
Secretariat information paper on the provisions of the WHO Constitution under which the instrument could be adopted

BACKGROUND

1. In December 2021, the Second special session of the World Health Assembly established through decision SSA(2), an Intergovernmental Negotiating Body (INB) to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response, with a view to adoption under Article 19, or under other provisions of the WHO Constitution as may be deemed appropriate by the INB.

2. In the decision, the Health Assembly requested the WHO Director-General to support the work of the INB. Following the first resumed session of the first meeting of the INB, the Bureau of the INB requested the WHO Secretariat to prepare an information paper on the provisions of the WHO Constitution under which the instrument could be adopted. The present paper, which was prepared by the WHO Secretariat, responds to that request.¹ The Secretariat stands ready to provide the INB or its Bureau with further information on this topic if requested.

THE THREE PRIMARY INSTRUMENTS UNDER THE WHO CONSTITUTION

3. The WHO Constitution expressly provides the Health Assembly with three types of possible instrument:

- (a) The Health Assembly may adopt *conventions or agreements*, per Article 19
- (b) The Health Assembly may adopt *regulations*, per Article 21
- (c) The Health Assembly may make *recommendations*, per Article 23

¹ This paper is based on a prior paper prepared by the WHO Secretariat, at the request of the Bureau of the Working Group on Strengthening WHO Preparedness for and Response to Health Emergencies, entitled Secretariat analysis for consideration by the Working Group to further identify the incentives for a new instrument on pandemic preparedness and response and the options for strengthening the effectiveness of the International Health Regulations (2005), including a consideration of the benefits, risks and legal implications (document A/WGPR/3/6).

4. These instrument types differ across a number of important criteria, including the process by which they come into being, their scope, and their legally binding nature on Member States. For ease of reference, a descriptive table of the three types of instrument along key axes is provided in the Annex to this paper.

CONSIDERATIONS REGARDING THE THREE PRIMARY INSTRUMENTS UNDER THE WHO CONSTITUTION – AND OTHER MODALITIES AVAILABLE TO WHO

5. The instruments are not exclusive, and the Health Assembly may establish more than one instrument, using one or more of the three instrument types under the Constitution, to address a health topic, including pandemic preparedness and response: it is *not* an “either/or” situation.

6. A key feature of the WHO Constitution and structure is the principle of transparency and information sharing, and in that regard Member States are, per Article 62, to report annually to the Organization on the action taken with respect to the three types of instrument, namely conventions and agreements, regulations and recommendations.

7. The three instrument types described above are not the only means by which WHO is able to fulfil its objective, as provided in Article 1 of the WHO Constitution, of the attainment by all peoples of the highest possible level of health. Key additional modalities include: (a) functions of the WHO governing bodies as set out in relevant Articles of the WHO Constitution, including in particular Articles 18 and 28; (b) actions by the WHO Secretariat, for example, Secretariat-issued technical guidelines in a variety of health topics; and (c) special norm-setting arrangements, for example, the Codex Alimentarius Commission, a collaboration between WHO and the Food and Agriculture Organization of the United Nations.

ANNEX

SUMMARY OF HEALTH INSTRUMENTS UNDER THE WHO CONSTITUTION

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