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A panacea for fixing global health governance?

The promises and pitfalls of negotiating a new pandemic treaty

Anna Holzscheiter

At the time of publication of this sef: Global Governance Spotlight, the Intergovernmental Negotiating Body (INB) of the World Health Organization (WHO) is convening to discuss the conceptual zero draft for a new pandemic treaty, whose negotiation is scheduled to begin in early 2023. WHO member states and non-state actors are anxiously awaiting this zero draft – they are eager to know if the provisions and rules they deem essential for better pandemic prevention, preparedness and control have found their way into the basic proposal with which official treaty negotiations will start. Without doubt, governmental and non-governmental actors alike have great expectations of this new pandemic treaty. Their wish list is overflowing and, in many ways, far-reaching, with proposals to include concerns over equity, intellectual property law, gender, one health, human rights and technology transfer in this new treaty. It goes without saying that after more than two years of a global crisis that turned out to be far more than a mere health crisis, there is a unique window of opportunity to improve international cooperation and write new global health rules. At the same time, however, the promises that many actors and institutions – state and non-state alike – project onto this treaty *in spe* are toned down considerably by a number of factors that make the creation of new international rules on how to handle health emergencies challenging, if not unlikely. I will highlight three aspects that appear to be particularly salient in understanding the context in which negotiations on the pandemic treaty are embedded: the scarcity of binding international law in the field of global health, including legal and institutional fragmentation and complexity; geopolitical dynamics and power struggles; and concerns over equity and global justice. These parameters, I will argue, create both promises and pitfalls for what may or may not become a new international instrument to address future pandemics.

Contextualising the negotiations on the new pandemic treaty

'Viruses know no borders': infectious diseases are a textbook example of global interdependence and their prevention and control are a prime example of common global goods. From the earliest moments of international cooperation on health matters, it was infectious diseases such as cholera, plague and yellow fever that were the reason for the first international health treaties. Each new global health crisis triggered by an infectious disease has led to new international agreements and intensified cooperation among governments. Unsurprisingly, the unforeseen and extraordinary effects of the rapid global spread of the SARS-CoV-2 virus on lives and livelihoods have sparked intense efforts to reform and improve existing institutions and craft new ones.

Undeniably, the COVID-19 pandemic has exposed serious gaps in global health governance, not least the limitations of the International Health Regulations and the institutional capacities of the WHO; a lack of enforcement, sanctioning and oversight power; and the need to enhance transparency and in-

ternational exchange of data and to strengthen global cooperation, equity and solidarity (distribution of vaccines and other resources). It is clear that the project of negotiating a new global pandemic treaty is driven largely by a group of liberal, multilateralist governments from the European Union. In fact, their initiative met with a rather lukewarm response from many countries of the Global South that had already lived through more than a year of hardship and gross global inequality in the face of the COVID-19 pandemic. At its second special session ever in November 2021, the World Health Assembly established an Intergovernmental Negotiating Body (INB) – open to all WHO member states and associate members – "to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response". In July 2022, the INB presented a first working draft of the WHO pandemic treaty, with the aim of having the new pact ready by May 2024.

Today, two years after the initiative of the President of the European Council and endorsed mainly by European countries, WHO member states are beginning to start serious negotiations on the new instrument. The tone, however, has already shifted to why we *still* (emphasis added) need a pandemic treaty – as number of authors in the Lancet commented in July 2022 (Hannon et al., 2022). The world's attention has turned away from the COVID-19 pandemic and towards the war in Ukraine and other global crises – at least from a Global North perspective. What is more, in parallel to the significant energy and resources needed to negotiate an entirely new international instrument, WHO member states set out to strengthen the existing International Health Regulations (IHR). The IHR have been the cornerstone of international cooperation and coordination to detect and report public health emergencies worldwide since 1969 and were modified once in 2005 – but revealed obvious limitations during the COVID-19 pandemic. As the international community thus embarks on two parallel rule-making processes, it appears to be an appropriate moment to ask: how realistic and feasible is the rapid adoption of a new, widely endorsed international pandemic treaty?

