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SANITARIA
PANAMERICANA
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IV REUNION



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MEMORANDUM

PROPOSED ADDITIONAL PROTOCOL TO THE
PAN AMERICAN SANITARY CODE

Submitted by the Representative of the
United States of America

In the early stages of the formulation of the International Sanitary Regulations No. 2, another Government, a Member of the World Health Organization (WHO), questioned whether the Regulations could appropriately provide that they would terminate or replace provisions in existing Sanitary conventions without a protocol being signed for that purpose. As the result of a thorough study of this question, the Department of State of the United States of America reached the conclusion, in which that other Government concurred, that no protocol to replace or amend existing sanitary conventions was necessary from a legal point of view, or desirable from a purely procedural point of view. One of the persuasive reasons from a procedural viewpoint, for this conclusion was the fact that Articles 21 and 22 of the Constitution of the World Health Organization, which relate to the adoption and bringing into force or regulations, were formulated primarily with a view to avoiding the necessity of calling an international conference and going through the time-consuming process of formulating and ratifying a new convention each time new sanitary rules are found to be necessary.

At the Special Meeting convened in Geneva in April 1951 to complete the drafting of the Regulations for consideration by the Fourth Health Assembly, a proposal was formally presented on behalf of the Pan American Sanitary Organization to the effect that the Regulations should provide that none of the provisions of the Pan American Sanitary Code would be effected by the Regulations until after the Pan American Sanitary Organization had given its

approval thereof in accordance with the Constitution of that Organization. The proposal would have replaced a provision in the draft Regulations under consideration according to which, except for certain specified Articles, the Pan American Sanitary Code would be terminated. The United States Delegation objected to the proposal because it considers such a provision as being in conflict with Article 22 of the Constitution of the World Health Organization and urged that the proposal be withdrawn. In the Committee the representative of the United States, and subsequently in the Assembly the representatives of fifteen other American Republics accepted, in place of the proposal of the Pan American Sanitary Organization, a modification of the text of the above-mentioned provision of the draft Regulations. According to that provision as modified, which was adopted on May 25, 1951 by the Assembly as part of Article 105 of the Regulations, the Pan American Sanitary Code, remains in effect except for the specified Articles which are replaced by the Regulations.

It had been hoped that, as a result of the consideration given the matter in the Special Committee and in the Assembly the legal effectiveness and adequacy of the Regulations would be recognized and accepted by all Members of the World Health Organization without further question. However, at the Fifth Meeting of the Directing Council the matter of a protocol to void those provisions of the Pan American Sanitary Code which are to be replaced by the Regulations, was raised and discussed at considerable length. The basic considerations presented by the United States representatives in opposition to such a protocol are set forth in two of the documents issued by the Fifth Meeting of the Directing Council (CD5/62 & 75).

With special reference to the Pan American Sanitary Code, it is noted that the Code, as signed at Habana November 14, 1924, contains no provisions regarding its amendment, and unlike most international instruments, contains no specific provisions as to how the Code itself should be approved and brought into force. The Additional Protocol to the Code, signed at Lima October 19, 1925, likewise contains no provision regarding amendment of the Code but does contain provisions regarding deposit of ratifications, effective date, and termination.

None of the provisions of the Code, nor any of the provisions of the existing Protocol thereto would, under the law of treaties, in any manner preclude any of the American Republics from subsequently agreeing, as they did in becoming parties to

the Constitution of the World Health Organization, to terminate or replace various provisions of the Code on technical matters, like quarantine regulations, in their relations with each other by means of regulations adopted by the World Health Assembly in accordance with Articles 21 and 22 of that Constitution. Under the law of treaties, regardless of what any two or more American Republics may agree to with respect to terminating or replacing technical provisions of the Code in their relations with each other, they would remain obliged to apply all the provisions of the Code in their relations with those American Republics which did not agree to the changes. Any change in the provisions of the Code regarding the Pan American Sanitary Organization, as such, or its functions, would be an entirely different matter. As for the provisions of the Code respecting the organization, functions, and duties of the Pan American Sanitary Organization, it is understood that without question no change could be made in any such provisions without a formal treaty, negotiated for that purpose by the American Republics and ratified by every State which is a party to the Code. The regulatory authority of the World Health Assembly, under Articles 21 and 22 of the Constitution of the World Health Organization, certainly furnishes no basis whatsoever for any action by the World Health Organization with respect to the character or the structure of the Pan American Sanitary Organization.

