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FACTORS CONTRIBUTING TO TREATY EFFECTIVENESS: IMPLICATIONS FOR A POSSIBLE PANDEMIC TREATY

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INTRODUCTION

The response of the international community and individual states to the COVID-19 pandemic has fueled calls to develop a new multilateral instrument to support the preparedness and response to future pandemics. These proposals are the subject of the upcoming special session of the World Health Assembly scheduled for November 2021. To support and inform deliberations on the potential utility and requirements for such an instrument, this paper provides an overview of considerations and factors that would enhance its effectiveness. The paper brings together multiple insights from diverse areas of study on treaty-related issues to describe and analyze these factors. The paper takes the notion of pandemic preparedness and response as the basis for the analysis of factors conducive to the effectiveness of a possible treaty.

WHAT IS AN EFFECTIVE TREATY?

Judging the effectiveness of a possible pandemic treaty is complicated by the fact that there is no standard formula or recipe for determining whether a given multilateral instrument will be effective. Nevertheless, given the large number of treaties and other international legal instruments already in existence, we can reach some judgments about factors that are conducive to success and issues that may detract from positive outcomes. This paper draws upon existing research in international law, international relations and regulatory theory to provide an overview of the full range of considerations that should be weighed in deliberations on such an instrument.

As a preliminary matter, the notion of treaty effectiveness does not have a unitary definition. Different observers may apply different definitions based on their personal understanding of what factors may be relevant or not. For the purposes of this analysis, I consider the idea of treaty effectiveness to pertain to the ability of a treaty to fulfill the aims that are reflected in the purpose and object of the treaty as framed by the parties.¹ It has been recognized in international affairs that individual states may negotiate, sign, or ratify treaties based on motives that diverge from the stated object and purpose; however, scholars have noted that there are good reasons to believe that states most of the time intend success in achieving the stated aims of the treaties they enter.² An additional assumption is that treaties are developed to address significant global challenges, and thus effectiveness can be considered a function of the extent to which they achieve these outcomes.

The analytical framework, on which this paper relies, lacks definitive or quantifiable bases in most cases. In many circumstances, the factors described are matters of degree, and critics could muster examples that contravene the points made. In other cases, threshold conditions, which are themselves subjective or difficult to determine precisely, may apply. Complicating the analysis further, all of these factors are subject to political considerations, which may change abruptly and sometimes dramatically. Notwithstanding these qualifications, the elements described are all relevant to a determination of the potential effectiveness of treaties. They are illustrated with relevant examples pertaining to practice. While different observers may reach different conclusions on the importance of criteria discussed in this contribution, it seems unlikely that these divergences of opinion would displace the entire set of factors posited.

FACTORS FOR THE EFFECTIVENESS OF A POSSIBLE PANDEMIC TREATY

This paper advances 16 factors as the basis for analyzing the effectiveness of a possible pandemic treaty. Each element is introduced and analyzed in turn.

Factors for treaty effectiveness
Political support
Ratification
Drafting and clarity
Governance arrangements
Regulatory design
Synergies and institutional compatibility
Scientific research and data
Financing globally
Financing national level
Compliance mechanisms
Strategic Treaty Management
Indicators
Evaluation
Community of practice
Global governance mobilization
Justiciability

Political support

At a basic level, treaties are created through political processes. As a result, multilateral treaties that apply globally require political support sufficient to enable or bring about many of the other elements required for an effective treaty. The question of political support is more general than other determinants of treaty success discussed below, namely ratification, a related but distinguishable concept. Political support is more intangible than ratification and relates to the motivations of state parties to support and further a treaty over its lifetime. It is a function of the role of states parties and their behavior rather than the activities and conduct of other constituencies described elsewhere in this paper. The level of political support required, as with the other elements of treaty effectiveness analysis, is not easily quantified, but it can be understood at a base level by distinguishing instances of strong political support from weak backing. Examples of multilateral treaties that have been drafted, agreed and signed by parties, yet have failed to achieve meaningful regulatory or governance effects, are numerous.³ These situations stand in contrast to examples of treaties that have been the subject of strong political support.

