US and WHO. President Biden and the Restoration of Ties with the World Health Organization: a new level of confidence?

by Gianpaolo Maria Ruotolo

Abstract: The paper analyses the latest practice of the United States relating to its membership of the World Health Organization and to the withdrawal ordered by the Trump Administration. It focuses on US reform proposals on both WHO institutional and substantive issues, in particular those on the International Health Regulation (IHR) and on the ongoing negotiations for the adoption of an international treaty against pandemics.

Keywords: United States; international law; World Health Organization; withdrawal; International Health Regulation; Pandemic Treaty; global health.

1. How to withdraw from a withdrawal.

If we wish to speak of the relationships of Joe Biden's Administration, and therefore of the United States of America today, with the World Health Organization (WHO), we must start by looking at what happened in the same context under the previous Administration led by Donald Trump.

As we know, the WHO is a United Nations (UN) specialized agency that coordinates health policy by Member States within the UN system.

In mid-April 2020, the then President Donald Trump, believing the Organization had completely mismanaged the Covid pandemic due to its supposed lack of independence from China, decided to suspend the US financing of the WHO.

In July 2020, Secretary of State Mike Pompeo even notified the UN Secretary-General – who is the depositary of the accessions – of the US decision to withdraw from the Organization, which, under the terms of a joint resolution adopted by Congress in 1948,[1] of which I will say more later on, would take effect from July 6th, 2021.[2]

We should remember that the United States played a key role in the establishment of the WHO and is a member of both the Organization's plenary body, the World Health Assembly (WHA) and of its Executive Board, and has always provided both assessed and voluntary contributions,

[1] P.L. 80-643; 62 Stat. 441.

[2] *Trump Administration Submits Notice of US Withdrawal from the World Health Organization Amid COVID-19 Pandemic*, in *American Journal of International Law*, 765 (2020).

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amounting to 22% of the WHO's core budget (an estimated $120.5 million for 2020, of which $58.3 million has been paid), an average of $262 million a year in voluntary funding from 2012 through 2019.

It must also be remembered that the Organization founding treaty, the WHO Constitution, adopted on 7th April 1948, does not contain any explicit rules on the withdrawal of Member States.[3]

So, when the United States, in 1948, joined the WHO through a joint resolution of Congress, it explicitly asserted the possibility of withdrawal, subject to one year's notice.

The WHO Member States accepted this condition on US participation.

Now, while the latter undoubtedly authorizes a US withdrawal, it is less clear whether the President has the authority to adopt the decision to withdraw *without* any congressional approval.

The resolution, moreover, requires that the United States continue to paythe WHO assessed contributions even after adopting the decision to withdraw, through the end of the fiscal year.

Also this, on the basis of US domestic law concerning the attribution of competences, casts doubt on the legitimacy of the President's decision to simply suspend funding in April 2020.

But, since these are issues of domestic US constitutional law, I will not investigate them any further here.

From an international law perspective, instead, the withdrawal from international treaties that do not explicitly provide for such an option – including those establishing international organizations – was not completely defined at the time of the accession of the United States to the WHO, its regulation being then doubtful, even in general international law.

Nowadays the Vienna Convention on the Law of Treaties of 1969, in art. 56 (*Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal*), provides that: "1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1."

Therefore, a withdrawal is possible – in the sense that it produces full legal effects in the international legal order – only if a treaty provides for this option, or if it is otherwise inferable, *i.e.* if there is somehow the possibility of deducing the intention of the parties or, again, if the right of withdrawal can be inferred from the nature of the treaty itself.

It should be remembered that, in the practice specifically pertaining the WHO, between 1949 and 1950, the Union of Soviet Socialist Republics, then followed by other Eastern European States and nationalist China, declared their withdrawal from the Organization.

[3] S.A. Solomon, C. Nannini, *Participation in the World Health Organization*, in *International Organizations Law Review*, 261 (2020).

The WHO Assembly decided not to recognize any effects of the withdrawal, and declared those Member States as merely "inactive".

So, when the same States, ten years later, asked for readmission, this was done simply upon payment of the past due contributions relating to the years of inactivity, and therefore without giving rise to a new admission procedure.

As for the Biden Administration, it must be said that the change of Presidency (and of Administration) came about *before* the expiration of the deadline for the former withdrawal could produce any effect: therefore, probably, the United States never became a WHO State in quiescence, in the foresaid sense, that is to say where its membership was "inactive".

So, I think that the withdrawal of the United States from the WHO, although legally possible, has never technically happened, due to the lack of maintaining the will to withdraw *before* the deadline for it to produce its effects.

In short: Biden's administration withdrew from... Trump's withdrawal.

