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### Breaking state-centric shackles in the WHO: Taiwan as a catalyst for a new global health order

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# Breaking State-Centric Shackles in the WHO: Taiwan as a Catalyst for a New Global Health Order

CHING-FU LIN,\* HAN-WEI LIU,\*\* CHIEN-HUEI WU\*\*\*

*After World War II, states established World Health Organization (WHO), recognizing that “the health of all peoples is fundamental to the attainment of peace and security.” This aspiration, embedded in global health governance, introduces a paradox vis-à-vis the WHO’s state-centric institutional design. Though Taiwan alerted the WHO to potential human-to-human transmission in the early stage of the pandemic, its participation in the WHO remains limited, contrasting the WHO’s goal of health for all peoples sharply against its outdated emphasis on statehood and power politics.*

*This Essay critically assesses how and why state-centric international health governance neither delivers its goal to “promote and protect the health of all peoples” nor accommodates the complexity of international politics, and explores new venues allowing a pluralist membership structure that better serves the WHO’s promise. We propose two ways of reinventing global health governance. The first approach is to reform within the WHO, which involves the amendment to Article 8 of the WHO Constitution. This can release the WHO from the shackles of state-centrism and move towards a new institutional design suitable for global health governance in the twenty-first century. The second approach is to go beyond the state-centric international organization by focusing more on the role of trans-government networks in reconstructing the new global health order in the post-COVID-19 era. Overall, our two-pronged approach aims at inclusiveness of global health governance, which will hopefully solicit and steer new actors, processes, and outputs in the re-established WHO or any new institutional settings.*

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## I. INTRODUCTION

After World War II, states recognizing that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being” and that “the health of all peoples is fundamental to the attainment of peace and security”<sup>1</sup> decided to establish the World Health Organization (WHO) with the aim of promoting and protecting health for all. Mindful of the fact that disease neither recognizes nor respects borders, the 2005 International Health Regulations (IHR) reiterate the goal of the universal application of its regulations “for the protection of all people of the world from the international spread of disease.”<sup>2</sup> The WHO Framework Convention on Tobacco Control (FCTC), similarly, stands as an “evidence-based treaty that reaffirms the right of all people to the highest standard of health.”<sup>3</sup> Given the inherently global nature of public health affairs, such statements indicate the aspiration that the WHO’s normative work be about more than “a collection of nation-states.”<sup>4</sup>

Such aspiration embedded in global health governance introduces a paradox vis-à-vis the WHO’s state-centric institutional design as evidenced and amplified by the COVID-19 crisis. The exclusion of Taiwan from the WHO—which alerted the WHO of potential human-to-human transmission at the early stage and successfully guarded its people against the pandemic—is heatedly debated.<sup>5</sup> Taiwan’s WHO participation presents a sharp contrast between the Organization’s goal of health for all peoples, on one hand, and its outdated state-centric design and power politics on the other. While scholars proposed the concept of “global health law” to reflect the erosion of sovereignty and encroachment of state powers due to globalization,<sup>6</sup> the WHO continues to rest its institutional design on the assumption of states being the dominant actors of international (health) law, envisaging international health governance rather than global health governance.<sup>7</sup> This state-centric view inevitably goes hand in hand with power struggles that undermine global health.

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1. Constitution of the World Health Organization pmbl., July 22, 1946, 14 U.N.T.S. 185 [hereinafter WHO Constitution].

2. World Health Assembly, *Revision of the International Health Regulations*, art. 3.3, WHA Res. WHA58.3 (May 23, 2005) [hereinafter IHR 2005].

3. WHO Framework Convention on Tobacco Control, foreword, May 21, 2003, 2302 U.N.T.S. 166.

4. Jennifer Prah Ruger, *Normative Foundations of Global Health Law*, 96 GEO. L.J. 423, 424 (2008).

5. See, e.g. Louise Watt, *Taiwan Says It Tried to Warn the World About Coronavirus. Here’s What It Really Knew and When*, TIME (May 19, 2020).

6. Ruger, *supra* note 4 at 424, (referring to the normative foundation of global health law as the theory of health and social justice).

7. Lawrence O. Gostin & Allyn L. Taylor, *Global Health Law: A Definition and Grand Challenges*, 1 PUB. HEALTH ETHICS 53, 57 (2008); DAVID FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE 51 (2004).

Against this background, this paper aims to demonstrate how and why state-centric international health governance neither delivers its goal to “promote and protect the health of all peoples” nor accommodates the complexity of international politics. This Essay will also explore new venues of allowing a pluralist membership structure that would better serve the WHO’s promise. In Part II, we analyze challenges and constraints facing Taiwan’s participation in the WHO as a full member and as an observer under the existing institutional framework. In Part III, we propose an amendment to the WHO Constitution and map a new path for global health governance through the lens of the trans-governmental network.