Applying this criterion requires a degree of realism among participants. Political support may develop over time and the initial reluctance of parties to support agreements, even if they have ratified them, may give way to greater support over time. Distinguishing between such situations and those in which political support will remain very weak is not straightforward and requires a realistic and hardheaded assessment. Hence, for parties advocating the creation of a new pandemic treaty, consideration of whether sufficient political support exists or can be developed over time should inform the decision to push forward with a treaty development process. Initial evidence does suggest that a pandemic treaty is already garnering a notable level of political support among some states. The sense of urgency surrounding the issue in light of the Covid-19 crisis has understandably heightened interest and may sustain support over time.

Ratification

The ability of a binding multilateral agreement to have normative and regulatory impact requires the achievement of sufficient levels of ratification. Ratification (as well as its functional equivalents of accession and adherence) involves states taking steps pursuant to their national constitutions and laws to bind themselves to an international agreement. Universal ratification may be the most conclusive indication of the formal endorsement by the international community, but it would be inaccurate to consider it necessary. At one end of the spectrum there are treaties that have failed to achieve ratifications of more than a handful of states decades after their agreement or signature.⁴ Short of universal acceptance, many highly influential multilateral agreements, such as the

Convention on the Rights of the Child (CRC), Framework Convention on Climate Change (FCCC), or Convention on Biological Diversity (CBD), have achieved notable levels of participation among very large numbers of states. While international relations scholars have debated whether ratification is a function of low normative requirements or can be attributed to state interests other than achieving effective regulation,⁵ it is difficult to argue that a globally applicable treaty with less than a majority of states has achieved its regulatory aims.⁶ Allowing for differences in population size, economic power, political power, or relative importance of the regulatory or governance concerns animating the creation of a multilateral treaty, a greater number of ratifications is indicative of greater treaty effectiveness.

The Vienna Convention on the Protection of the Ozone Layer and Montréal Protocol on Substances that Deplete the Ozone Layer illustrate how high levels of ratification may support treaty effectiveness. Widely regarded as among the more effective international agreements, the Montréal Protocol and Vienna Convention, which aim at phasing out of the use of ozone depleting substances and which facilitate countries' transitions away from those substances, stand out because of their ratification by 197 countries. While not the only factor contributing to the agreements' success, such high levels of support have no doubt contributed to the positive results.

For the purposes of a potential pandemic treaty, realistic assessment of the prospects for ratification will be required. Some allowance needs to be made for the inability to predict in advance what the parties' ultimate decision would be with respect to joining any agreement that was concluded. However, strong evidence of broad reluctance among many states to consider entering an agreement should weigh into parties' calculations of advancing the treaty making process. This consideration is especially important for an agreement like a pandemic treaty, where the impact of higher levels of ratification could be particularly important due to high level of interdependence between countries confronting a common global challenge.

Regulatory design

Multilateral treaties, are, in their essence, regulatory instruments. The effectiveness of a treaty depends upon the degree to which it effects change in society by steering or modifying the behavior of states and nonstate actors, such as citizens and companies. The way in which treaties are designed has a bearing on their regulatory impact. Chief among these considerations is the way in which the relevant regulatory problem is conceived and defined by an instrument. A related consideration is the normative force behind an agreement. Both the problem framing and normative force have important impacts on the ultimate effectiveness of a treaty instrument. In connection with the proposals for a pandemic treaty, both matters are currently under consideration.

At the most general level, the question of the problem conception is a question about what objective the treaty will aim to address. Thus far, issues of pandemic preparedness and response have been advanced as the most important.⁷ The question of whether the regulatory problem is well framed will turn on the specifics of what the draft agreement ultimately includes. It will be important to ensure that care is taken in the process of framing these elements.

Likewise, the question of the normative force of an eventual agreement is a question about what the agreement asks of state parties and relevant international organizations. A well-known debate among international lawyers today concerns whether binding multilateral agreements are becoming less normatively rigorous over time.⁸ On this view, there is concern that, at an extreme, multilateral treaties are in effect becoming less legally binding as the demands they put on states become less rigorous. This element is not amenable to a definitive judgment because of the breadth of the considerations and degree of subjectivity involved; however, from the standpoint of a given treaty's ability to shape state behavior, the level of prescriptiveness of an agreement can have an important impact on a treaty's ultimate effectiveness. If the regulatory aims of a treaty are framed in hortatory or aspirational terms only, the ability of the instrument to affect state behavior will depend on the goodwill or interpretation that individual states apply to it. Alternatively, an agreement which designates very clearly what conduct states should follow, can be less subject to the preferences of those states.