2. US in the WHO "as it is": global health, national security and COVAX.

What happened with the WHO may not confirm some scholars' affirmations: that, even if it appears probable that some foreign policy initiatives – and, therefore, those which imply both the application or production of international law rules – could have been predictable reactions to the excesses of the previous Presidency, President Biden has never intended to systematically dismantle *everything* associated with his predecessor.

And this unlike "Terminator Man" Trump, who tried to undo all the things Obama did.[4]

But, as far as multilateral treaties are concerned – which are seen as a sort of fetish symbol for international law as a whole by public opinion, which often measures the behaviour of States and its compatibility with international law by means of the yardstick of adherence to such treaties – the contemporary US certainly lends more attention to them than in previous years.

In particular, the Biden Presidency has shown greater attention mostly to those multilateral treaties which, internally, do not require the approval of Congress.

And the outcome of the November 2022 mid-term elections clearly explains the reason why …[5]

[4] J.E. Alvarez, *Biden's International Law Restoration*, in *International Law & Politics*, 525 (2021).

[5] After the elections, in fact, in the Senate the Democrats have 56 seats, 1 more than before, and the Republicans 49,1 fewer, but the majority is 51. In the House of Representatives, the Democrats instead have 9 seats fewer than before, 212, and the Republicans 8 more, 220. The majority is 218. www.economist.com/mid-terms-2022.

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So, as a "reinstated" member of the WHO, the United States has not only paid and will pay off the financial dues that were previously suspended, but it is also seeking to use its financial influence to promote reforms (of both institutional and substantive law), in order to reach forms of conscious assessment of what went wrong during the Covid-19 pandemic.

And the peculiar approach of Biden's Administration towards the WHO may be understood if one thinks of Biden as a President who owes his election (also) to the failure of his predecessor to contain the pandemic and who sees (again) threats to *global health* as threats to *national security*.[6] This implies the need to re-evaluate the fundamental right to health and care contemplated in the WHO Constitution also as a *global public good*.

And, as is known, *global health* "places a priority on improving health and achieving equity in health for all people worldwide. Global health emphasizes transnational health issues, determinants, and solutions; involves many disciplines within and beyond the health sciences and promotes interdisciplinary collaboration; and is a synthesis of population based prevention with individual-level clinical care".[7]

As for international law sources,[8] it is enshrined in art. 25 of the Universal Declaration of Human Rights of 1948: Everyone has the right to a standard of living adequate for the health and well -being of himself and of his family.

And in art. 12 of the International Covenant on Economic, Social and Cultural Rights of 1966: States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[9]

Very briefly, international "global health" law imposes on States three categories of obligations:

1) obligations to respect;

[6] International law has to deal with national security, in the sense of the capacity of a State's domestic legal order to protect its fundamental values, when it is used as a limit to the application of international obligations. It is a concept that international law does not fully define, leaving this task to national law. In this regard, the issue of the 'justiciability' of State measures based on the concept of national security (that is to say whether it is possible to subject them to judicial review by international adjudicatory bodies) generated the idea that every State has *carte blanche* on the matter, *i.e.* holds an autonomous and unchallengeable discretionary power to define not only the content of its own national security interests, but also the *essential nature* of the same. E.V. Bonventre, K.H. Hicks, S.M. Okutani, *U.S. National Security and Global Health. An Analysis of Global Health Engagement by the U.S. Department of Defense. A Report of the CSIS Global Health Policy Center—Working Draft*, Washington, 2009. See also K.L. Scheppele, *The International Standardization of National Security Law*, in *J. Nat'l Sec. L. & Pol'y*, 437 (2010).

[7] J.P. Koplan, T.C. Bond, M.H. Merson, K.S. Reddy, M.H. Rodriguez, N.K. Sewankambo, J.N. Wasserheit, *Towards a common definition of global health*, in *Lancet*, 373 (2009); See also D.P. Fidler, *International Law and Global Public Health*, in *The University of Kansas Law Review*, 1 (1999). O. Aginam, *Global Health Governance: International Law and Public Health in a Divided World*, Toronto, 2005.

[8] J.P. Ruger, *Normative Foundations of Global Health Law*, in *Georgetown Law J.*, 423 (2008).

[9] On the right to health in international law in general, and in the Covenant in particular, see UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, Document E/C.12/2000/4.

2) obligations to protect; and
3) obligations to fulfil the *right to health.*

All of these include preventing discrimination in access or delivery of care, reducing environmental pollution, restricting coercive and/or harmful culturally-based medical practices. A human rights-based approach to health also obliges States to provide strategies and solutions to help/urge/force political entities to help people enjoy the right to health and to develop a human rights-based health policy development.[10]

So it is no coincidence that the WHO believes that the failure of a State to prevent the spread of a contagious disease represents a danger to all States *as a whole*, as all of them benefit whenever each protects the health of its people.