## II. THE LIMITS OF WHO’S INSTITUTIONAL DESIGN: TAIWAN AS A LEGAL AND POLITICAL PARADOX

Cross-border public health threats require the WHO to bring together all states to act collectively. Nonetheless, globalization presents two challenge to this state-centric approach. On one hand, it neglects the critical role of non-state actors like non-governmental organizations and multinational enterprises in pursuing public health.<sup>8</sup> On the other, the decline and disaggregation of nation states has introduced the idea of “governance without governments,”<sup>9</sup> describing how the exercise of public authority may be carried out by international organizations, state-like entities, or through transnational networks of governments. While states played the dominant role in promoting and protecting health when the WHO was established in 1948,<sup>10</sup> the complexity of current international politics and the demand for new governance cast doubt on the effectiveness of the state-centric model. Moreover, the failure to bring relevant non-states, state-like actors, and states lacking widespread international recognition into the existing regime continues to undermine the effectiveness of global health governance, in particular transnational disease control. Taiwan’s exclusion from the WHO during global health crises, including the 2003 severe acute respiratory syndrome (SARS) outbreak and the 2020 COVID-19 pandemic,<sup>11</sup> exposes the weaknesses of this state-centric model: whether and how to include Taiwan presents a legal and political paradox for this *World Health Organization*.

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8. Gostin & Taylor, *supra* note 6, at 57; FIDLER, *supra* note 6, at 25.

9. *See generally* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

10. For a history, *see generally* LAWRENCE O. GOSTIN, GLOBAL HEALTH LAW 91-92 (2014) (noting that “the WHO’s constitution entered into force on April 7, 1948, when the required twenty-six countries ratified it...The WHO convened its first World Health Assembly in June 1948, with delegates from fifty-three of the WHO’s original fifty-five member states attending.”).

11. James Griffiths, *Taiwan’s Coronavirus Response is Among the Best Globally*, CNN (Apr. 5, 2020), <https://www.cnn.com/2020/04/04/asia/taiwan-coronavirus-response-who-intl-hnk/index.html>.

*A. The Impracticable Case of Taiwan as a Full Member*

In theory, Taiwan is eligible for WHO membership. In fact, Taiwan applied for full membership in accordance with Article 6 of the WHO Constitution in 2007 under the name of “Taiwan,”<sup>12</sup> which was rejected with a 148-17 vote in the WHA on the ground that Taiwan is not a sovereign state and thus unqualified for membership.<sup>13</sup> This rejection reflects the insurmountable legal and political obstacles standing along this path. Legally, issues around Taiwan’s statehood and the scope and coverage of the UN General Assembly Resolution 2758 present the main problems.<sup>14</sup> Politically, membership applications must win a majority of support from WHO Members to succeed.

After the Chinese civil war between the Nationalist Party (Kuomintang) and Communist Party in 1945, the defeated Nationalist Party fled to Taiwan in 1946 and continued to participate in the UN and its special agencies, including the WHO under the name of the Republic of China (ROC).<sup>15</sup> Nonetheless, whether the ROC could legitimately represent China had already debated in the UN and the WHO.<sup>16</sup> In 1971, the UN General Assembly adopted Resolution 2758, recognizing the People’s Republic of China (PRC) as the sole legitimate government representing China and expelled the representatives of the ROC.<sup>17</sup> As a UN specialized agency, the WHO followed this Resolution.<sup>18</sup> In 1972, upon the proposal of the Executive Board,<sup>19</sup> the World Health Assembly (WHA), the decision-making body of the WHO, adopted decision WHA 25.1 with the same language and effect.<sup>20</sup>

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12. Office of the President Republic of China (Taiwan), Office of the President Holds Press Conference Detailing Taiwan’s Efforts to Obtain WHO Entry (Apr. 12, 2007), <https://english.president.gov.tw/NEWS/2664> (last visited Nov. 11, 2020).

13. David Brown, *China-Taiwan Dueling in International Arena*, COMPARATIVE CONNECTIONS: A QUARTERLY E-JOURNAL OF BILATERAL RELATIONS IN THE INDO-PACIFIC (July 2007), <http://cc.pacforum.org/2007/07/dueling-international-arena/>.

14. G.A. Res. 2758 (XXVI), A/RES/2758(XXVI) (Oct. 25, 1971).

15. On the intricacy of Taiwan-China relations and Taiwan’s territorial status, see e.g., Jonathan I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 AM. J. INT’L L. 453 (2000). On the competition between the Republic of China and the People’s Republic of China over the representation of China, see e.g., Report on the Representation of the People’s Republic of China within the Organizations of the United Nations System, 11 INT’L LEGAL MATERIALS 561 (1972); see James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT’L L. 93 (1976).

16. GIAN LUCA BURCI & CLAUDE-HENRI VIGNES, WORLD HEALTH ORGANIZATION, 26–27 (2004).

17. G.A. Res. 2758, *supra* note 14.

18. G.A. Res. 396 (V), A/RES/396(V) (Dec. 14, 1950).

19. WHO Executive Board (EB), *Representation of China in the World Health Organization*, EB Res. EB49.R37 (Jan. 26, 1972).

