

POLITICS, POWER, AND PUBLIC HEALTH: A COMMENT ON PUBLIC HEALTH'S "NEW WORLD ORDER"

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David Fidler's article, *Constitutional Outlines of Public Health's "New World Order"*¹ provides a rich and thought-provoking analysis of the recent and significant changes to global governance structures in the issue area of public health. The article situates these changes in the discourse of constitutional law, drawing careful and nuanced comparisons between the United States Constitution and the international legal system.

As someone who has explored the nascent analogies between domestic constitutions and international law and institutions in other policy spaces,² I am entirely sympathetic to this project. By emphasizing the international public health regime's constitutional aspirations, Professor Fidler helps to reorient global health policy away from its Westphalian roots. But he does more than just establish the existence of a clear break with the past. His paper also provides a blueprint for conceptualizing new forms of health governance, a plan that includes the full panoply of governments, NGOs, international officials, and networks of state and non-state actors, each with different roles to play in creating a coherent global health policy.

It should be clear by now that my view of Professor Fidler's article is that of a fellow traveler. And it is in that spirit that I will make three points that I hope will frame and sharpen some of the arguments he presents. The first point concerns the continuing centrality of nation states in shaping the new public health order.³ The second point identifies competition among international institutions or regimes as an omitted variable that at least partly explains the recent changes at the World Health Organization ("WHO").⁴ And the third

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1. David P. Fidler, *Constitutional Outlines of Public Health's 'New World Order,'* 77 TEMP. L. REV. 247 (2004).

2. See generally Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 193 (2003) (discussing the systematic and structural issues prevalent in the study of the intersection between international and constitutional law).

3. See *infra* notes 6-9 and accompanying text for a resolution of Fidler's conflicting assertions about state and sovereignty health alliances.

4. See WHO, at <http://www.who.int/en/> (last visited July 24, 2004) (providing access to WHO's publications, current health topics and research tools). See *infra* notes 11-15 and accompanying text

point introduces the idea that comparable constitutional changes have already occurred in other international regimes, which raises the question of why the public health regime lagged in its responses to globalization and—more importantly—whether there are any lessons that can be learned from the experience of other “new world orders” in areas such as human rights, trade, or the environment.⁵

The first point concerns pervasiveness of state sovereignty and state interests. Professor Fidler’s approach to this issue is conflicted. At several places he makes a “hard” claim about the new public health governance, stressing that “a new template has superceded the Westphalian . . . model” and at one point stating flat out that “Westphalian governance is dead.”⁶ Yet in other sections of the paper, he backs away from these hard assertions, making the softer claim that “the vertical re-allocation of sovereign power from governments to non-state actors and international organizations [has] occurred in theory only,” and that “the new world order still reflects [at least in part] the strategic priorities of the old world order.”⁷

I think Professor Fidler has good reason to be ambivalent about the nature of sovereignty and state interests in global public health’s nascent constitutional framework. Consider, for example, the new competencies to gather and disseminate information that the WHO claimed in the wake of the Severe Acute Respiratory Syndrome (“SARS”) and avian flu epidemics and the cooperative responses by WHO member states to those assertions of authority. Professor Fidler expresses some surprise at these developments, noting that the WHO had no “express legal or policy authority” for its actions and that states reported information to the organization even in the absence of any mandatory mechanisms for compliance.⁸

But are these responses really so surprising? If states have redefined and expanded their national interests in the wake of new public health threats (as the article’s discussion of the United States’ reframing of HIV/AIDS as a national security threat illustrates), they may be perfectly willing to acquiesce in or even support the assertion of additional non-binding authority by intergovernmental bodies. Indeed, accretions of soft power by the WHO may actually serve states’ interests—providing a means to mount an effective response to serious trans-border health problems but without having to cede harder forms of lawmaking authority.⁹

As long as the interests of states and the interests of intergovernmental

for a description of the WHO’s dilemma with regulatory competition.

5. See *infra* notes 16-20 and accompanying text for an assessment of the future problems in public health governance.

6. Fidler, *supra* note 1, at ¶¶ 77, 84.

7. *Id.* at ¶¶ 56, 129.

8. *Id.* at ¶¶ 74-75.

9. See Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 56-58 (2004) (explaining why powerful states acquiesce in the creation of nonbinding legal norms as a means of furthering their own interests).

organizations are aligned, it is entirely possible that the WHO will continue to acquire new authority to combat public health scourges. The true test of the new public health order will come when international officials seek to assert authority in areas in which states—especially powerful countries such as the United States and the members of the European Union—have divergent interests. At that point, the networks of NGOs and other non-state actors that Professor Fidler describes may have sufficient capacity to mobilize, inform, and shame states in ways that will deter some forms of retrenchment to the Westphalian model.¹⁰ But I doubt that those non-state actors will be powerful enough to deter all reassertions of state power.

What might cause the WHO to claim expanded authority in ways that clash with state interests? It's here that my second point about regulatory competition needs to be factored into the equation.¹¹ Professor Fidler notes that the SARS outbreak "heightened WHO's governance power[s] because only it was in a position to coordinate such a global endeavor."¹² This may be true for SARS. But I doubt it is equally true for the many issues that lie within the expanding global public health regime that he describes. Indeed, I would suggest that the WHO's light-footed response to SARS was prompted not only by a desire to stop the spread of a new and threatening disease, but also by a fear of being eclipsed by other governance structures—both public and private—had it not responded effectively.