The promises and pitfalls of a new pandemic treaty – institutional fragmentation, geopolitics and inequity

There is exceptional momentum for a new international pandemic agreement. Its negotiation, however, and the prospect of its potential success or failure cannot be understood without reflecting on how they are embedded in a pre-existing legal and institutional landscape and in contemporary geopolitical dynamics, surrounded by an ever-growing and diverse set of governmental and non-governmental actors.

1. Institutional complexity and (soft) legal fragmentation in global health

Today's global health governance can be described as a complex landscape of international rules and a multiplicity of international organisations and global health initiatives targeting diverse aspects of health governance (specific diseases; financing; trade, etc.). While there are, understandably, high hopes that a new treaty could bring more order to and weave together different areas of international cooperation, fragmentation has progressed to such an extent that these hopes seem unfounded. In fact, global health may be described as an area of international cooperation based almost entirely on 'soft', i.e. non-binding international agreements. This imbalance between soft norms and rules and hard international agreements results in part from the fact that health is often framed as belonging to the realm of social and economic politics and law, a field that continues to meet with much contestation and resistance globally, as reflected in the ideologically loaded debates on the 'human right to health'. Paradoxically, the one legally binding agreement that is in the spotlight of global disagreement over the appropriate rules for global health in the wake of COVID-19 – the 1994 TRIPS Agreement adopted by the World Trade Organization (WTO) – lies entirely outside the authority of the WHO.

There is, thus, considerable promise in a new, comprehensive treaty that could knit together the scattered pieces of global health law, including broader international norms such as sovereignty, equity, universal health coverage, human rights and solidarity. This treaty could potentially also strengthen the authority of the WHO to oversee its implementation and fortify its position as the institutional heart of global health governance. It will, however, be a difficult task to ensure coherence between the WHO pandemic treaty on the one hand and the International Health Regulations or any amended agreement on intellectual property law under the WTO on the other – the hierarchy and relationship between these institutions and international rules already being a key issue in the treaty negotiations.

Ultimately, current efforts to create more binding international health law cannot be thought of independently from ongoing activities of institutional experimentation, particularly in health financing, such as the Financial Intermediary Fund for Pandemic Prevention, a pet project of the US administration under Joe Biden. These activities may undermine the strengthening of binding global health law as ongoing fragmentation and institutional experimentation in the field of global health offer ample opportunities for governments dissatisfied with a potential new pandemic treaty to shift their interests and energy to alternative forums.

2. Geopolitical climate and power struggles

Beyond these institutional and legal aspects, the negotiations on the new pandemic treaty are embedded in a geopolitical climate and power struggles that make both the outcome of the negotiations and its relevance within the legal and institutional global health landscape highly unpredictable. For some time now – the latest examples being the Trump administration taking office in 2016 and the Brexit referendum – a world order described by many as 'liberal' with the US and its allies as its backbone has been in decline, threatened both from within Western liberal democracies and from without (Russia, China). The effects of this decline were also painfully felt with the temporary US withdrawal from the WHO, the vaccine race between different global power spheres, and nationalistic and unilateral pandemic governance.

As the world has moved on to be alarmed and divided by new global emergencies, it appears legitimate to ask how these developments will affect the negotiations on the pandemic treaty. As the votes on the General Assembly resolutions on the war in Ukraine have shown, the disappointment of many countries of the Global South in the lack of solidarity from wealthy countries during the pandemic has resulted in their faltering solidarity for the liberal international order. During the 75th World Health Assembly in May 2022, Carlos Correa, Executive Director of the South Centre, criticised that "solidarity has been proclaimed but not practiced by developed countries which led to major inequality in the pandemic response". The disappointment is aggravated by more than apparent inconsistencies in interests as reflected, above all, in Germany's enthusiasm for WHO reform and the pandemic treaty on the one hand and its opposition to a TRIPS waiver for COVID-19 vaccines or, more broadly, changing international intellectual property rules in the WTO on the other. In sum, the pandemic treaty – which started, for the most part, as a European initiative – may offer a real opportunity to put global pandemic governance on an entirely different path and to highlight aspects of equity and common but differentiated responsibility between North and South and between affluent and developing countries (as already proposed). If negotiations are dominated by the status quo interests of wealthy governments – often also at the centre of the global health economy – it is highly likely that they will end in an impasse similar to the one currently besetting the World Trade Organization (WTO) (TRIPS agreement, waiver).