20. WHA, *Representation of China in the World Health Organization*, WHA Res. WHA25.1 (May 10, 1972).

Against this backdrop, the first obstacle for Taiwan's WHO bid is whether Resolution 2758 legally prevents Taiwan from joining as a state distinct from China. While the PRC has repeatedly asserted that Resolution 2758 declares Taiwan to be an inalienable territory of China,<sup>21</sup> a closer examination of the Resolution's text reveals that it only addresses the representation of China, without addressing Taiwan's territorial title.<sup>22</sup> In practice, the UN treats Resolution 2758 as addressing both. When Taiwan applied for UN membership in 2007, then-Secretary-General Ban Ki-moon relied upon Resolution 2758 to reject the application as an agenda item.<sup>23</sup> This statement nonetheless invited protest from the U.S. and its allies, as they held that Resolution 2758 addresses *only* the representation of China, not the status of Taiwan.<sup>24</sup> The second legal obstacle is the controversy

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21. See, e.g., Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on May 14, 2020, [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1779190.shtml](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1779190.shtml) (last visited Nov. 21, 2020) ("There is only one China in the world and the Taiwan region is an inseparable part of China's territory. . . . No legal basis can be found in WHO's Constitution or the WHA's Rules of Procedure to justify the participation of a region of a sovereign state in the WHA."). Similar terminology is used in the PRC's joint statements or communiqués when establishing diplomatic relations with third countries, such as with Panama in 2017 and El Salvador in 2018. Comunicado Conjunto entre la República de Panamá y la República Popular China sobre el Establecimiento de Relaciones Diplomáticas [Joint Statement between the Republic of Panama and the People's Republic of China on the Establishment of Diplomatic Relations], Ministerio de Relaciones Exteriores de Panamá (June 13, 2017), <https://www.mire.gob.pa/images/PDF/documentos%20y%20formularios/Acuerdoschina/COMUNICADO%20CONJUNTO%20PANAMA%20CHINA.pdf>; El Salvador y China establecen relaciones diplomáticas, Ministerio de Relaciones Exteriores de El Salvador (Aug. 21, 2018), <http://web.archive.org/web/20190824110331/https://rree.gob.sv/el-salvador-y-china-establecen-relaciones-diplomaticas/> (last visited Nov. 22, 2020).

22. G.A. Res. 2758 (XXVI), *supra* note 14 ("The General Assembly, Recalling the principles of the Charter of the United Nations. Considering the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter. Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council. Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it."). On the territorial title of Taiwan, see Lung-chu Chen and W. M. Reisman, *Who Owns Taiwan: A Search for International Title* 81 YALE L.J. 599 (1972).

23. United Nations Secretary-General, Transcript of Press Conference by Secretary-General Ban Ki-Moon at United Nations Headquarters, 18 September 2007, SG/SM/11164, (Sept. 18, 2007), <https://www.un.org/press/en/2007/sgsm11164.doc.htm> (last visited June 24, 2020).

24. In a demarche to the UN Under-Secretary-General for Political Affairs, the U.S. stated that it takes no position on the question of Taiwan's sovereignty and rejects the UN Statements indicating that the UN considers "Taiwan for all purposes to be an integral part of the People's Republic of China." {The source does not use an abbreviation.} The U.S. held that while Ban's statement is in line with the PRC's position, "it is not universally held by UN member states, including the United States." John J. Tkacik Jr., *Taiwan's "Unsettled" International Status: Preserving U.S. Options in the Pacific*, BACKGROUND NO. 2146 at 12-13, June 19, 2008, [http://s3.amazonaws.com/thf\\_media/2008/pdf/bg2146.pdf](http://s3.amazonaws.com/thf_media/2008/pdf/bg2146.pdf) (last visited June 24, 2020).

around Taiwan's statehood. Is Taiwan, despite its official title as the ROC, a state, supporting its accession to the WHO? This question is of fundamental importance as Article 6 of the WHO Constitution limits its full member to states. Views on Taiwan's statehood diverge, given that Taiwan has not explicitly declared itself a state distinct from China.<sup>25</sup> Some scholars, including James Crawford, argue that, while Taiwan may be deemed as a *de facto* state, it is not a state *de jure* since Taiwan has never explicitly pronounced its distinctive statehood.<sup>26</sup> Some argue that, regardless of the absence of unequivocal formal declaration, Taiwan's "deeds and conduct" are "tantamount to a quasi-declaration of independence".<sup>27</sup> Thus, territorial title and statehood are two legal obstacles facing Taiwan for its path to the WHO membership. Politically, a simple majority of members must approve applications for WHO membership. This low procedural requirement, without the possibility of an UN-level veto, is premised upon the universality principle,<sup>28</sup> as reflected in the objective of the WHO to attain highest level of health by all peoples<sup>29</sup> and goal of the IHR 2005 for "universal application for the protection of all people of the world from the international spread of disease".<sup>30</sup> However, given that a vast majority of countries maintain diplomatic relations with the PRC which has strong influence in the WHO decision-making and functioning, it is difficult for Taiwan to win political support from a majority of WHO members. After debates, Taiwan's membership application in 2007 was removed from the agenda by the Chairperson of the General Committee, Australian Health Minister Ms. Sarah Halton.<sup>31</sup> Regardless of the General Committee's actions, the political will of WHO members is nonetheless a key factor for WHO admission, as the cases of Germany, Japan, and the Cook Islands show.<sup>32</sup> While Taiwan's membership application enlivened debate on its exclusion

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25. See generally J. P. Jain, *The Legal Status of Formosa: A Study of British, Chinese and Indian Views*, 57 AM. J. INT'L L. 25 (1963); Jonathan I. Charney & J. R. V. Prescott, *supra* note 15; LUNG-CHU CHEN, *supra* note 15.

26. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 198–221 (2nd ed., 2006)

27. LUNG-CHU CHEN, *THE U.S.-TAIWAN-CHINA RELATIONSHIP IN INTERNATIONAL LAW OF POLICY* 71–93 (2016).

28. BURCI & VIGNES, *supra* note 16, at 22.

29. WHO Constitution, *supra* note 1 at art. 1.

30. IHR 2005, *supra* note 2 at art. 3.3. See generally David P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4 CHIN. J. INT'L L. 325, 374–376 (2005).

31. WHA, Summary Records of Meetings of Committees, General Committee, First Meeting, Monday, May 14, 2007, at 12:15, in SIXTIETH WORLD HEALTH ASSEMBLY: SUMMARY RECORD OF COMMITTEES, REPORT OF COMMITTEES 3–6, WHA60/2007/REC/3 (2007). The General Committee is a committee comprising twenty-five members including President and Vice President of the Health Assembly and Chairman of main committees with one of its duties, according to rule 31(e) of WHA Rules of Procedure, being to decide on the addition to provisional agenda of the Health Assembly.

32. BURCI & VIGNES, *supra* note 16 at 23–25.



from the international health community, it was nonetheless politically costly—even the U.S. and some European countries, which supported Taiwan’s observer status, refused to support Taiwan’s bid for full membership.<sup>33</sup>

*B. The Promise and Pitfalls of Participating with Observer Status*

Observer status is another way for Taiwan to avoid controversy around its sovereignty and yet still participate in the WHO. The WHO Constitution does not, as a matter of law, spell out the term “observers,” but Article 18(h) gives the WHA the power “to invite any organization, international or national, governmental or non-governmental” with responsibilities related to those of the WHO” and “to appoint representatives to participate, without right of vote, in its meetings or in those of the committees and conferences convened under its authority,” subject to conditions it prescribes.<sup>34</sup> The only explicit reference to “observers” is under Rule 3 of the WHA Rules of Procedure, which stipulates that the Director-General may invite certain entities to sessions of the WHA: states having made application for membership; territories applying for associate membership; and states which have signed but not accepted the Constitution.<sup>35</sup> However, the established practice has, by virtue of the WHO Director General’s discretion or WHA decisions, added new categories of observers beyond Rule 3.<sup>36</sup> Broadly, these fall into three categories: (1) the Holy See as a non-Member State observer;<sup>37</sup> (2) the Palestinian Liberation Organization (PLO) as an observer under WHA Resolution 27.37;<sup>38</sup> and (3) others, *e.g.* the International Committee of the Red Cross, Order of Malta, and Inter-Parliamentary Union.<sup>39</sup>

Taiwan does not fall in any of these categories, by law or by practice, and has thus struggled to consistently set foot in the WHO’s Assembly, subject to highly political exercises. Taiwan began seeking observer status in

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33. Che-Ming Yang, *The Road to Observer Status in the World Health Assembly: Lessons from Taiwan’s Long Journey*, 5 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 331, 335 (2010).

34. WHO Constitution, *supra* note 1 at art. 18(h).

35. See WHO, Rules of Procedure of the World Health Assembly, r. 3, in BASIC DOCUMENTS 174 (49th ed., 2020) [hereinafter WHA Rules of Procedure].

36. BURCI & VIGNES, *supra* note 10, at 36–38.

37. The Holy See was first invited to join the WHA in 1949 and has participated in it every year since accepting another invitation in 1953. BURCI & VIGNES, *supra* note 10, at 37.

38. World Health Assembly, *Activities of the World Health Organization with regard to Assistance to Liberation Movements in Southern Africa pursuant to United Nations General Assembly Resolution 2918 (XXVII) and Economic and Social Council resolution 1804 (LV)*, WHA Res. WHA27.37 (May 21, 1974). Following the UN, the WHA aligned the PLO’s WHO participation with the UN General Assembly Resolution 52/250. World Health Assembly, *Collaboration within the United Nations System and with other Intergovernmental Organizations Aligning the Participation of Palestine in the World Health Organization with its Participation in the United Nations*, WHA Res. WHA53.13 (May 20, 2000).

39. BURCI & VIGNES, *supra* note 10, at 37–38.

1997 when it applied through its allies Senegal, Nicaragua, and Honduras under the name “Republic of China (Taiwan).”<sup>40</sup> Yet this and later bids in 1998 and 1999 failed.<sup>41</sup> The pro-independence Democratic Progressive Party (DPP), which took power in 2000, re-oriented its accession strategy by using the names “Taiwan” or “health entity” since 2002 instead.<sup>42</sup> Taiwan drew on its experience in other international arenas, notably the World Trade Organization (WTO), by using a more flexible and functional term (*i.e.* health entity) to avoid sovereignty disputes. But these bids failed due to opposition from China, which considered Taiwan’s separate membership as a threat to its “One China” principle.<sup>43</sup> Taiwan made a more aggressive move in 2007 by applying for “membership” in the name of “Taiwan,” which was unfruitful.<sup>44</sup>

After years of frustration, Taiwan eventually attended the 62nd WHA in 2009 as an observer called “Chinese Taipei.” This was largely due to a matrix of geopolitical and public health factors: the diplomatic truce with China under former President Ma Ying-jeou, support from allies with and without official diplomatic ties, and inclusion of a “universal application”

