Legalization as an institutional choice in the context of research and development

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In their article published in this issue, Steven J Hoffman & John-Arne Røttingen note that an international agreement on the important issue of research and development (R&D) could take any number of forms.[1] Following discussions at the 2012 World Health Assembly (WHA), the authors describe a variety of administrative, financial, decision-making, oversight and compliance mechanisms, their point being, presumably, that concerns expressed at the WHA (which are described below) can be overcome if attention is paid to the most appropriate form that an international agreement on R&D might take.

Hoffman and Røttingen are correct in stating that international regimes come in a variety of forms[2] and that the Member States of the World Health Organization (WHO) can structure a much-needed regime on R&D in any number of different ways. These are questions of form. The more pressing question is whether a binding international instrument (i.e. a treaty) is an appropriate institutional choice.

Treaties serve functions such as addressing cooperation and coordination problems under conditions of interdependence,[3] elevating an issue's profile politically,[4] lending credibility to a commitment[5] and shaping the interests of states (both by altering their rational self-interest and their commitment to particular ideas).[6] However, treaties are not costless. Negotiations are expensive and time-consuming exercises that entail high opportunity costs for WHO and its Member States. Treaties are not the ideal institutional choice for addressing every global health problem and should not be embraced reflexively.

The opportunity costs associated with treaties need to be given careful consideration. Before deciding to initiate treaty negotiations, WHO Member States should, as a general rule, begin by examining the potential treaty's substance (i.e. what the parties might agree upon in broad terms) and then ask themselves whether any other existing models could better achieve the outcomes pursued.

The Consultative Expert Working Group on Research and Development: Financing and Coordination (CEWG) undertook an analysis and recommended the negotiation of a treaty. This recommendation was premised on the idea that a binding commitment would secure financial contributions to fund R&D.[7] The fact that Member States rejected the proposition brings us to the question of whether a treaty is a suitable institutional choice.

On the one hand, identifying the functions that a treaty on R&D may serve is easy enough. First, a collective action problem persists in that there is insufficient investment in R&D accompanied by an incentive for some states to free-ride on the investment of others. Although it is not obvious how Member States might address this problem through a treaty lacking binding financial commitments, solving collective action problems is a typical function of treaties. Second, coordination problems persist in the context of resource allocation, standard setting and information exchange. Typically, treaties address problems of coordination alongside cooperation (collective action) problems. Third, there is a normative dimension in that rules governing intellectual property protection further incentivize investment in commercially rewarding innovation. The CEWG report recommended that a treaty establish norms, which is a typical function of treaties. In particular, the CEWG identified the need for a rule de-linking investment in R&D from prices paid by consumers.

On the other hand, making the best institutional choice involves weighing the pros and cons of a treaty against those of other approaches in light of the political will of Member States. As Hoffman and Røttingen argue, one issue to consider is whether a financing mechanism devoid of a binding legal obligation to contribute funds will work. Another is whether a treaty would lock in R&D as a political priority in a way that would divert resources away from other important health issues, rather than leading to the provision of new resources. Yet another issue is whether approaches that lack legal obligation and do not create new incentives for action would be credible in light of the political history of R&D at the international level.

One thing is clear: the CEWG report has brought the issue of R&D to a head after a long process that has not satisfied WHO Member States as a whole. A case for action has been made, and the onus now rests on those opposing a treaty negotiation to put forward a credible alternative. It is not enough, in this respect, for donor countries to merely argue that the answer lies in having developing countries increase investment in R&D. In truth, incentives for investing in R&D are shaped by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and similar agreements. Donor countries advocated TRIPS and tied its adoption to access to their markets as part of a single undertaking when establishing the World Trade Organization. They did so not to encourage innovation in the territories of their trading partners, but to allow firms to extract monopoly rents from countries where intellectual property protection was weak or non-existent. Hence, both donor and recipient countries have played their own roles in creating the status quo, and a system of shared responsibility is needed moving forward. ■

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