An example of innovative regulatory design can be seen with the Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated (IUU) Fishing (PSMA), adopted under the auspices of the UN Food and Agriculture Organization.⁹ The PSMA addresses the difficult challenges in preventing IUU by requiring inter alia all parties to take steps to require vessels entering their ports to seek permission before entry, detail the nature of their catch and deny entry to vessels where sufficient evidence that the vessel has engaged in IUU fishing or related activities is found. This regulatory mechanism has made strides in addressing a major loophole in the use of a global common resource and effectively denies access to port facilities among all signatory countries, which represent a significant share of ports on multiple continents.

The subject of the proposed pandemic agreement, including readiness and response, involves different considerations and motivations among states, which may require the different provisions to be calibrated using different levels of regulatory rigor.

Drafting and clarity

A related but distinct consideration is the manner in which a treaty is drafted. Two elements stand

out: first is the structure of a treaty, and second is the clarity with which it is written. The structure of an agreement pertains to how its provisions are set forth in a formal manner. Practice among treaty drafters tends to support certain common structural approaches.¹⁰ Nevertheless, structural considerations can affect the strength and impact of treaties and the structure of a treaty may affect the ways in which international courts and tribunals interpret its measures.¹¹

Clarity pertains to the language used to capture its normative requirements. Among treaties, as with other legal texts, ambiguity is at the heart of many legal disputes. Even where the meaning of treaty texts appears clear and uncontroversial on its face, states may opportunistically or honestly disagree on interpretations. This fact of life of international law cannot be wholly avoided. At the same time, it should be recognized that sometimes treaty drafters may choose to leave certain terms underspecified, as a way of achieving agreement on a text. Indeed, ambiguities not necessarily undermine an agreement's effectiveness. Nonetheless, as a general matter, sufficient attention should be given to the question of quality drafting to minimize the degree to which confusion or disagreement may arise over time with respect to what a treaty requires. Indeed, this seemingly pedestrian consideration has an impact on many of the other factors described in this paper.¹²

Governance arrangements

For complex matters, multilateral agreements often require ongoing efforts to ensure that their regulatory aims are achieved. It is unrealistic to expect that an agreement reached at one time can achieve regulatory purposes when unchanged years or even decades after agreements are reached. It is thus customary for modern multilateral treaties to be managed on an ongoing basis by their state parties. A widely used approach involves conferences of the parties (COP) (or meetings of the parties), usually with a smaller number of states as members of governing or executive committees. To convey the understanding of active and strong governance COPs carry out, some scholars have noted their functional similarity to international organizations, referring to them as "autonomous institutional arrangements."¹³

Ensuring that governance arrangements are designed in ways that can further the regulatory success of treaty instruments is thus an important part of the overall effectiveness question. Relevant considerations include ensuring that the processes are not overly politicized, avoiding cumbersome procedures, ensuring the participation of relevant stakeholders in the process and ensuring appropriate levels of engagement and voice among the full range of state parties.

For a potential pandemic treaty, efforts will need to be made to allow for responsive management of the treaty in ways that support the technical and scientific work. The heavily politicized environ-

ment surrounding Covid-19 suggests that a significant role should be given to scientific and health experts. In this regard, ensuring strong engagement of experts within the World Health Organization (WHO) or other relevant international organizations would seem advisable.

Synergies and institutional compatibility

One peculiar feature of the law of treaties is the autonomy of individual treaty instruments to each other and from international organizations.¹⁴ It is generally accepted among international lawyers that there is no hierarchy between different treaty instruments. Accordingly, scholars have recognized that there is a degree of fragmentation to the international legal system, which can create conflicts between different treaty regimes.¹⁵

From a positive perspective, synergies and interactions between different treaty regimes can contribute to the effectiveness of treaty instruments. Linkages between issues may contribute to collaborations between treaty bodies and states parties in ways that positively affect the implementation of those agreements. Identifying and capitalizing on such approaches can influence the overall effectiveness of a given treaty. In the case of a pandemic treaty, some of those synergies and opportunities will no doubt relate to the International Health Regulations but other treaty interactions will also play a role.¹⁶ These include human rights, the environment, trade, and agriculture among others.¹⁷