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40. ROC MINISTRY OF FOREIGN AFFAIRS, ZHONGHUA MINGUO BASHILIU NIAN WAIJIAO NIANJIAN § 2 (中華民國 86 年外交年鑑) (1997), [http://multilingual.mofa.gov.tw/web/web\\_UTF-8/almanac/almanac1997/3-2.html](http://multilingual.mofa.gov.tw/web/web_UTF-8/almanac/almanac1997/3-2.html) (last visited June 24, 2020). From 1997 to 2001, Taiwan has sought to rejoin the WHO under the name of “Republic of China (Taiwan)”; from 2002 to 2008, it changed its strategy by using “Taiwan,” “Health authorities of Taiwan,” or “Taiwan, health entity.” For details, see Yang, *supra* note 33, at 350.

41. For a history overview, see Yang, *supra* note 33, at 335, 350 (listing all of the proposed bids and strategies used by Taiwan to participate in the WHO between 1997 and 2008). For a general overview of available meeting records, see WHA, Summary Records of Meetings of Committees, General Committee, First Meeting, Monday, May 5, 1997, at 13:05, in FIFTIETH WORLD HEALTH ASSEMBLY: SUMMARY RECORD OF COMMITTEES, REPORT OF COMMITTEES 2–3, WHA50/1997/REC/3 (1997) (after discussion, announcing a consensus to reject the proposal); WHA, Verbatim Records of Plenary Meetings, Third Plenary Meeting, Monday, May 5, 1997, at 14:30, in FIFTIETH WORLD HEALTH ASSEMBLY: VERBATIM RECORDS OF PLENARY MEETINGS 13–31, WHA50/1997/REC/2 (1997) (the issue was further discussed and presented for a vote but lacked majority support).

42. ROC MINISTRY OF FOREIGN AFFAIRS, ZHONGHUA MINGUO JIUSHIYI NIAN WAIJIAO NIANJIAN (中華民國 91 年外交年鑑) (2002), [http://multilingual.mofa.gov.tw/web/web\\_UTF-8/almanac/almanac2007/html/01.html](http://multilingual.mofa.gov.tw/web/web_UTF-8/almanac/almanac2007/html/01.html) (last visited Oct. 26, 2020). See Office of the President Republic of China (Taiwan), Zongtong Jiu Taiwan Jiaru Shijie weishengzuzhi (WHO) Yiti Juxing Guoji Jizhahui [The President holds an international press conference on “Taiwan’s accession to the World Health Organization (WHO)"] (May 11, 2007), <https://www.president.gov.tw/NEWS/11288> (last visited Oct. 29, 2020).

43. See *e.g.*, H.E. Madame Wu Yi, Speech of Vice Premier and Minister of Health on Taiwan-Related Proposal at General Committee of 56th World Health Assembly (May 19, 2003), <http://www.china-un.ch/eng/gjhyfy/hy2003/t85541.htm> (last visited June 24, 2020).

44. ROC MINISTRY OF FOREIGN AFFAIRS, ZHONGHUA MINGUO JIUSHILIU NIAN WAIJIAO NIANJIAN (中華民國 96 年外交年鑑) (2007), [http://multilingual.mofa.gov.tw/web/web\\_UTF-8/almanac/almanac2007/html/01.html](http://multilingual.mofa.gov.tw/web/web_UTF-8/almanac/almanac2007/html/01.html) (last visited June 24, 2020). Some of Taiwan’s allies who supported the previous bids refused to support this attempt. Jonathan Herington & Kelly Lee, *The Limits of Global Health Diplomacy: Taiwan’s Observer Status at the World Health Assembly*, 10(1) GLOBALIZATION & HEALTH 71, 75 (2014).

clause in the amended IHR 2005 after the SARS outbreak. Taiwan's observer status, however, only allows its participation in limited WHA activities.<sup>45</sup> When the DPP took power in Taiwan in 2016, cross-strait relations have escalated, and Taiwan has been completely excluded from the WHA since 2017.<sup>46</sup>

### III. A NEW GLOBAL HEALTH ORDER BEYOND WESTPHALIA

The challenges and constraints facing Taiwan's WHO participation as a full member and observer under the existing institutional framework arguably stem from the increasingly contested concept of "sovereignty." In our view, the global health order should release itself from the outdated Westphalian system to serve the welfare of all peoples. There is no logically necessary connection between sovereignty and the right to participate in—and contribute to—the global health community. Time and again, the exclusion of certain groups of people in the name of sovereignty—rhetorical, ill-defined, interest-laden, and fluid—can only raise doubts on the legitimacy of the institutional design, and even the very existence, of the WHO. Indeed, Don Herzog in his seminal work "Sovereignty, R.I.P." rejects the classic theory of sovereignty: while it was "sensible enough as a response to early modern Europe's wars of religion," it is by no means "a timeless bit of political theory."<sup>47</sup> Building on such premises, we consider two ways of reinventing global health governance. One is reform within the WHO; the other is to transform without it. Our two-pronged approach aims at inclusiveness of global health governance, which will hopefully solicit and steer new actors, processes, and outputs in the re-established WHO or any new institutional settings.

