

# **Reconceptualizing the International Health Regulations in the Wake of COVID-19: An Analysis of Formal Dispute Settlement Mechanisms and Global Health Diplomacy**

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Abstract:

The COVID-19 pandemic brought renewed attention to the International Health Regulations, a multilateral treaty to “prevent, protect against, control and provide a public health response to the international spread of disease.” But a historical review of the treaty reveals the true focus of the treaty has always been about avoiding economic restrictions during pandemics. This resulted in a State practice of widespread non-compliance with the treaty. Some have suggested the United States invoke the International Health Regulations’ legal dispute resolution mechanism against China in response to China’s role in the spread of COVID-19. Yet, since its inception, this mechanism has never been pursued. Why? This Article answers this question by walking through what an international lawsuit or arbitration by the United States against China would actually look like—and how it would fail. Likely appreciating this reality, State practice has made the International Health Regulations function more like a soft power tool than an instrument of hard law. This is not necessarily a bad thing, as diplomacy has upsides that formal legal settings do not. However, unchecked diplomatic tactics have increased geopolitical tensions between the United States and China at the expense of countries in the Global South’s ability to recover from the pandemic. In the conclusion of this Article, I suggest some solutions outside traditional treaty law that can help reach the ultimate goal of the International Health Regulations: an efficient global pandemic response system.

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## I. INTRODUCTION

On January 30, 2020, the Director-General of the World Health Organization (WHO) declared a novel coronavirus, COVID-19, a Public Health Emergency of International Concern (PHEIC).<sup>1</sup> The power to do so is derived from Article 12 of the International Health Regulations (IHR), a multilateral treaty designed to regulate State behavior in the face of a disease outbreak.<sup>2</sup> The IHR was most recently revised in 2005, but the framework for the treaty stems back to the International Sanitary Conferences of the 1800s.<sup>3</sup> The purpose of the IHR is to “prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic.”<sup>4</sup> Unfortunately, noncompliance has been an issue since the first iterations of the treaty, particularly with provisions requiring States to report to WHO information regarding PHEICs as well as any related travel and trade restrictions they plan to implement.<sup>5</sup> In addition, States have struggled to meet the IHR’s requirements to develop and maintain core public health capacities, which affects their ability to monitor and respond to PHEICs.<sup>6</sup> The COVID-19 pandemic was no exception. From the very start of the outbreak in late 2019, many States violated the IHR.<sup>7</sup> Since its onset, COVID-19 spread to 532.3 million people worldwide and caused 6.3 million deaths (as of June 2022).<sup>8</sup> In 2020, the global economy contracted three-and-a-half percent.<sup>9</sup>

In this Article, I argue that not only is the IHR legally insufficient to tackle PHEICs but that it has consequently been turned into a tool for soft power

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1 *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 30, 2020), [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) [https://perma.cc/JQY9-8HN5].

2 World Health Organization: Revision of the International Health Regulations art. 12, May 23, 2005, 44 I.L.M. 1013 [hereinafter IHR].

3 Norman Howard-Jones, *The Scientific Background of the International Sanitary Conferences 1851-1938*, 1 HIST. INT’L PUB. HEALTH 9 (1975).

4 IHR, *supra* note 2, art. 2.

5 *See infra* note 70 and accompanying text.

6 IHR, *supra* note 2, Annex 1A; Nirma Kandel, Stella Chungong, Abbas Omaar & Jun Xing, *Health Security Capacities in the Context of COVID-19 Outbreak: An Analysis of International Health Regulations Annual Report Data From 182 Countries*, 395 LANCET 1047, 1050-52 (2020).

7 *See infra* Part IV.C.

8 *COVID-19 Dashboard*, JOHNS HOPKINS U., <https://coronavirus.jhu.edu/map.html> [https://perma.cc/66EG-Z7LT].

