account in order to maximize credibility and effectiveness while reducing the risks of duplications and weakening the existing institutional and legal frameworks.

2. International rules can take different forms for different reasons; their respective functions as well as pros and cons should be seen along a continuum of options rather than only focusing on the formal legal “label” of an instrument, such as “treaty,” or on the false dichotomies of “hard” vs “soft” or “binding vs “non-binding” rules.
3. The complexity of the problems revealed by COVID-19 may call for a package of different instruments rather than a single one, to address diverse issues through the most appropriate tool that better performs needed functions (e.g. coordination, mutual obligations, financing, scientific development and cooperation).
4. The question of the most appropriate institutional forum where particular instruments could be concluded and implemented is an important consideration. If states pursue a number of instruments as per the preceding bullet, the latter can be negotiated within the same organization or in separate ones. In such a case, the comparative advantages of WHO (as compared for example to the UN), but also its limitations as a technical agency, have to be factored in the discussion.
5. If multiple instruments are eventually pursued, there are pros and cons to negotiating them at the same time as a package or sequentially, e.g. a political instrument followed by a more focused treaty. A package deal is far more complex and will require more time, but would allow for political bargains to be struck across issue areas, which may allow for breaking stalemates on difficult issues. A sequential approach may enable at least some quick wins, but may make it far more difficult to resolve polarized gridlock.
6. Finally, we recognize the importance of exploiting the current political momentum and level of commitment among global leaders to aim at quick solutions before the window of opportunity closes. On the other hand, the time necessary to reach meaningful and well-crafted agreements that can attract reliable, sustainable commitment should not be underestimated. We do not consider it feasible to negotiate new “hard” law – that is, legally binding, specific, and with credible compliance arrangements -- within a year. The need for sustained engagement in the next few years can be a consideration in plotting a way forward, e.g. what issues, forum or instruments to prioritize.