Professor Fidler refers to one such governance structure in the paper: the Global Health Security Initiative created by the G-7 countries and Mexico.¹³ At its first meeting held in Ottawa in November 2001, this group of national health ministers committed to "forging 'a new partnership to address the critical issues of protecting public health and security.'"¹⁴ But this partnership was limited to a small club of countries that excluded the vast majority of WHO members. And, more significantly, it envisioned collaboration among the club's members both inside the WHO and outside of it.¹⁵ How much this so-called global initiative comprised of just eight states will work within the WHO will depend on the organization's responsiveness to the club's interests.

10. Cf. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 1-38 (1998) (discussing strategies used by NGOs and other non-state actors to pressure states to comply with international human rights norms).

11. See Helfer, *Regime Shifting*, *supra* note 9, at 17 (discussing competition among international regimes and among intergovernmental organizations); Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and..."*, 96 AM. J. INT'L L. 77, 92 (2002) (discussing "the role of interorganizational competition").

12. Fidler, *supra* note 1, at ¶ 72 (emphasis added).

13. See Press Release, Health Ministers/Sec'ys/Com'r, Health Ministers Launch Initiatives to Improve Health Security Globally (Dec. 6, 2002) (outlining agreed-upon measures to strengthen a national health response to smallpox virus), Health Canada Online, available at <http://www.hc-sc.gc.ca/english/media/releases/2002/mexico.htm>.

14. Press Release, U.S. Dep't of Health & Human Servs., Secretary Thompson Joins Health Ministers In 'Ottawa Plan.' Countries Forge New Partnership to Strengthen Public Health and National Security (Nov. 7, 2001), available at <http://www.hhs.gov/news/press/2001pres/20011107a.html>.

15. See *id.*

The Global Health Security Initiative is an example of competition that the WHO faces from a potential rival for public governance. On the private side, the WHO's performance is also being assessed by networks of non-state actors. Professor Fidler notes that these NGO networks were instrumental in transmitting public health information to the WHO about countries where SARS was prevalent. The WHO provided a logical receptor for this information, and it deftly tapped into and encouraged the network's operations. But had it not done so—that is, had the WHO stuck to the powers specified in its Constitution—these networks would surely have sought other outlets for the information they possessed. The essential point is that the recent changes at the WHO need to be assessed not only as a substantive policy response, but also from the perspective of an organization competing with other governance arrangements for control over an increasingly salient and contested policy space.

Third and finally, I would invite Professor Fidler to consider what lessons (if any) can be learned from the partial and incomplete trends toward constitutional governance in other international issue areas. The disaggregation of traditional notions of sovereignty through vertical and horizontal reallocations of power is not distinctive to public health. In fact, it has occurred throughout the international legal system—in areas from human rights to international trade and the environment.

International agreements in each of these areas empower private parties to file claims against governments for violations of treaty-based rights or obligations. The existence of judicial and quasi-judicial fora for hearing these claims permits litigants and interest groups to interact both with supranational actors (such as international judges) and with sub-national actors (such as national court and domestic parliaments) in ways that mirror the “vertically oriented approach” that Professor Fidler documents in the public health arena.¹⁶

In addition, international actors in these issue areas have expanded their powers in ways not expressly authorized by the texts of the treaties that created them. In the human rights field, for example, treaty bodies receive shadow reports from NGOs that challenge assertions in states' official reports,¹⁷ and they have claimed the right to interpret the validity of states' reservations.¹⁸ In the trade context, the WTO Appellate Body allows the submission of amicus briefs from private parties although nothing in the Dispute Settlement Understanding allows it to do so.¹⁹

16. Fidler, *supra* note 1, at ¶ 55.

17. See Minn. Advocates for Human Rights, UNIFEM, *Stop Violence Against Women: A Note About Shadow Reports* (describing the role of NGOs and shadow reports as providing both necessary additional information and lobbying of U.N. human rights committees), available at http://www.stopvaw.org/A_Note_About_Shadow_Reports.html (last updated Nov. 1, 2003).

18. See Hum. Rts. Comm., General Comment 24 (52), *General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev2/add.6 (1994) (explaining duties of states under the Covenant regarding unilateral reservations), available at <http://wwwserver.law.wits.ac.za/humanrts/gencomm/hrcom24.htm> (last visited Sept. 12, 2004).

19. See John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*,

Yet, in each of these cases, states responded by resisting the accretions of authority by international actors.²⁰ And this suggests that the constitutional outlines of governance in the public health regime are likely to be contested as well, if not today then soon, as the consequences of public health policy's decoupling from traditional notions of sovereignty become more pronounced, and as the interests of states, NGOs, and intergovernmental officials begin to diverge.

28 HARV. ENVTL. L. REV. 1, 46-47 (2004) (discussing a dispute over the filing of amicus briefs before WTO dispute settlement panels and the Appellate Body).

20. See, e.g., *id.* at 46-47 (describing the backlash by developing countries to the Appellate Body's assertion of authority to receive amicus briefs); General Comments – Government Responses, *Observations on General Comment No. 24 (52), on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, United States of America*, CCPR A/50/40/Vol.1, Annex VI (1995) (stating that the Human Rights Committee does not have the power under the covenant to make binding interpretations), available at http://www.bayefsky.com/general/a_50_40_vol._i_1995.php (last visited Sept. 15, 2004).