#### A. *Amending the WHO Constitution & Associate Member Provision*

To ameliorate the WHO's state-centric ossification, we question whether the existing membership structure remains an appropriate paradigm of global health governance and propose an amendment to the

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45. For instance, observers may attend open meetings of the WHA or any of its main committees, and make a statement when invited by the President and subject to the consent of participating members. See WHA Rules of Procedure, *supra* note 35, r. 46.

46. See e.g., DD Wu, *WHO Déjà vu: Taiwan Not Invited to World Health Assembly: WHA Says Cross-Strait Understanding Between China and Taiwan is the Basis for Invitation*, DIPLOMAT (May 13, 2017) <https://thediplomat.com/2017/05/who-deja-vu-taiwan-not-invited-to-world-health-assembly/> (last visited Oct. 29, 2020); Chris Horton, *Blocked by China, Taiwan Presses to Join U.N. Agency's Meeting*, N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/world/asia/taiwan-world-health-china.html> (last visited Oct. 29, 2020).

47. DON HERZOG, SOVEREIGNTY, R.I.P. 25 (2020).

WHO Constitution to relax the already anachronistic definition and requirements of associate members.

The WHO Constitution establishes a two-tiered membership structure colored by state-centric concepts. While states are eligible to participate in the WHO as Members, under Article 8, “[t]erritories or groups of territories which are not responsible for the conduct of their international relations may be admitted as Associate Members by the Health Assembly upon application made on [their] behalf ... by the Member or other authority having responsibility for their international relations.”<sup>48</sup> Associate Members may fully participate in the activities of the WHO without voting rights.<sup>49</sup>

The WHO Constitution’s drafting history indicates that inclusion of this provision was necessary after World War II, when many non-self-governing entities were parties to the International Office of Public Hygiene and the International Sanitary Conventions.<sup>50</sup> At the time of the WHO’s establishment, “[i]t would have been improper not to have permitted such territories to continue their participation in the new Organization.”<sup>51</sup> Most of the former Associate Members—*e.g.* Morocco, Tunisia, Sudan, Gold Coast, and Sierra Leone—joined the WHO as Members after they gained independence.<sup>52</sup>

While this traditional state-centric, sovereignty-based approach prevails across UN agencies,<sup>53</sup> the term “territories or groups of territories which are not responsible for the conduct of their international relations” is outdated. As Crawford rightly pointed out, the use of “dependent territory” already appeared “to nineteenth-century writers [as] strange and anachronistic.”<sup>54</sup> Indeed, despite being a questionable legal concept *per se*, “dependent territories”—colonies, protectorates, protected states, and trust territories—effectively no longer exist.<sup>55</sup> At present, there are only two Associate Members in the WHO, Puerto Rico and Tokelau.<sup>56</sup> Even special administrative regions like Hong Kong and Macau are not Associate Members, but have access to regional committees, though they cannot vote

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48. WHO Constitution, *supra* note 1, art. 8.

49. *Id.*

50. BURCI & VIGNES, *supra* note 16, at 33.

51. *Id.*

52. *Id.*

53. The UN Charter established important principles regarding “non-self-governing territories” (as the dependencies of colonial and other powers were euphemistically addressed). U.N. Charter, arts. 73–74.

54. CRAWFORD, *supra* note 26, at 283.

55. GERD DROESSE, MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS: PARADIGMS OF MEMBERSHIP STRUCTURES, LEGAL IMPLICATIONS OF MEMBERSHIP AND THE CONCEPT OF INTERNATIONAL ORGANIZATION 153 (2020).

56. WHO, THE WORLD HEALTH REPORT 1998: LIFE IN THE 21ST CENTURY, A VISION FOR ALL 214 (1998), [https://www.who.int/whr/1998/en/whr98\\_annex.pdf?ua=1](https://www.who.int/whr/1998/en/whr98_annex.pdf?ua=1) (last visited June 24, 2020).

in plenary meetings.<sup>57</sup> The time is ripe to give the term Associate Member a new definition to animate a new global health order.

Amending WHO Constitution Article 8 may allow the Organization to break the shackles of state-centrism and establish a new institutional design suited for global health governance in the twenty-first century. This is particularly warranted as pandemics can emerge out of non-states and respect no national borders. Such overhaul of the rigid membership structure enables the WHO to react to the growing globalization of health threats, in which interests, actors, processes, and forces flow across borders and levels of governance, blurring these ill-drawn distinctions. Indeed, the WHO must “re-establish itself as the world’s health organization” rather than as an inter-state bureaucracy.<sup>58</sup> In particular, relaxing the requirements for Associate Membership may allow relevant entities such as separate health territories, international organizations, technical government agencies in non-member states, and even transnational actors (*e.g.* global philanthropy and civil society), to participate in all WHO activities without voting rights and contribute meaningfully to global health governance. Such entities are well positioned to exchange best practices, offer technical expertise and consultation, share information, provide funding, and facilitate public-private partnership transnationally.