With respect to a letter from the Director of the Pan American Sanitary Bureau transmitting to the United States Government copies of Resolution XLIV and related documents for consideration, the Department of State informed the Director in a letter dated May 19, 1952 as follows:

"The Government of the United States is in sympathy with the desire of the American Republics to cooperate and function as a group in health and quarantine matters as indicated in Resolution XLIV. Careful consideration of the documents forwarded with your letter and of other relevant factors has been given the proposal for the additional protocol in the light of this cooperative spirit of the American Republics.

"A careful weighing, however, of all the considerations involved leads to the opinion that an additional protocol such as that proposed is neither necessary nor appropriate. The United States, accordingly, while sharing the cooperative spirit of the other American Republics whose representatives voted in favor of Resolution XLIV, regrets that it can not agree to the adoption of the suggested protocol and must maintain the position

as set forth in (1) the Statement made on 28 September 1951 by the Treaty Adviser to the Representative of the United States (CD5/62) and in (2) the Remarks made by the United States Representative October 1, 1951 (CD5/75) in the Fifth Meeting of the Directing Council.

"It is noted that, according to the Report of the 'ad hoc' Committee on Reservations to the International Sanitary Regulations (WHO/ISR.Res/r), 25 March 1952, only two of the twenty American Republics Members of the World Health Organization made any reservations to the new International Sanitary Regulations. Only one of the reservations made by one of those States questions the adequacy of the Regulations as an international instrument to replace certain of the technical provisions of the Pan American Sanitary Code. In connection with that reservation, the 'ad hoc' Committee made the following observations and recommendation:

'It is the considered opinion of the Committee that the nature of the reservation is such that it substantially detracts from the character and purpose of the Regulations and that furthermore it is incompatible with the provisions of the Constitution of the World Health Organization.

'The Committee therefore recommends to the Assembly that the reservation be not accepted.'

"The relevant provisions of the Constitution of the World Health Organization regarding the adoption and bringing into force of regulations are Articles 21 and 22 which read as follows:

'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.

.....'

'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.'

In becoming parties to the Constitution of the World Health Organization, all twenty American Republics Members of the World Health Organization agreed that they would individually consider and determine whether or not they would reject or make reservations to the regulations adopted by the World Health Assembly. The proposed protocol, however, ignores those provisions of the Constitution by providing that the American Republics must act as a group, not individually, in determining whether or not they will apply any new regulations which affect the Pan American Sanitary Code. If such a protocol were brought into force, none of the American Republics Members of the World Health Organization could apply any new regulations adopted by the World Health Assembly which were inconsistent with the provisions of the Code until after the Code had been amended by the American Republics acting in accordance with the procedure set forth in that protocol. Each American Republic would, accordingly, be obliged to make reservations to all such regulations pending amendment of the Code by a protocol. The application of such a protocol would, in effect, constitute a formal declaration on the part of the American Republics that the American Republics reject, as regards relations among them, the more flexible procedures for the formulation of new international sanitary rules which they agreed to when they became parties to the Constitution of the World Health Organization.

"In addition to being contrary to the purposes and intention of the Constitution of the World Health Organization, such a protocol would serve no useful purpose. Any amendment of the Code regarding the establishment and organization of the Pan American Sanitary Bureau could be brought into force only by an international instrument formulated for that purpose and duly ratified by each of the American Republics parties to the Code. Amendment of any of the technical provisions of the Code by a procedure other than by regulations adopted by the World Health Assembly in accordance with the Constitution of the

World Health Organization would likewise require the formulation of a separate international instrument and ratification thereof by the American Republics.

"In view of the foregoing considerations and the position set forth in the documents referred to, the United States does not consider that it can become a party to the protocol proposed in Resolution XLIV.

"The United States Government is of the considered view that, under the provisions of the Articles 105-107 of the International Sanitary Regulations, the eighteen American Republics Members of the World Health Organization which have made no reservation to, or have given no notification of rejection of, the Regulations will, upon the entry into force of these Regulations on October 1, 1952, be bound to apply those Regulations as between themselves in place of the specified provisions of the Pan American Sanitary Code."

Subsequently, in reply to a letter from the Director of the Pan American Sanitary Bureau commenting on the above-mentioned letter from the Department of State, the Department further explained the position of the United States with respect to the protocol, substantially as follows:

"The Department is gratified to learn that the Pan American Sanitary Bureau shares the considered view of the United States Government that the eighteen American Republics Members of the World Health Organization which have made no reservation to, and have given no notification of rejection of, the International Sanitary Regulations will be bound to apply those Regulations as between themselves as of October 1, 1952.

