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MULTILEVEL GOVERNANCE OF
INTERDEPENDENT PUBLIC GOODS
Theories, Rules and Institutions for the
Central Policy Challenge in the 21st Century

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GLOBAL GOVERNANCE PROGRAMME

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Multilevel Governance Problems at the Intersection of Trade, Health and the ‘Global Knowledge Economy’

Frederick M. Abbott*

The Doha Declaration Plus Ten

The year 2011 represents the 10th anniversary of the Doha Declaration on the TRIPS Agreement and Public Health. The anniversary is being recognized in a substantial number of forums, including with the joint participation of the Directors-General of the World Health Organization (WHO), World Intellectual Property Organization (WIPO) and World Trade Organization (WTO) (a more detailed account of the state of play with respect to medicines in the decade since the Doha Declaration, and proposals for the future, is in Frederick M. Abbott, 2011).

The social forces that gave rise to the Doha Declaration focused attention on public health and access to medicines problems confronting large parts of the world's population. Funding for procurement and distribution of medicines, particularly to treat HIV/AIDS, malaria and tuberculosis has risen. Support has increased for research and development (R&D) on drugs and vaccines for diseases predominantly affecting individuals in developing countries. Nonetheless, major problems involving innovation and access to health care and medicines remain to be addressed, including in the more advanced economies. The economic difficulties facing the advanced industrial economies in 2008-2011 have exacerbated, and will continue to exacerbate, problems in providing essential health services as countries at all levels of development are restricting payments for government services. It is an opportune occasion to reflect on multilateral institutional mechanisms for improving global public health.

Secretariat Cooperation, Member State Game-Play

During the course of the past decade cooperation has improved among the secretariats of the WHO, WIPO and WTO in the field of public health. Cooperative projects have been carried out, including those involving the establishment of technical resource centres, conducting research on technical subject matter, and trilateral support of member state negotiating exercises. This cooperative work is undertaken both formally at the request of member states, and informally among individuals working for the institutions.

When attention is turned to relationships among the member states of the three institutions, the situation in respect of public health is more problematic. Governments continue to view the alternative forums of WHO, WIPO and WTO as mechanisms for securing strategic advantage. If negotiations in one forum take a problematic turn, proposals can be made in the other forums to limit or reverse the perceived adverse impact. Some of the larger advanced industrial actors appeared disaffected with the Geneva process as a whole, and have moved the principal focus of rulemaking and enforcement efforts to bilateral and regional forums.

It should not be surprising that individuals working in multilateral institution secretariats are better able to cooperate than are country/regional governments. Governments are complex enterprises whose officials are responding to various internal and external pressures that restrict their perspective. A senior government official negotiating in Geneva might consider some new proposal to be a reasonable approach to achieving a global objective, but that official's personal conclusion may be at

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odds with the perspective of important home-country constituencies. The complexity of each individual government is multiplied 150 times in the major multilateral institutions.

It is an interesting question whether the international community would be better served by according a more powerful role to the "technocrats" at institutions like WHO, WIPO and the WTO. On one hand, there would almost certainly be greater prospects for progress in the formulation of rules-making proposals. Simply in terms of numbers, it would be easier to craft agreement among 15 or 20 technocrats than it is to establish agreement among 150 governments (or 60 actively negotiating governments). On the other hand, the "democracy deficit" and potential for undue influence/corruption loom over any suggestion to enhance the role of the technocrats.

There is no self-evident solution to promoting cooperation among governments at the multilateral level -- as witnessed by the apparent failure of the Doha Development Round. It is certainly possible that the idea of intrusive multilateral governance is not feasible because of its inherent complexity and the constant pressures toward national autonomy.

New Instruments, Multiple Forums

When governments are successful in negotiating new rules in individual multilateral forums, they are nonetheless left with problems of inconsistent rules. A lack of advance planning and legal integration was a major gap in the negotiation of the Nagoya Protocol (F. M Abbott, 2010), and is bound to lead to confusion and difficulty. It is not so difficult to foresee similar cases arising from new negotiating efforts.