An amendment that opens up associate membership to a range of relevant actors is aligned with the post-Westphalia world order, where public goods have been increasingly provided by non-state entities.<sup>59</sup> In fact, while the eligibility of members in international organizations has traditionally been limited to states, as epitomized by the UN specialized agencies, international organizations have gradually been admitted as members of other international organizations in their own right, including the WHO. For example, the WHO Framework Convention on Tobacco Control (FCTC) allows regional economic integration organizations to participate as members in the treaty system,<sup>60</sup> and the European Union (EU) ratified the WHO FCTC with full rights except the right to vote and provides

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57. WHO Constitution, *supra* note 1, art. 47. China and the U.K. declarations in 1989 allowing Hong Kong (H.K.) to represent itself in the Regional Committee for the Western Pacific. Macao subsequently took the same procedure to participate in its own name at the regional level. After being transferred to China, H.K., and Macau continue to enjoy separate representation at the regional level yet not at the WHO; BURCI & VIGNES, *supra* note 10, at 33. *See also* WHO Regional Committee for the Eastern Mediterranean (WHOEM), *Membership of Palestine in the Regional Committee*, WHOEM Res. EM/RC40/R2. (June 17, 2014).

58. KELLEY LEE, *THE WORLD HEALTH ORGANIZATION* 99 (2008).

59. *See* INFORMAL INTERNATIONAL LAWMAKING (Joost Pauwelyn et al. eds., 2012).

60. Chien-Huei Wu, *EU’s Participation in the WHO and FCTC: A Good Case for “EU as a Global Actor?”*, 5(2) ASIAN J. WTO & INT’L HEALTH L. & POL’Y 467, 478–83 (2010).

European Union (EU) ratified th separately from EU members.<sup>61</sup> Such institutional design marks the Organization’s move to promote the “[h]ealth in all policies” approach.<sup>62</sup> Furthermore, the WTO’s approach to membership that is open to non-state entities—any “separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for,”<sup>63</sup>—may also serve as an instructive benchmark of which other international organizations, such as the WHO, should take note.

### B. *Revisiting the Role of Trans-Governmental Network*

While we propose relaxing the definition and requirements of Associate Membership, we are not naïvely disregarding the difficulty of passing such an amendment, considering the current global political climate. Even though the WHO Constitution has been amended on multiple occasions,<sup>64</sup> future amendments must satisfy various procedural requirements. Specifically, amendments categorized as “important questions” by the Rules of Procedure for the WHA require submission of amendment proposals to the Director-General,<sup>65</sup> a two-thirds majority WHA decision,<sup>66</sup> and Members’ deposition of the instrument of acceptance with the UN Secretary-General.<sup>67</sup> These procedural obstacles to overcome are formidable, not to mention the significant political friction.

More recently, however, the changing international order amid the COVID-19 crisis seems to indicate another route for entities like Taiwan to overcome these difficulties. Soon after his decision to halt U.S. funding for

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61. Thea Emmerling & Julia Heydemann, *The EU as an Actor in Global Health Diplomacy*, in GLOBAL HEALTH DIPLOMACY: CONCEPTS, ISSUES, ACTORS, INSTRUMENTS, FORA AND CASES 223, 235 (Ilona Kickbusch *et al.* eds., 2013).

62. *Id.*

63. Marrakesh Agreement Establishing the World Trade Organization art. XII.1, Apr. 15, 1994, 1867 U.N.T.S. 154. A related practice of treaty design can be seen in the 1995 UN Fish Stock Agreement, which “applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas.” Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 1.3, Aug. 4, 1995, 2167 U.N.T.S. 3 (“1995 UN Fish Stocks Agreement”), Taiwan has been involved in the Agreement as a “fishing entity” (instead of formal, full member), which “shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the stocks.” *Id.* art. 17.3.

64. *E.g.* Amendments to articles 24 and 25 of the Constitution of the World Health Organization, WHO Doc. WHA51/1998/REC/1, 26 (12 May 1986).

65. WHA Rules of Procedure, *supra* note 35, r. 70.

66. WHO Constitution, *supra* note 1, arts. 60 & 73.

67. WHA Rules of Procedure, *supra* note 35, r. 120.

the WHO,<sup>68</sup> U.S. President Donald Trump announced on May 29, 2020 that the U.S. would cut ties with the Organization.<sup>69</sup> Putting aside the procedural hurdles for withdrawal,<sup>70</sup> one immediate question arises as to the forms and processes in which the U.S. might engage other governments on health matters. While we see no constructive momentum in the move of the Trump Administration to withdraw and defund the WHO, we nevertheless notice that the theory of trans-governmental networks seems to shed some light in reconstructing the new global health order in the post-COVID-19 era.

Since the 1970s, trans-governmental networks have emerged to outstrip many formal functions conducted by the traditional diplomacy of foreign ministries or international organizations.<sup>71</sup> As Slaughter remarked, “[t]he state is not disappearing, but it is disaggregating into its component institutions, which are increasingly interacting principally with their foreign counterparts across borders.”<sup>72</sup> These networks are “trans-governmental” because they “involve specialized domestic officials *directly* interacting with each other, often with minimal supervision by foreign ministries.”<sup>73</sup> These are networks because they feature “loosely-structured, peer-to-peer ties

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68. The U.S. White House, *Fact Sheets: President Donald J. Trump Is Demanding Accountability from the World Health Organization*, Apr. 15, 2020, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-demanding-accountability-world-health-organization/> (last visited June 24, 2020).