An agreement that illustrates regime interaction is the Agreement for the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”) adopted under the World Trade Organization.¹⁸ The SPS Agreement specifies that countries’ health measures pertaining to food safety and animal and plant health should not restrict international trade more than necessary to accomplish public policy goals. As a gauge of whether national measures satisfy this criteria, technical standards adopted by these other organizations are used. These include the FAO/WHO Codex Alimentarius Commission for Food Safety, the World Organization for Animal Health (OIE) and the FAO International Plant Protection Commission. While challenges relating to the appropriateness of measures taken by developed countries, in particular, have been raised by developing countries, the SPS Agreement has created an important framework to address and harmonize activities and resolve disagreements by building on the technical standards created by these other intergovernmental organizations.

Experience with treaties in many areas suggests that positive linkages and synergies between agreements may develop over time. As our understanding of these issues has improved, efforts can be made during the drafting process to anticipate and avoid regime conflicts and promote positive synergies. Synergies can be realized across many of the other factors of treaty effectiveness, including financing, development strategies, and global governance arrangements. They can be facilitated by building them into strategic frameworks (see Strategic Treaty Management below).

Scientific research and data

The ability of multilateral treaties to steer national legal and governance processes in accordance with treaty obligations depends, in part, upon the ability of relevant stakeholders to develop scientific research and data that can inform decision-making for implementation and effectiveness purposes. This view is becoming increasingly relevant as new technologies are being developed and applied to a range of multilateral instruments. Given the subject of the pandemic treaty as a public health instrument, the need for accurate and timely scientific research and data is even more critical than in other contexts. In some cases, science and data collection arise through organic developments within treaty regimes. In other cases, provisions are made within the treaties to prioritize these matters.¹⁹ This approach seems appropriate given the importance of scientific, public health and medical research within a possible pandemic treaty. As described earlier, it may warrant giving prominent roles to scientific and health expert communities in governance. As precedent, the Intergovernmental Panel on Climate Change and Intergovernmental Panel on Biodiversity and Ecosystem Services, which inform the FCCC and CBD respectively, are instructive models.

Strategic Treaty Management (STM)

Multilateral treaties involve complex sets of requirements, operational aspects, resourcing and planning. International law has tended to regard the conclusion of a treaty and the interpretation of its elements as final step in the legal process. Increasingly as a result of the challenges of putting treaties into effect among 193 states in the United Nations, conferences of the parties have been relying on forms of STM to advance the work programs and decision-making for treaties.²⁰ Significant numbers of governing bodies to multilateral treaties have developed time-bound strategic plans, which form the basis for operations, financing, and results measurement for those agreements over a specified number of years. Notable examples include the CBD, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (APM Convention), and WHO Framework Convention on Tobacco Control (WHO FCTC). As I have discussed elsewhere, strategies developed at the global level cascade down to the national level through National Treaty Implementation Strategies, which are often integrated into National Development Strategies.²¹ While strong empirical research findings about the results of strategic planning among treaties has yet to be produced, there is anecdotal evidence that suggests that many of the other elements described in this paper can be enhanced and better managed through the use of strategic frameworks.²²

Thus far, treaties and treaty bodies have begun to use STM following the adoption of a treaty, generally doing so in the absence of any specifications or signals in the treaty text to the effect that a

strategic plan is required or desirable. Nevertheless, a new treaty such as the proposed treaty on pandemics, could anticipate this possibility and build it into the framework of any future agreement.

Financing globally

Adequate financing is important to accomplishing the aims of many multilateral treaties. The practice of financing treaty regimes is heterogeneous. Examples can be found of treaties that lack reliable financial arrangements even with high levels of ratification.

In the first instance, the approach to financing treaties is affected by the whether treaty-related activities are part of the core work of the organization or are discrete. In organizations and bodies such as the International Labour Organization, World Intellectual Property Organization, or the Office of the UN High Commissioner for Human Rights, the secretariat and main activities to promote treaty implementation would normally be included in the overall work plans and budgets for the organizations. In contrast, treaties falling under the UN Food and Agriculture Organization (FAO) such as the International Treaty on Plant Genetic Resources for Agriculture or International Plant Protection Convention, have budgets that are separate from the core FAO budget.