For a not entirely hypothetical illustrative case: a number of ideas have been put forward at WHO on new mechanisms for funding R&D on new vaccines and treatments (Health Action International Global et al., 2001). It is possible that a new international legal instrument ("New Instrument") will emerge with some creative approach to promoting R&D. What if that new approach is inconsistent with some rule of the TRIPS Agreement?

In what is probably the easiest case, a WHO-sponsored New Instrument would be adopted by consensus of WHO members and, from the standpoint of the Vienna Convention on the Law of Treaties (VCLT), would be a later in time agreement with coincident parties as the WTO Agreement, with the later in time agreement governing (Article 30(3), VCLT). Given that the WTO Appellate Body has already recognized that the WTO is not a self-contained legal system (WTO Appellate Body, 1998), it seems unlikely that the Appellate Body would fail to give priority to a later in time inconsistent agreement among coincident state parties. The situation becomes more difficult if a WHO New Instrument was not accepted by one or more key economic actors. It would be effective among its state parties, including at the WTO (per Article 30(4) of the VCLT). But, rights and obligations in respect to parties that did not adopt the New Instrument would remain governed by the WTO Agreement, including, for example, the TRIPS Agreement. This could give rise to "material issues".

What if the New Instrument provided that a certain type of innovation is not subject to patenting, and an enterprise based in a state party that did not adopt the New Instrument sought to patent that type of innovation in a state party that did adopt it? Under Article 30(4) of the VCLT, the state party adopting the New Instrument presumptively would remain obligated to grant a patent further to Article 27.1 of the TRIPS Agreement. Would Article 27.1 allow the adopting state party to refuse patenting as justified on field of technology differentiation grounds in the sense of the panel report in the *Canada-Generics* case? (WTO Appellate Body, 2000).

The lawyers should spend some time working out these integration issues before they arise in a concrete way. This might be a useful area for cooperation among the legal divisions of the WHO, WIPO and WTO.

Expanding Institutional Coordination

A number of proposals to put global public health on a more sustainable footing involve the creation of new financing mechanisms. None of the WHO, WIPO and WTO are set up as global financial managers. A logical fourth institution is the World Bank, which does considerable work in the field of public health, but largely separate from the Geneva institutions. Other institutions such as the Global Fund, UNITAID and UNICEF are important in the procurement context. Institutions such as UNCTAD work with developing countries on transfer of technology relating to public health. The Gates Foundation has become a major factor in global public health dialogue, and there are a number of nongovernmental organizations, such as DNDi and the Medicines Patent Pool, that are important. Advocacy NGOs continue to play an important role. There may be a space for the formation of something in the order of a Global Health Coordination Council that could and should help establish priorities and overall strategy for addressing problems of global public health.

Back to the Future

From the early 1800s to 1995, nations relied on the principle of national treatment as the means to promote fair trade; and in the 1940s most-favoured-nation treatment was added as a means to promote global stability. The entry into force of the WTO Agreement represented a substantial intrusion into the regulatory sovereignty traditionally enjoyed by governments. This "experiment in intrusion" is not an unqualified success. As the major emerging market countries - Brazil, China, India - begin to behave more like the United States and European Union - content with rules imposed on others, but acting unconstrained for their own accounts - the problems facing multilateral institutions grow more acute. It is not so clear that the principle of national treatment has outlived its usefulness as the bedrock of international cooperation. Reciprocal fairness might be preferable to - or more pragmatic than - collective intrusion.

References

- Abbott, F. M (2010) *An International Legal Framework for the Sharing of Pathogens: Issues and Challenges*. Geneva: ICTSD Issue Paper 2010/30.
- Abbott, F.M. (2011) 'Intellectual property and public health: meeting the challenge of sustainability', in 23 November 2011 Geneva: Global Health Programme of the Graduate Institute.
- Health Action International Global et al. (2001) *Consideration of an Essential Health and Biomedical R&D Treaty*. [online]. Available from: www.who.int/phi/news/phi_1_joint_submission_en.pdf.
- WTO Appellate Body (2000) *Canada - Patent Protection of Pharmaceutical Products*.
- WTO Appellate Body (1998) *United States - Import Prohibition of Certain Shrimp and Shrimp Products*.