69. BBC, *Coronavirus: Trump Terminates US Relationship with WHO*, May 30, 2020, <https://www.bbc.com/news/world-us-canada-52857413> (last visited June 24, 2020); Julian Borger, *US Officially Notifies World Health Organization of Its Withdrawal*, *GUARDIAN*, July 8, 2020, <https://www.theguardian.com/world/2020/jul/07/us-officially-notifies-world-health-organization-of-its-withdrawal> (last visited July 14, 2020). Although Joe Biden vowed to rejoin the WHO if he wins the election in November 2020. BBC, *Coronavirus, Biden Vows to Reverse Trump WHO Withdrawal*, *BBC NEWS*, July 8, 2020, <https://www.bbc.com/news/world-us-canada-53332354> (last visited July 14, 2020).

70. The U.S. reserved its right to withdraw from the WHO when it acceded in 1948, provided that (1) it has given a one-year notice and (2) it has discharged its financial obligation in full for the current fiscal year. As the WHO Constitution does not provide for withdrawal of membership, this reservation was made under Article 75 of the WHO Constitution. 22 U.S.C. § 290c. The fact that the Assembly admitted the U.S. as a full member without challenging this reservation presumably constitutes an acceptance of a reservation for the purpose of Article 20.3 of Vienna Convention of Law of Treaties. BURCI & VIGNES, *supra* note 16 at 23; *see also* United Nations, Status of the Constitution of the World Health Organization, [https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=2&mtdsg\\_no=IX-1&chapter=9&lang=en](https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IX-1&chapter=9&lang=en) (last visited Nov. 22, 2020). Moreover, there are debates on the presidential power to terminate international agreements unilaterally. Curtis Bradley observed that some sort of legislative approval was required in the 19th century, but the practice changed during the 20th century—presidents terminated treaties on their own authority. For a comprehensive account, *see* Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 *TEX. L. REV.* 773, 788–96, 801–10 (2014); Curtis A. Bradley & Laurence R. Helfer, *Treaty Exit in the United States: Insights from the United Kingdom or South Africa?*, 111 *AM. J. INT’L L.* 428 (2017); Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 *YALE L.J. FORUM* 432 (2018).

71. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 31 (2004).

72. *See id.* at 57–85.

73. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *VA. J. INT’L L.* 1, 5 (2002).

developed through frequent interactions rather than formal negotiation.”<sup>74</sup> They expand a state’s capacity to address issues requiring international cooperation that necessitate highly technical expertise beyond the toolkit of foreign ministries. Such issues are cross-border by nature and cannot be resolved adequately by domestic officials without cooperating with their foreign counterparts. By virtue of their informality, these networks can be more responsive and cost-effective than traditional diplomacy and international organizations. The characteristics exhibited by trans-governmental networks present promise in managing global health affairs, in particular, the issue of infectious diseases. They may also allow the redress of human rights deficiencies in the WHO to make international regulatory cooperation more inclusive, thus reflecting the spirit of “universal application” under the IHR and beyond.<sup>75</sup>

Our two proposals above are not mutually exclusive. Rather, they orient towards the same core argument: to break the unwarranted “impermeability” of sovereign states in the governance of global health and institutionalize a pluralist membership structure in the WHO (or any alternatives) for the 21<sup>st</sup> century. A re-shaped WHO or any new institutional settings may actively embrace new actors, processes, and outputs in coordinating global health governance for all.

#### IV. CONCLUSION

The COVID-19 pandemic offers a new opportunity to reflect upon the WHO, a regime based on a state-centric, sovereignty-driven institutional design prevailing across UN agencies. In excluding relevant entities like Taiwan by adhering to the rigid, outdated concept of Westphalian sovereignty, the WHO has failed to live up to its constitutional mandate to promote “health for all peoples.” The promotion of global health necessitates swift, flexible governance which is increasingly incompatible with ossified, state-centric bureaucracy. This paradox is further exacerbated by the politicization of global health governance, with U.S.-China

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74. Slaughter defines “trans-governmental networks” as “pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the ‘domestic’ from the ‘international’ sphere.” SLAUGHTER, *supra* note 71 at 14.

75. IHR 2005, *supra* note 2 at arts. 3.1 & 3.3. A notable example is the Asia-Pacific Economic Cooperation (APEC), which set up the Health Task Force (HTF) in 2003—now the “Health Working Group” (HWG)—to help address health-related threats. The HWG has launched initiatives to bring together policymakers in the region; it sees itself as a “as a regional health forum dedicated to demonstrating the value of health to economic growth and development and to building awareness of the return on investment on health innovation” while engaging other international organizations including the WHO. APEC, *Health*, <https://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Health> (last visited June 24, 2020).



competition leading to the Trump Administration's decision to withdraw from the WHO.

We hope to resolve this perennial paradox through two-pronged reform. Internally, we challenge whether the existing membership structure remains an appropriate paradigm for global health governance and reflects the diversity of international politics, and propose a WHO constitutional amendment to relax the requirements of Associate Membership. Externally, we suggest that trans-governmental networks indicate a possible alternative to the WHO by offering a more effective channel that allows the contribution of relevant entities, regardless of statehood. While our proposals are, of course, subject to the changing global political situation in the post-COVID-19 era, we should nevertheless seize the opportunity to steer the trajectory to a new global health order for all—with or without the WHO.