create an interesting dichotomy between formal legal status and actual perception by third parties and operational needs. As an example, the Global Fund has been admitted by the UN General Assembly as an observer, probably the first ''national institution'' to have been so invited. Similarly, some of the PPPs in question act in a large number of countries and require legal protection for their staff, funds, and assets. As national institutions, they would not be entitled to any particular protection unless they conclude bilateral agreements with all countries concerned (an approach followed, for example, by the International Federation of Red Cross and Red Crescent Societies). This is the case once again of the Global Fund, which enjoys privileges and immunities comparable to those of an international organization only in Switzerland through a host agreement concluded with the Swiss Federal Council, and in the United States through an executive order issued under the International Organizations Immunities Act. However, the large number of grants awarded by the Fund constitutes an obvious target for possible legal claims. In order to address that problem, the Board adopted in 2009 a convention on the privileges and immunities of the Fund, the first example to my knowledge of a treaty adopted by the governing body of a national institution comprising NGOs, private companies, and foundations alongside states. The convention is deposited with the Global Fund and has already attracted a few ratifications. By granting broad jurisdictional immunities to the members of the Board, the Convention gives international legal protection to nonstate entities normally not enjoying that status, e.g., NGOs, private companies, and foundations.

This overview shows how the trend I have described is contributing to blur in practice the concept of international organization, delinking formal legal status from ''recognition'' and treatment at an international level. Could a next step be the attribution of conduct and responsibility under international law to hybrid entities regardless of their formal status, if they exercise direct control over their own activities?

In conclusion, the institutional phenomenon that we dub PPPs shows a mixed balanced sheet with regard to possible developments in international institutions. On the one hand, PPPs have overcome many limitations of existing international organizations, mobilized unprecedented political and financial resources around important health problems, and pursued bold and innovative solutions. On the other hand, they have contributed to increased fragmentation, competition for limited funds, and higher transaction costs for recipient countries. On the one hand, PPPs have forced international organizations like the WHO to question and redefine their role and comparative advantage in a crowded and competitive field where they no longer enjoy an unchallenged primacy; on the other hand, they risk eroding the unity and centrality of the normative and policy-setting functions of the WHO and leading to confusion and inconsistency in an essential area of global health.

21st Century International Institutions

By David Gartner[*]

Introduction

Over the last decade, some of the most dramatic innovations in the architecture of global governance have taken place in the realm of global health. There are striking contrasts between the level of participation of nonstate actors and the degree of institutional autonomy

[*] Associate Professor of Law, Sandra Day O'Connor College of Law, Arizona State University.

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between recently created global health institutions and comparable institutions in areas such as global development and global environmental governance. Three distinctive features are common to this new generation of global health institutions: (1) more participatory governance structures; (2) greater institutional independence; and (3) a commitment to performance-based financing. More independent, more participatory, and more performance-based institutions are outperforming less independent, less participatory, and less performance-based institutions.[1]

In the 20th century, the World Health Organization (WHO) was the centerpiece of global health governance, and its legacy includes remarkable interventions such as the elimination of smallpox. Today global health governance is a much more complex and diverse institutional environment. Global health governance has been transformed through significant innovation in the models of governance and accountability adopted by a new generation of institutions. Over the last decade, global health assistance nearly tripled to over $28 billion per year.[2] However, the WHO now represents less than 5% of total global health funding, and new institutions dominate the flow of resources. Vertical funds focused on specific global health challenges have been the key drivers of the expansion of funding. From a base of less than one billion dollars in 2002, these global health vertical funds grew more than ten-fold and account for approximately two-thirds of the expansion of global health financing.[3]

Participation, Independence, and Performance

Vertical funds with more participatory governance structures and a closer link between performance and funding are demonstrating more success in the areas of resource mobilization, learning, and impact.[4] Looking across vertical funds in development, it is only health vertical funds which have indisputably raised additional resources for the sector as a whole.[5] More independent, more participatory, and more results-focused vertical funds pose a challenge to traditional forms of governance.

Membership at the WHO is explicitly defined with reference to states. Only states may become parties to the WHO constitution, and membership requires that states accept the constitution. The WHO model reflects a state-led model of governance. Nongovernmental organizations may be invited to ''participate without the right to vote'' in meetings of the World Health Assembly, but for national organizations this requires the consent of the government concerned.[6]

In contrast with the WHO model, the GAVI Alliance provides a more significant role in its governance structure for nonstate actors, including partner foundations, the private sector, and technical experts. Seats on its board are allocated for representatives from research and technical institutes, the vaccine industry, and individual experts.[7] The GAVI Alliance represents a model of expert governance that includes nonstate as well as state actors.

[1] *See* David Gartner & Homi Kharas, *Scaling Up Impact: Vertical Funds and Innovative Governance*, *in* Getting to Scale: How to Bring Development Solutions to Millions of Poor People (Laurence Chandy, Akio Hosono, Homi Kharas & Johannes Linn eds., 2013).

[2] Institute for Health Metrics and Evaluation, *Financing Global Health 2012: The End of a Global Age?* (2013).

[3] Gartner & Kharas, *supra* note 1, at 113.

[4] *Id.* at 131.

[5] Nicolas Van de Sijpe, *Is Foreign Aid Fungible? Evidence from the Education and the Health Sectors* (Oxford University, Centre for the Study of African Economies, Working Paper No. 2010-38), *available at* http://www.csae.ox.ac.uk/workingpapers/pdfs/2010-38text.pdf.