3. Rewriting the rules of global equity and justice

The first proposal presented by the INB already emphasised that, in all probability, the treaty would also cover pandemic *recovery* and ambitions to "break the pandemic cycle". It is more than clear from the perspectives of many state and non-state actors deeply dissatisfied with contemporary global health governance that the adoption and success of the new pandemic treaty will depend on whether a broad notion of equity and global justice is adopted – one which includes questions of gender, anti-racism and socio-economic equality. It will be its ability to re-write international rules on health equity, access to essential medicines, benefit sharing, equal access to and sharing of health data, and, more broadly, the human right to health that will determine the level of support for a new pandemic treaty from many countries and non-state actors. Their high hopes and expectations with regard to a fundamental transformation of the economic and political parameters of global health extend not only to core international norms but, naturally, also to the very process of negotiating the treaty itself. Who is sitting at the negotiating table? Whose positions, interests and perspectives will eventually be reflected in the treaty drafts and to what extent will more radical positions by many countries and non-state actors of the Global South prevail? It is impossible to de-couple reflections on who has access and can be heard in the pandemic treaty negotiations from reflections on how substantively the new treaty will alter the parameters of global health governance. The broad global endorsement of a new pandemic treaty will essentially depend on its ability to address international norms and rules as regards international solidarity and questions of inequality and power imbalances, inside and outside of the WHO. At the same time – and judging from the pre-proposals – the new treaty may fail to materialise precisely because it is seen by many as a panacea for the many deficiencies in the rules and institutions that shape global health governance.

Recommendations

As the analysis above suggests, the contours of a new pandemic treaty are highly unpredictable in a world in which the liberal international rules established in the aftermath of World War II and the end of the Cold War have proven ineffective in preventing another major global health catastrophe. This catastrophe not only cost the lives of 6.6 million people to date, but evolved into a major economic and social crisis for which substantial national and international inequalities were the breeding ground. In this geopolitical climate, it is far from certain that governmental and non-governmental actors around the world will remain committed to negotiating the treaty, especially if the envisaged timeline – with adoption in 2024 – proves unrealistic.

Those governments – particularly the countries of the European Union, including Germany – that are spearheading the treaty effort bear great responsibility. They must show genuine openness to the in-

terests of a broad set of governments and non-state actors in shifting pandemic governance from narrow health security issues, coordination and surveillance towards much broader questions of strengthening health systems, addressing equity concerns and altering the economic parameters of global health governance. If they have a genuine interest in changing not only the parameters of global *responses* to health emergencies but also the many economic and social drivers of global health emergencies, they will need to close ranks with a broad range of state and non-state actors, who are endorsing the transfer of new norms on 'common but differentiated responsibilities' from climate negotiations to pandemic governance. Two recommendations result from these arguments for the German federal government's future actions: first of all, Germany must show normative consistency in order to be seen as a genuine, credible supporter of the new pandemic treaty. If Germany (like the United Kingdom, Canada and the European Union) continues to oppose a COVID-19 vaccine waiver in the WTO, how can its advocacy for the human right to health, equity and strengthening health systems be seen as sincere? The zero draft for the pandemic treaty, as it stands, contains six proposals on intellectual property alone, including a passage on concerns that intellectual property on life-saving medical technology is a threat to the human right to health. With a view to its aspirations to be and remain a leading nation and backbone of coherent, strong and equity-driven global health governance, Germany will need to reconsider its position in the WTO as regards the TRIPS Agreement. Secondly, in light of its efforts to enhance diversity in global health, Germany should speak out in favour of a diverse composition of the drafting group and a strong role for not-for-profit non-governmental organisations in the monitoring and implementation of the pandemic treaty provisions. As one of the few WHO member states that sends a national youth delegate to the WHA, it should, for instance, be advocating for a meaningful representation of youth as a stakeholder group at the negotiating table. Based on its more recent commitment to feminist foreign policy, it should also be strongly promoting the gender dimensions of pandemic preparedness and response.

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