

# Pathogen Sharing and International Law: The Search for Equity Under the Pandemic Treaty

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*On 19 July 2023, the British Institute of International and Comparative Law (BIICL) organised an event titled "[Pathogen Sharing and International Law: The Search for Equity Under the Pandemic Treaty](#)". The discussion was chaired by Dr Stephanie Switzer, University of Strathclyde. The panel speakers were Prof Gian Luca Burci, Geneva Graduate Institute, Prof Elisa Morgera, University of Strathclyde, One Ocean Hub, Dr Mark Eccleston-Turner, King's College London, Dr Michelle Rourke, Law Futures Centre, Griffith University and Prof John Harrington, Cardiff University. This blog post summarises the conversation and consolidates some key points covered in the event.*

World Health Organization (WHO) member states are currently negotiating a 'pandemic treaty' conceived in recognition of "[the catastrophic failure of the international community in showing solidarity and equity in response to the coronavirus disease \(COVID-19\) pandemic](#)". The negotiations represent a critical opportunity to place equity at the heart of future pandemic prevention, preparedness and response. They also have the potential to reframe the paradigm for global health governance more broadly.

Having acknowledged equity as a core objective of the pandemic treaty, the negotiators must now add flesh to bones. On 19 July 2023, **Mr Anthony Wenton** of the British Institute of International and Comparative Law convened a panel of leading international experts, chaired by Dr Stephanie Switzer, to discuss the questions which that exercise raises.

Opening the discussion, **Professor Gian Luca Burci** spoke about the background to the proposal for a pandemic treaty and the dynamics of the negotiations. He noted that the proposal for a treaty to address the weaknesses in the global health order brought to light by the Covid-19 pandemic had been driven by concerns relating to governance, financing, human rights safeguarding, the balance of public and private authority, the need for legal rules and equity. He acknowledged that parallel negotiations to reform the International Health Regulations (2005) (IHR) in response to the Covid-19 pandemic were also in progress, with a substantial overlap in subject matter.

Professor Burci explained that key issues in the negotiations to date had ranged from the 'One Health' approach of recognising the role of the environment in public health, through to alert systems, travel measures, the role of the WHO and genetic sequencing. Equity had been a central concern throughout all these discussions. Reflecting the complexity of defining equity as an operational concept, debate in this regard had focused on issues including the role of the environmental law concept of 'common but differentiated responsibilities', equitable access to counter-measures, pathogen sharing, financing and transfer of technology and manufacturing capacities.

With the target adoption date of May 2024 approaching, Professor Burci highlighted that open questions remain: what are the relative merits of the treaty and IHR as mechanisms for adapting the global health order? How can states navigate the functional and political limits of a WHO treaty to drive a multidimensional response involving other regimes and institutions with relevant competencies? Why is human rights language absent from the draft treaty and IHR and how should this be addressed? Can negotiating states reach a 'package deal' that accommodates their differing objectives? What will be the outcome of the negotiations in 2024 and beyond?

**Dr Michelle Rourke** spoke about pathogen sharing and the global infrastructure that supports it. She highlighted that as pathogens emerge and evolve, timely access to samples and genetic data enables detection of potential threats and swift development of counter-measures including vaccines. Infrastructure developed to support this includes the Global Influenza Surveillance and Response System (GISRS). Under this system, National Influenza Centres collect and analyse virus specimens and submit relevant samples to regional WHO Collaborating Centres for further analysis, the results of which form the basis of the WHO's annual recommendations on the composition of influenza vaccines.

Dr Rourke noted that the pre-cursor to the GISRS had become the subject of controversy when the Indonesian Minister of Health announced that Indonesia would cease sharing its H5N1 avian influenza samples under that system, highlighting that lower-income

countries were not being afforded fair access to vaccines and other counter-measures developed using their samples. These events contributed to the instigation of negotiations which created the Pandemic Influenza Preparedness (PIP) Framework in 2011, a pathogen-specific 'access and benefit sharing' (ABS) system.

Under the PIP Framework, states commit "*on an equal footing*" to provide access to influenza viruses of pandemic potential and to share in the benefits of such access. The PIP Framework operationalises this commitment through Standard Material Transfer Agreements governing transfers of biological materials within the GISRS and to external parties such as pharmaceutical companies, which inter alia bind external parties to share pandemic response products with the WHO for distribution during a pandemic. Dr Rourke noted that the effectiveness of the PIP Framework had not been tested in a major influenza pandemic and its limitations of scope meant that much pathogen sharing occurs outside its auspices. Nonetheless, she observed that negotiating states appeared to be contemplating incorporating an ABS mechanism based on the PIP Framework in the pandemic treaty.