[6] Constitution of the World Health Organization, chapter XVI, art. 71.

[7] GAVI Board, http://www.gavialliance.org/about/governance/gavi-board/.

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The Global Fund to Fight AIDS, Tuberculosis, and Malaria provides for still wider participation for civil society groups, especially affected populations at both the global and national levels. Its board includes representatives from NGOs from the Global North and South and those living with target diseases of AIDS, tuberculosis, and malaria. The Global Fund reflects a multi-stakeholder model of governance that includes affected communities.[8] It also extends this model of governance to the national level since it requires funding proposals to be approved by a multi-stakeholder country coordinating mechanism. Initial evidence suggests that this expanded participation at the national level has contributed to more effective implementation. Case studies of 40 countries reveal that greater substantive participation by NGOs was tied to stronger grant performance.[9] Broad participation in the governance structure also leverages nonstate actors in donor countries to become champions for mobilizing resources for this newer generation of global health institutions.

Global health vertical funds are generally independent entities, in contrast with recently created institutions in related development sectors. While independence creates a range of challenges, it also creates new opportunities for innovative governance. In contrast to global health governance, many of the new vertical funds in the climate and development sectors are actually formally attached to the World Bank.[10] These less independent institutions are much less likely to fully involve nonstate actors in institutional governance. While fully independent institutions are the most likely to include civil society actors as partners in governance, World Bank linked institutions are less likely to do so, and UN linked institutions are the least likely to do so.[11] More independent institutions also tend to be the most transparent. Greater transparency and the disclosure of failures can serve to strengthen organizational learning within these institutions.[12] Finally, more independent institutions are more likely to adopt performance-based approaches to financing, which closely tie future flows of financing to evaluations of past performance.[13]

On the dimension of performance-based financing, the gap between global health funds and other vertical funds is quite striking. While performance-based financing has become central to global health governance, it remains in its early stages in many other sectors. With performance-based financing, grant performance has tended to improve over time within these global health institutions. For example, a recent analysis of the tuberculosis portfolio of the Global Fund found that successful evaluation that leads to continued funding predicts higher future performance.[14] Performance-based financing also plays a role in learning as it provides a built-in feedback loop on the consequences of best practices that can generate innovation and foster wider dissemination of lessons learned. However, in the global health context a major challenge remains moving beyond reliance on input measures toward using output measures as the underlying basis for assessing performance.

[8] Global Fund Board, http://www.theglobalfund.org/en/board/constituencies/.

[9] Global Fund, Lessons from the Field: A Report Card on the Country Coordinating Mechanism Model (2008).

[10] For example, the Clean Technology Fund, the Strategic Climate Fund, and the Global Agriculture and Food Security Program are each formally administered by the World Bank.

[11] *See* Kenneth Abbott & David Gartner, *Reimagining Participation in International Institutions*, J. Int'l L. & Int'l Rel. (2012).

[12] Lola Dare, *Independent Evaluations of the Global Fund*, 375 Lancet 1694 (2010).

[13] *See* Gartner & Kharas, *supra* note 1.

[14] Itamar Katz et. al., *Factors Influencing Performance of Global Fund Supported Tuberculosis Grants*, Int'l J. Tuberculosis & Lung Disease (2010).

Conclusion

Innovative models of global health governance raise new challenges in terms of the accountability of nonstate actors and the tensions flowing from institutional fragmentation. At the same time, these models of governance hold enormous promise for thinking about innovation and the reform of other international institutions. Fragmentation poses a challenge, but it also has catalyzed new kinds of competition and collaboration within the global health sector and fostered organizational learning within many global health institutions. More participatory, more independent, and more performance-based international institutions have proven largely successful in the context of global health governance. In related sectors such as development and global environmental financing, resource mobilization, organizational learning and institutional impact could likely be improved through adopting more participatory, independent, and performance-based approaches to governance.

A Global Health Constitution for Global Health Governance

By Jennifer Prah Ruger[*]

Globalization has intensified economic interdependence, global communication, and international migration, giving new urgency to addressing health issues globally and inaugurating a new era in global health governance (GHG) to replace the former international health governance (IHG). IHG was relatively simple, with a smaller set of actors and clearer lines of responsibility. GHG is more complex, with more actors, resources, and interests, differing organizational forms, and uncoordinated activities. GHG lacks an architecture for health, and the operational chaos is clear.

Global Health Governance Problems

Key GHG problems include: (1) hyper-pluralism and fragmentation, producing incoherence and disorder; (2) blurred lines of responsibility, making it hard to hold actors—including the World Health Organization (WHO)—responsible; (3) unsustainability, as the proliferation of new actors with new interests reduces health investment incentives for the global community and nations; (4) uncertainty about normative principles guiding global health and disparate, sometimes conflicting goals; (5) lack of a master health plan or global health strategy; (6) injustice, as powerful countries and institutions control finances and decisionmaking; (7) lack of credible compliance and dispute resolution mechanisms; (8) inadequate global standards and rules, other than the International Health Regulations; and (9) a facade of ethics concealing self- and national interests under the prevailing rational actor model. Today's global system, including the WHO, is inadequate for dealing with global health issues. Effective governance demands new solutions—a framework for solving global health problems.

A Global Health Constitution

The world needs a global health constitution (GHC) to provide guiding principles and objectives, division of labor and functions, checks and balances among global health actors, and a framework for integrating global health work.

[*] Associate Professor, Schools of Public Health, Medicine, Graduate School of Arts and Sciences, Yale University; Adjunct Associate Professor, Yale Law School.

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