For treaties that have dedicated budgets, broadly speaking there are two approaches to financing, which are similar to financing approaches for international organizations. These are voluntary or assessed contributions. Assessed contributions are often used to support the core functions of treaties, with voluntary contributions used to support specific programs as well as projects at the national level. In recent decades, a new model of treaty financing has arisen based on a trust fund or similar mechanism, whereby states and international financial institutions and philanthropies have contributed in a pooled fashion to support the activities of one or more multilateral instruments.²³ Such approach has been recently suggested in relation to a possible pandemic treaty.²⁴

Although the need for financing to support the activities of multilateral treaties would seem obvious, parties have not always taken such steps, leaving treaty secretariats and supporting international organizations in difficult circumstances. While an argument can be made that international agreements differ in the financing needed to accomplish their aims (as for example with strongly normative treaties such as the Convention on the Prevention and Punishment of the Crime of Genocide or Treaty on the Prohibition of Nuclear Weapons, many others, including a pandemic treaty, will require substantial financing to support active governance and implementation assistance for developing countries, research and technology development, and, as described further below, some kind of possible verification or compliance mechanism.

National finance

As with financing at the global level, a key element of the effectiveness of a multilateral treaty is the availability of financing at the national level. There is no absolute level of financing necessary, as different agreements entail different levels of financing needs. The importance of determining national financing needs in advance of the development and conclusion of a multilateral treaty is to ensure that the ambitions reflected in the agreement do not surpass what resources might be available at the national level. Considerations include determining the national budgetary resources available and the availability of development finance to support the implementation of the agreement. The integration of National Treaty Implementation Strategies with National Development Strategies provides a means to facilitate budgetary support for treaty purposes.

Compliance

The subject of compliance with the obligations that multilateral treaties create has been a long-running topic of analysis and debate within fields of international law and international relations. Compliance is a function of the legal obligations of treaties. The relationship between compliance with treaties and their effectiveness is close but the concepts are distinguishable. It is difficult to consider treaties that have poor compliance among their state parties as being effective, but compliance alone does not suffice to ensure that an agreement satisfies the demands of effectiveness. Other factors cited in this paper bear on whether compliance will further treaty effectiveness. If an agreement does not include a strong regulatory design or normative posture, simple compliance may not generate results. Likewise, poor drafting may enable states to claim to be technically compliant when their actual observance may be weak.

At the same time, it is often too facile to deem states' poor records of compliance as proof that a given treaty is ineffective. There are myriad reasons that parties may not comply. Moreover, the degree or nature of noncompliance may differ. States may be in partial compliance, technically out of compliance, or have taken good faith steps to come into compliance yet fall short.

Whatever the merits of these nuances, a critical aspect of the effectiveness question involves measures that are taken to improve the levels of compliance that states achieve. A variety of measures have been taken among different multilateral treaties to review, verify, or sanction states for failing to comply with treaty obligations.²⁵

The notion of compliance with multilateral agreements is central to their rationale and purpose. If one conceives of the various reasons that states enter multilateral treaties, avoiding certain harms,

protecting certain public goods, or upholding certain standards of conduct are significant. The norms that treaties define are generally designed to ensure the fulfillment of these goals. Yet, treaties can only achieve their intended purposes if states act consistent with their norms, or, in other words, comply with the treaty.

Typically, multilateral treaties require parties to report on their activities relating to their treaty obligations. State reporting is the most basic approach to compliance and typically provides a basis for more rigorous compliance practices. Procedures designed to address failures to comply (non-compliance procedures or NCP) should be distinguished from enforcement. While both deal with trying to bring about observance of international law, NCP is a broader notion.

One type of compliance control measure is verification, which involves direct observation of matters within states to confirm the veracity of information disclosed in parties' reports. On site inspections are used to verify the accuracy and correctness of information and reports that states provide.

Another related concept is enforcement. In international law, enforcement pertains specifically to efforts taken at the international level, in other words between states or between states and international institutions.²⁶ This distinction can be drawn even though there is some equivocation in the terminology used by different treaties, which may use the term enforcement to apply to actions taken at the national level.²⁷

Enforcement should also be distinguished from dispute resolution. The former relates to securing states' observance of the rules, while the latter pertains to disputes between two or more states that may occur within a treaty regime.