And it is no coincidence, also, that President Biden, on January 21st 2021, declared the United States would join COVAX, the WHO international program launched to promote equal access to vaccines by coordinating the relevant international resources, and play a more active role globally, whose motto is "*no one is safe, unless everyone is safe*".

This guaranteed vaccine availability for 92 low-income Countries, on the basis of need and vulnerability.

3. US and WHO reforms: PHEIC and transparency in IHR.

As we have seen, the failure of the WHO in preventing over forty million infected people around the world and over a million deaths from Covid-19 induced the US to support a series of reforms of its legal framework.[11]

In particular, with regard to *substantive* aspects, they concern the international legal regime of the so-called Public Health Emergencies of International Concern (PHEIC, whose acronym, it must be said, resembling the word "fake", sounds a bit ironic...), and the reactions towards States that do not respect the obligations imposed by the International Health Regulations (IHR),[12] such as the activation of *soft law* reputational mechanisms ("name and shame") and allowing reactions that, by aiming at avoiding disproportionate or discriminatory quarantines, may be respectful of human rights.

Here we aim at focusing on just some of the substantive IHR modification proposals (relating to articles 5, 6, 9, 10, 11, 12, 13,15, 18, 48, 49, 53 and 59), those concerning the *timeframe* within which the States must proceed to notify the Organization (and, through it, other Members) about

[10] M. Da Silva, *The international right to health care: a legal and moral defense*, in *Michigan Journal of International Law*, 343 (2018); V.A. Leary, *The Right to Health in International Human Rights Law*, in *Health and Human Rights*, 24 (1994).
[11] S. Behrendt, A. Müller, "The far-reaching US proposals to amend the International Health Regulations at the upcoming 75th World Health Assembly: A call for attention", in *European Journal of International Law Talks!*, 2022,
[12] On the 2005 IHR see D.P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, in *Chinese Journal of International Law*, 325 (2005).

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potential dangers for global health and the measures they are taking to combat them, which would be reduced to only 48 hours.[13]

Furthermore, there is the proposal to provide for an even more stringent deadline, of only 24 hours, within which the States must proceed to verify the information received by the WHO from private subjects with regard to dangerous events for global health.

Art. 10 IHR, in fact, allows the WHO to collect information from private subjects, in the silence of the State involved, providing in the meantime an obligation (procedural, of merely consultative value) to request their verification by the same State.

For this verification, today, no time limit is envisaged, which makes the provision somewhat ineffective; the United States' proposals aim to provide for its modification.

Let us remember that the IHR, when a State identifies a potential PHEIC, provides for a 'coordinated international response' to the spread of disease.

In this context, the latter proposal, I think, may represent an implementation of the general *principle of transparency*, an instrumental value that could contribute to addressing some of the "democratic deficits" of the WHO.[14]

The proposed rules also would give the WHO the authority to declare a PHEIC at an intermediate, regional level – rather than only globally as it does now – thus creating some kind of "yellow" warning light before the declaration of a full-scale global emergency.

Now, switching to the legal nature of the IHR, international legal scholarship is essentially divided between those who consider it as an act of secondary law[15] and others who instead consider it as an agreement, an international treaty.

Let us recall articles 21 and 22 of the WHO Constitution:

Article 21 The Health Assembly shall have authority to adopt regulations concerning: (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

[13] apps.who.int/gb/ebwha/pdf_files/WHA75/A75_18-en.pdf.

[14] On the issue see E.A. Bruemmer, A.L. Taylor, *Institutional Transparency in Global Health Law-making: The World Health Organization and the Implementation of the International Health Regulations*, in A. Bianchi, A. Peters (Eds.), *Transparency in International Law*, Cambridge, 2013, 271 ss. J. Klabbers, *The Normative Gap in International Organizations Law: The Case of World Health Organization*, in *International Organizations Law Review*, 272 (2019).

[15] "The law of international organizations can be divided into primary and secondary law, primary law being the founding treaties, sometimes characterized as the constitutions of the organizations. Secondary law derives from primary law, in that its normative effect formally depends upon a primary source of international law, ie a treaty provision allocating this competence to the organization"; see M. Benzing, *International Organizations or Institutions, Secondary Law*, in *Max Planck Encyclopaedias of International Law*, Oxford, 2007.

commerce; (e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce.

Article 22 Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.

So, an IHR adopted by the Assembly becomes binding for all Member States once the deadline specifically indicated in its notification by the Director General has elapsed, and it enters into force when therein provided.

The WHO Constitution, moreover, provides also for an opting-out clause for those States which, within the same time limit, wish to communicate a refusal or make reservations, which therefore will not be bound by the regulation or any part thereof.