**Dr Mark Eccleston-Turner** noted that by proposing to incorporate ABS in the pandemic treaty, states were seeking to resolve the issues with availability of pathogen samples and lower-income countries' access to counter-measures which had emerged during the Covid-19 pandemic by connecting them through a market mechanism.

He argued that ABS had long proved ineffective in delivering equitable outcomes in the fields of environmental law and public health law. Moreover, incorporating ABS in the pandemic treaty would introduce market dynamics to relations where they were likely to be counterproductive. From the perspective of access, multilateral ABS mechanisms were vulnerable to being undermined by bilateral ABS transactions, incentivising states to withhold samples with a view to achieving more advantageous terms bilaterally. From the perspective of benefits, the system was inadequate to displace the status quo whereby higher-income countries are able to dominate the global supply of counter-measures in a pandemic and would not guarantee that states reap benefits commensurate to their contributions in the event of public health need. Normatively, he highlighted that ABS requires states to sacrifice their sovereign resources to access counter-measures, rather than treating such access as a fundamental right.

He concluded by emphasising that the pandemic treaty negotiations presented an opportunity to reframe the conceptualisation of equity in public health to look beyond ABS and develop alternative solutions outside the paradigm of market mechanisms.

**Professor Elisa Morgera** spoke about the lessons that other areas of international law could hold for the pandemic treaty negotiations.

She drew a distinction between the flaws identified in ABS mechanisms and a broader notion of 'fair and equitable benefit sharing', which she suggested could be derived from the various areas of international law that employ benefit sharing concepts. She highlighted that key normative elements drawn from those areas could inform this notion, including promotion of the agency of beneficiaries, iterative dialogue, and emphasis on equity as necessary for the effectiveness of frameworks which seek to maximise international cooperation to achieve global benefits.

Based on her research into the conditions required for fair and equitable benefit sharing, Professor Morgera highlighted the importance of enhancing international collaboration through fair research partnerships to advance international objectives. In this context, she highlighted that engagement with the human right to science could helpfully inform future approaches to benefit sharing, in particular insofar as it demonstrates the need for technology co-development and mutual capacity building. She explained that her work as part of the One Ocean Hub had highlighted the importance of knowledge production to equip governments and other stakeholders to address challenges locally and at a multilateral level. Fair research partnerships had emerged as a key element of this.

Professor Morgera suggested that the experience of researchers contributing to other aspects of sustainable development could hold lessons for the pandemic treaty negotiations in that it highlighted the transformative nature of the change required to deliver the sustainable development agenda and of the governance required to drive it.

Concluding the discussion, **Professor John Harrington** highlighted colonialism as the key historical element that explains the inequalities between states which are inherent in the present global health order. He suggested that Covid-19 had precipitated a crisis of legitimacy for the global health order by exposing structural inequalities, and situated the present momentum towards global health reform within a broader context of calls for a more equitable 'new international economic order', a retreat from post-Cold War unipolarity and dynamics such as the decolonisation movement.

Professor Harrington identified equity, solidarity and sovereignty as the key values at play. He noted that the speakers had highlighted that the currency of ABS implied an impoverished, transactional view of equity. He identified solidarity, founded on the right to health and a focus on shared rights and interests, as counterposing this. And, noting that sovereignty was often viewed negatively as a barrier to cooperation, he drew attention to the potential positive aspects of states' ability to assert sovereignty where there exists an imbalance of power (though recognising the present limits of sovereignty in this context).

Together, the speakers' contributions highlighted the need for the pursuit of equity through the present negotiations to address structural inequalities embedded in the global health order. Resonating with this message, in the days following the discussion at a joint meeting of the bodies respectively responsible for the pandemic treaty negotiations and IHR amendments, the WHO Director-General urged delegates to "*make equity the driving force for change, with solidarity as the moral compass*". What course they set will be closely watched.

**Author:**

**Elissa Foord**

URL: <https://www.biicl.org/blog/70/pathogen-sharing-and-international-law-the-search-for-equity-under-the-pandemic-treaty>