Finally, the notion of implementation is relevant to compliance, but distinguishable. Unlike compliance, which is at least in theory amenable to a binary determination, implementation is somewhat less precise. It refers to a range of activities that may be undertaken in furtherance of treaties' provisions.

The impact of such provisions is open to debate, however, failure of treaty parties to measures at the time of signature may impede the effectiveness of a treaty long term. Indeed, in some instances as part of the political compromise to get an agreement signed, parties agree to a treaty text devoid of compliance measures. While not impossible, it becomes difficult to add a compliance measure to an agreement once enacted. Hence the decision to implement a compliance measure or not at the conception and treaty formulation stage can have long-term consequences for its effectiveness. Given the seriousness of the issues covered by a pandemic treaty and the importance of high levels of compliance to achieve its intended purposes, some approach to compliance control would be warranted. Proposals for a verification element to a compliance mechanism for a possible pandemic

treaty would create a more rigorous process but are likely to engender resistance among states.

One pragmatic option for addressing a compliance mechanism in the face of political opposition would be to allow states to opt into a separate compliance instrument. Normally this type of approach has occurred through the use of optional protocols as in the case of the CRC and Convention on the Rights of Persons with Disabilities, among other agreements.

Indicators

Increasingly multilateral treaty bodies have instituted frameworks to measure the performance of treaties over time, similar to trends seen in international organizations and national governments around the world. The typical approach to doing so is to apply indicators, which are simplified representations of reality, but can capture important elements that bear on the success as well as the effectiveness of treaty instruments.

As an element of the broader idea of STM, in recent years indicators have been developed following the adoption of strategic plans for multilateral treaties. Examples include the CBD, the WHO FCTC and APM Convention, among others.

To illustrate, the metrics for the CBD, the Aichi Biodiversity Targets, were agreed as part of the Strategic Plan for Biodiversity in 2010. They cover all of the major elements of the Strategic Plan and have been incredibly influential at the international and national levels as well as among scientific and civil society constituencies. To support measurement of the targets, more detailed indicators have been developed. These indicators have been subject to ongoing refinement among the various stakeholders over the more than 10 years since their adoption. Overall, the Aichi Targets and indicators have shaped the research of the scientific community and improved monitoring of the CBD's performance. These results are particularly important given that the treaty lacks a compliance mechanism.²⁸

In addition to these treaty-specific indicators, the Sustainable Development Goals (SDGs) also encompass many multilateral treaty obligations and thus constitute another illustration of the use of indicators in international law. Generally, indicators can be useful in gauging the performance of agreements overall and could provide a good means for parties to monitor the performance of a possible pandemic treaty.

Evaluation

In addition to indicator frameworks and compliance mechanisms, treaty secretariats, international organizations with responsibility over treaties and treaty parties have begun to use evaluation as a tool to measure the outcomes of treaty practices. Approaches to evaluation have included self-reviews, as well as third-party evaluations.²⁹ The scope of evaluations has ranged from a review of multilateral treaties overall to individual programs at the international level or national level implementation activities. Methodologies for evaluations have tended to follow the practices used in development assistance programs.³⁰ Alternative models include the OECD's Guiding Principles for Regulatory Quality and Performance.³¹ New approaches to evaluation are in development which involve complex system thinking, as well as regulatory perspectives.³² Evaluations have been used by national governments, international organizations and NGOs as tools to improve the development of strategies and program effectiveness in general. The use of evaluation among multilateral treaties may contribute to such positive outcomes.

Community of practitioners

A common trait among many more successful multilateral treaties is the development of communities of practitioners dedicated to advancing the purposes of the treaty. These communities involve actors working at both the national and international levels. They play multiple roles including advocacy, knowledge development and awareness raising among policymakers and the public. Sometimes the same actors may engage in all these activities, while some actors may engage in only one or a limited number.