"With the recognition, that the International Sanitary Regulations will enter into force in October 1, 1952 with respect to the above-mentioned eighteen American Republics, the purpose to be served by the proposed protocol is materially decreased. The absence of any reservations or rejections of the Regulations by those States, together with a recognition of the correctness of the view that those States will be bound by the Regulations upon their entry into force, may alleviate considerably the harm such a protocol may cause, but there remain material objections to the signature of such a protocol.

"As previously stated, signature of such a protocol implies that the State taking such action does not consider the provisions of Articles 21 and 22 of the Constitution of the World Health Organization and Article 105 of the Regulations as being adequate and effective to replace the existing conventions and agreements or certain provisions thereof as specified in Article 105.

"A further factor, which should not be overlooked, is that Article 105 of the Regulations does not provide for unconditional replacement of any of the provisions of the Pan American Sanitary Code. Replacement of existing sanitary conventions and provisions thereof specified in Article 105 is 'subject to the provisions of Article 107 and the exceptions hereinafter provided'.

"Article 107 of the Regulations provides, in part, as follows:

13. The World Health Assembly may, as a condition of its acceptance of a reservation, request the State making such reservation to undertake that it will continue to fulfill any obligation or obligations corresponding to the subject-matter of such reservation, with such State has previously accepted under the existing conventions and agreements listed in Article 105.

.....

15. If the World Health Assembly objects to a reservation, and that reservation is not then withdrawn, these Regulations shall not enter into force with respect to the State which has made such a reservation. Any existing conventions and agreements listed in Article 105 to which such State is already a party consequently remain in force as far as such State is concerned.'

Accordingly, continuation in force, at least to a limited extent, of existing sanitary conventions is contemplated by Article 105 and other relevant Articles of the Regulations. The voiding of provisions in the Pan American Sanitary Code by a separate protocol as proposed might well lead to confusion. This would be especially true as to the applicability of the technical provisions of the Code by any American Republic which becomes a party

to the protocol and makes a reservation to the Regulations. The World Health Assembly could, pursuant to paragraph 3 of Article 107, make as a condition of its acceptance of that reservation a request that the State making the reservation 'undertake that it will continue to fulfill any obligation or obligations corresponding to the subject-matter of such reservation, which such State has previously accepted under the existing conventions and agreements listed in Article 105'. Furthermore, if the Assembly should object to the reservation and the reservation is not then withdrawn, the Regulations, as provided in paragraph 5 of Article 107, would not enter into force with respect to the State making the reservation, and the Pan American Sanitary Convention would remain in force as to all its provisions, so far as that State was concerned. Thus, if a State should follow the policy of becoming a party to the proposed protocol for the purpose of voiding certain provisions of the Pan American Sanitary Code in order to apply the Regulations, it may find itself in the embarrassing position of having to ratify the Code a second time in order to apply its provisions in case of objection by the Assembly to a reservation made to the Regulations by that State. In this respect, all the technical provisions of the Pan American Sanitary Code potentially remain in force under the provisions of the Regulations.

"While the provisions of the Pan American Sanitary Code which are not referred to in Article 105 of the Regulations as being replaced appear to be of inter-American concern only, experience in the application of Articles 3-8 and 12-15 of the Code along with the application of the corresponding provisions of the Regulations may indicate the desirability of replacing those provisions of the Code by the existing provisions of the Regulations, by amendments to those Regulations, or by new regulations of a broader scope. There would then exist a definite conflict, as pointed out in the Department's letter of May 19, 1952, between the obligations undertaken by twenty of the American Republics when they became parties to the Constitution of the World Health Organization and obligations undertaken by those American Republics which become parties to the proposed protocol.

"It may be further noted that the proposed protocol can have no bearing upon the rights or responsibilities of any American Republic which does not become a party thereto."

As indicated hereinabove, the United States Government is in entire sympathy with the desire of other American Republics to cooperate and function as a group in health and quarantine matters as contemplated by the proposed protocol. The United States Government shares the deep pride which all the other American Republics have for the Pan American Sanitary Organization and its distinctive inter-American regional character. It feels obliged however, to oppose the protocol because it is convinced that the protocol, rather than serve any beneficial purpose in the relations among the American Republics or in their relations with the World Health Organization, would present more legal problems and questions than it would resolve.