The WHO Assembly, with a simple majority vote, is indeed free to accept the reservations or to reject those it deems incompatible with the object or the purpose of the regulation itself. In the event it does not accept them, and the reserving State does not withdraw, the same effects of a refusal are produced, so that the reserving State is excluded from the regulation.

As has been said, it is not easy to define the very nature of IHR as international legal sources as they seem to share some profiles with "third-degree" sources and some others with international treaties.

Indeed, they are formally adopted by a majority by the WHO as an autonomous international law subject, and their power to bind even States that have not given their consent – minority States, which at the time of the vote declared their abstention or even expressed their opposition – may lead suggest a third degree source, on the model of EU regulations.

On the other hand, one must consider that the Assembly is made up of the same subjects who, at least potentially, will be recipients of the mandatory effects of the regulation.

So the relationship between the body that holds the regulatory power (the Assembly) and the recipients of the regulation (the same States that sit within it) seems to switch the construction of the legislative production process from a vertical to a horizontal perspective and, therefore, argues for the regulation having a conventional nature, and thinks of it as an agreement concluded at the end of an atypical procedure, autonomously outlined in the WHO Constitution.

And let us remember that the international legal order provides for a general principle of freedom of forms and formalities for the conclusion of treaties.[16]

Another element that seems to further the idea that the IHR are some kind of treaty is that they are subject to registration pursuant to art. 102 of the UN Charter.[17] Furthermore, the possibility that WHO non-member States can become part of the regulations, through the notification of their instrument of acceptance to its Director-General, makes it clear that the

[16] C. Brölmann, *Law-Making Treaties: Form and Function in International Law*, in *Nordic Journal of Interational Law*, 383 (2005).
[17] D. Greco, *L'Organizzazione mondiale della sanità davanti alla pandemia di COVID-19. La* governance *delle emergenze sanitarie internazionali*, Firenze, 2022.

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obligatory nature of this source does not presuppose, as it does for third degree sources, the status of member of the Organization.

Switching very briefly to the institutional profile modification proposals, the US has backed a recommendation to increase the State's assessed contributions in order to provide a more flexible funding for the WHO budget, and also to increase the WHO General Director's executive emergency powers and to conceive WHO deployment missions as the default option during PHEICs; on the enforcement side, there is a project to institute also a compliance committee and universal peer review mechanism.[18]

It should also be added that other reform efforts, such as the reiterated appeals of the US to allow Taiwan to join the Organization, even only as an observer, are likely to generate the resistance of some other States (such as China).

4. Negotiating a Pandemic Treaty

In addition, the US, together with the EU,[19] proposed to negotiate, always under the auspices of the WHO, a new international legal instrument, the Pandemic Treaty.[20]

On 1st December 2021, the WHO Members reached a consensus to open a process to draft and negotiate a treaty to strengthen pandemic prevention, preparedness and response.

Following this decision, the first meeting of an intergovernmental negotiating body took place on 24th February 2022, in order to agree on working procedures and timelines.[21]

The negotiators met again on 1st August 2022, to discuss progress on a working draft in order to deliver a progress report to the 76th World Health Assembly in 2023, with the aim of adopting the instrument by 2024.

From the news that has leaked out, the treaty under negotiation would aim to guarantee Member States a greater quantity of information, of better quality and at greater speed, with regard to pandemic threats and, at the same time, guarantee their citizens greater certainty of access, to fair conditions, to measures to combat the pandemic, such as diagnostic tools, medicines and vaccines.

To do this, States should commit to consultation mechanisms regarding decisions concerning pandemics and ensure international supply chains aimed at guaranteeing the protection of citizens, especially workers during the pandemic.

Furthermore, under proposal is the construction of stable means for sharing the results of scientific research and, in a more general sense, for

[18] S. Behrendt, A. Müller, *The far-reaching US proposals*, cit.

[19] www.consilium.europa.eu/en/infographics/towards-an-international-treaty-on-pandemics/.

[20] www.who.int/news-room/questions-and-answers/item/pandemic-prevention--preparedness-and-response-accord.

[21] www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-first-meeting-of-the-intergovernmental-negotiating-body-to-draft-and-negotiate-a-who-convention-agreement-or-other-international-instrument-on-pandemic-prevention-preparedness-and-response-24-february-2022.

monitoring the implementation of the obligations deriving from the pandemic treaty itself.

The latter, in the intentions of its proponents, should impose an integrated approach of State policies in the protection of national health as a tool for the global approach, linking the health of human beings to that of animals, plants, and the planet in general, building, for this purpose, a network also with private subjects.

Gianpaolo Maria Ruotolo
Dipartimento di Giurisprudenza
Università di Foggia
gianpaolo.ruotolo@unifg.it

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