Examples include scientific and technical communities, civil society organizations, professional associations, journalists and officials from both governments and international organizations. Advocacy oriented actors have been recognized to play important roles in framing issues and educating policymakers and mass publics on issues.³³ Scientific and technical communities conduct primary research on underlying problems and approaches to addressing and designing global regulatory solutions within treaty regimes and study their impact. Both groups may engage in capacity building and knowledge development among other experts and stakeholders from outside of the regulatory regime.

Different treaties may relate to these types of stakeholder communities either as the product of intentional design or as spontaneous or organic occurrences. The WHO FCTC, for instance, has articles that specifically reference the importance of civil society and the cultivation of scientific research.³⁴ The vitality and energy that stakeholder communities provide in multilateral treaty re-

gimes has been well recognized in academic commentary, but it may not always be appreciated by policymakers and government officials.

For most multilateral regulatory instruments, the amount of work and the knowledge requirements for their advancement are significant and cannot be accomplished by governments alone. While advocacy is an important element of furthering treaty norms and bringing about effective implementation³⁵, the role of these communities goes far beyond lobbying. Oftentimes, there are shared objectives of the many stakeholders and deciding upon appropriate courses of action is a cooperative, rather than confrontational, matter. It is thus advisable to ensure that treaty regimes are developed with a view to creating and sustaining these types of communities over time. The community of international public health and epidemiology is a tremendous asset that can contribute positively to a potential pandemic treaty.

Mobilizing global governance

International and regional organizations are an additional group of stakeholders critical to advancing multilateral treaties. Similar to the discussion of synergies and collaboration, there are many international organizations that pertain to any given issue area covered by multilateral treaties. In the case of a potential pandemic treaty, the relevant organizations have been well noted in commentary.³⁶ Given the number of issues that overlap between the different international organizations, there is a significant opportunity for these organizations to help advance work under this potential treaty.³⁷ Approaches to furthering the engagement of international organizations horizontally across multiple institutions include:

- joint strategies assigning mandates during the treaty formulation phase
- agreements on shared goals, targets, and indicators (such as the SDGs or their eventual replacement)
- creation of shared financing platforms and forums for dialogue
- inclusion of organizations as observers or participants in relevant meetings and
- collaboration at the national level in relation to the development of UN Development Assistance Frameworks (UNDAF) and support for National Development Strategies.

These types of arrangements can play important roles in furthering the purposes of specific treaties.

Justiciability

In many cases, the ability of actors at the national level to enforce the implementation of obliga-

tions under multilateral agreements is an important factor in ensuring their effectiveness. Different treaties and different legal systems may be more or less amenable to litigation as a tool to enforce the obligations treaties create. Notable examples include human rights and environmental treaties, pursuant to which national actors may seek to enjoin or compel governments to take steps to implement treaty obligations or seek damages for failure to do so.³⁸ Many of the considerations involved in whether treaties are justiciable at the national level pertain to specific attributes of domestic constitutional law or other aspects of access to justice domestically. Treaties can also be subject to litigation in the context of investment arbitration. Considerations of whether treaty obligations may be amenable to enforcement through litigation include matters touched on earlier in this paper, such as, the rigor with which obligations are framed and the requirements for parties to implement treaties under domestic law (e.g. statutes or regulations).

ANALYSIS

As the foregoing discussion suggests, there are many factors involved in achieving an effective treaty. All elements described are important and no single factor stands out as dominant. At the moment a treaty is concluded, it is impossible to determine what its effects might be, because many aspects of successful agreements may only emerge over time. Nevertheless, by surveying the range of considerations and weighing the likelihood of meeting the key needs, the process of treaty formulation and agreement can be enhanced. Likewise, by examining the multiple factors involved, state parties and other stakeholders can anticipate the needs for ensuring the realization of an effective agreement, after it enters into force.

CONCLUSION

As proponents of a pandemic treaty have argued, improving the legal and governance arrangements to address pandemic preparedness and response could reduce the negative consequences of any future contagious disease outbreaks. The severe social and economic consequences of the current Covid-19 crisis suggests that, at the very least, the international community should make efforts to avoid repeating the experience. If states decide that it is worth concluding a new pandemic treaty, then it stands to reason that it is also necessary to ensure it works well. Although it is difficult to predict with certainty what the eventual results might be, this paper has set forth key elements for success. It is hoped that armed with this perspective, parties and interested stakeholders may deliberate with greater confidence and ambition.

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