

ILA COMMITTEE ON GLOBAL HEALTH LAW

NOTE ON THE NEGOTIATION OF A PANDEMIC ACCORD AND AMENDMENTS TO THE INTERNATIONAL HEALTH REGULATIONS

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In this Note, the Global Health Law Committee of the International Law Associations offers some observations in response to the negotiation of a pandemic instrument and amendments to the International Health Regulations (IHR). It observes that the two instruments address overlapping subject matters, such as the pursuit of One Health Measures. This raises complex questions around the interaction of the regimes. The Committee's main aim in this brief Note is to encourage the negotiating member states to prioritize a set of allocation principles or methodologies for placing subject matter into one or the other negotiating basket.

The challenges of parallel negotiations

The negotiation of a new pandemic instrument (the “Pandemic Accord”) and of amendments to the IHR are proceeding in parallel. The dynamics of the two processes are very different: the Pandemic Accord is being negotiated starting from a “zero draft” prepared by the bureau of the Intergovernmental Negotiating Body (INB) based on an extensive bottom-up consultation process. The IHR process, on the other hand, has as a starting point a large number of proposed amendments that would extend and modify IHR subject matter and significantly expand its scope. Member states of the WHO have indicated that the resulting two instruments should be complementary and not duplicative or conflicting.

This interaction between the Pandemic Accord and IHR’s different regimes raises complex questions, both for the drafting phase and when it comes time to implement and operationalize. The questions are both institutional and substantive. Parallel regimes regulating the same or similar matters in different silos would exacerbate the fragmentation of international law, as addressed by the International Law Commission, various international tribunals, and a host of international legal scholars.

WHO member states appear to recognize the challenge inherent in pursuing negotiations in parallel, with proposals addressing: the pursuit of a One Health approach to prevent spillover of animal pathogens to humans; a dedicated framework for pathogen- and associated benefit-sharing; the strengthening of health systems; developing and implementing improved mechanisms for transfer of technology; production and distribution of medical (including pharmaceutical) products (referred to as “countermeasures”) – and associated issues involving intellectual property rights (IPRs); the building-up of financial resources, as well as governance issues such as ensuring compliance and accountability and building an institutional mechanism to promote effective implementation.

Historical precedent, such as the multiyear negotiating process resulting in the Pandemic Influenza Preparedness (PIP) Framework, suggests that negotiating substantive and

governance rules for such a substantial basket of subject matter issues will be difficult within the timelines presently contemplated by the member states of the WHO (both the Pandemic Accord and the amended IHR should be adopted by the 77th WHA in May 2024). Two sets of negotiations over substantially similar subject matter taking place in parallel in different internal WHO groupings is likely to make the process slower because both negotiating groups will be covering substantially overlapping, and broad, agendas. Ultimately the groups will be required to engage in a coordination or synchronization effort that itself may prove quite difficult and time-consuming to conclude.

As member states attempt to coordinate the substance and working of the two agreements, they will be faced with choices not only of placement of issues in either instrument but also about which substantive rules take precedence in particular circumstances and how processes will be sequenced, such as to define when certain obligations or action items are “triggered”. Sequencing is particularly important because the future Pandemic Accord would in principle apply to “pandemics” while the IHR will continue to apply to a broader range of events, risking questions of process and scope precisely when clarity and speed are most required. Adding to the complexity is the fact that the subject matters being proposed for negotiation in the two instruments in several cases overlap with the instruments, rules and competencies of other international bodies, tribunals and organizations and may arguably fall outside WHO’s constitutional competence (e.g., questions of animal health).

Allocating negotiation of a Pandemic Accord & IHR amendments

The Committee observes that both instruments will form part of public international law. New instruments and regimes should align with existing systems so as not to undermine coherence. The Vienna Convention on the Law of Treaties (VCLT) offers a framework for integrating new treaties and instruments, including through Articles 31 and 32, and with particular regard to its “systemic integration” clause in Article 31.3.(c) VCLT.

The Committee recommends that the drafters take close account of overarching principles such as equity and the protection of human rights, which should form a part of each regime. When implementing these principles, the consistency and interaction with existing human rights treaties should be taken into account. Similarly, existing international obligations with respect to matters such as protection of biodiversity, intellectual property, trade and investment should be considered.

Financing necessarily needs to be addressed for operationalizing any new agreements. This will very likely demand cooperation and coordination with other international institutions and may raise challenging questions about financing from outside sources such as the newly created “Pandemic Fund” at the World Bank.

We do not attempt to make recommendations about any particular subject matter. Instead, we encourage the negotiating member states to focus initially on a set of allocation principles or methodologies for placing subject matter into one or the other negotiating basket. Various approaches could be considered. For example, the IHR has historically addressed the response to the international spread of infectious diseases, and it has made provision for the sharing of information with WHO and among member states to allow appropriate precautionary and reactive measures, as well as their coordination and

harmonization, to be considered promptly. Sharing of pathogens and related genetic sequences and information to permit rapid development of countermeasures may appear a logical “fit” within the IHR’s set of immediate emergency response concerns. Similarly, addressing issues concerned with adoption of travel and trade restrictions would appear to require immediate attention; so too issues associated with risk communication and guidance on appropriate preventive or control measures. The substantive scope of the IHR and related adoption processes are informed by Articles 21 and 22 of the WHO Constitution.

Subject matters such as implementing the One Health approach to control zoonotic spillover, the strengthening of health systems capacity, and improving the global framework for the development, production and distribution of countermeasures (and associated technology transfer) will require some period of time to implement and are more regulatory and transactional in nature than the issues mentioned in the previous paragraph. This should not depend on whether the IHR are triggered in a particular circumstance. This may argue in favor of placing these subject matters in the Pandemic Accord basket. Moreover, WHO member states taking on a scope of obligations currently contemplated by Pandemic Accord negotiating proposals may find it necessary or appropriate to obtain parliamentary approval for ratification of a resulting agreement. Space for this is provided by Article 19 of the WHO Constitution, whereas the amendments to the IHR will enter into force after a defined and relatively short deadline for all member states that do not “opt out”.

Throughout the dialogue at WHO, member state negotiators no doubt will be mindful that proposals to delegate important decision-making authorities to international institutions may encounter resistance at the national approval stage. The decision-making processes and authorities proposed under the instruments may be a significant factor when they are reviewed within the member states, and this should be closely considered by the negotiators.

Allocation of Pandemic Accord and IHR amendment subject matter should accommodate the complex negotiating environment with a view to effective implementation.