9 Eduardo Levy Yeyati & Federico Filippini, *Social and Economic Impact of COVID-19*, at 1 (Brookings Inst., Working Paper No. 158, 2021).

diplomacy, which can undermine the IHR's objective. I will highlight the ineffectiveness of the IHR by exploring the multitude of barriers to successfully utilizing the legal dispute resolution mechanisms in the event of a breach of the treaty by a State. I further show how because the legal mechanisms are doomed to fail, States defer to soft power tactics instead. By juxtaposing the legal fiction with the political reality, I illustrate why the IHR needs to be reimaged. This Article will start with background information about the IHR, including the object and purpose, State practice since the adoption of the treaty, and instances where States have failed to perform their treaty duties. Second, this Article will discuss why recourse to international dispute settlement bodies is not a viable tool to increase the effectiveness of the IHR, exemplified by the hypothetical case against The People's Republic of China (China) regarding China's handling of COVID-19. I picked China as the hypothetical defendant as China is the most likely country of origin for the COVID-19 virus. In addition, China has been the central focus of international scrutiny surrounding COVID-19, especially by the United States. This Article will discuss theories of liability, and the difficulty of obtaining the appropriate venue, assessing remedies, and enforcing judgments under international law. Next, this Article will discuss the efficacy of informal dispute mechanisms such as diplomacy and how they have played out in the COVID-19 pandemic as well as in previous pandemics. I will conclude by discussing new approaches for achieving the goals of the IHR.

## II. HISTORY AND OVERVIEW OF THE IHR

Globalization on the heels of the Industrial Revolution brought increased concern for transmitting diseases across borders. At the same time, international law was beginning to take the shape it has today.<sup>10</sup> The nineteenth century brought about the beginnings of the intersection of international law and public health. Yet, another concern always loomed over this evolution of international health law and arguably had more influence on its formation than any other aspect: travel and trade. Walking through the history of the IHR, we see how economic concerns were always, at least implicitly, at the forefront of discussions. Additionally, the advent of new technologies, as well as increased international focus on the environment and human rights, led to major changes to the IHR in 2005. These changes affected the legal dispute resolution mechanisms in the treaty, rendering them less effective. But even before the 2005 changes, historical State practice in relation to the IHR showed rampant noncompliance. Fearing economic repercussions from admitting to disease outbreaks, States generally take actions

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10 Malcolm Shaw, *International Law*, in ENCYC. BRITANNICA, <https://www.britannica.com/topic/international-law/Historical-development> [<https://perma.cc/6AFD-VVES>].

guided by economic considerations before health or legal considerations. The result is that the IHR has been treated like a guidance tool for diplomacy rather than an instrument of hard law. This is most easily exemplified by the spike in tension between the United States and China following the spread of COVID-19. In this section, I will discuss the history of the IHR and how it has come to function today.

*A. The History of International Law and Public Health*

In the summer of 1851, twelve States convened in Paris for the first-ever International Sanitary Conference.<sup>11</sup> Attendance was almost exclusively European, but the goal was to reach an “international” consensus on quarantine regulations following an outbreak of cholera in India.<sup>12</sup> The conference was unsuccessful at achieving any tangible goals.<sup>13</sup> This failure was in large part due to the familiar and futile combination of politics and ignorance: diplomats and the physician-delegates that accompanied them were as strong-headed in their convictions as they were wrong.<sup>14</sup> The Austrian and British governments refused to discuss cholera at all, focusing only on yellow fever and the plague.<sup>15</sup> They incorrectly believed that cholera was an airborne disease originating from foul smells and filthy people, even though this theory was already debunked by England’s top doctor.<sup>16</sup>

Despite the failure of the first conference, States continued to meet on the issue of international disease control. The second through sixth International Sanitary Conferences were as unproductive as the first, with delegates continuing to contest the cause of cholera.<sup>17</sup> But though disagreements persisted, some common themes that would carry into the twentieth and twenty-first centuries

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<sup>11</sup> Howard-Jones, *supra* note 3, at 12.

<sup>12</sup> *Id.* at 9-11.

<sup>13</sup> *Id.* at 12.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> In 1849 Dr. John Snow postulated that the cholera outbreak in London originated from feces-contaminated drinking water. Snow, who at the time was the personal anesthetist to Queen Victoria, later became known as the “father of modern epidemiology.” *Id.*; Theodore H. Tulchinsky, *John Snow, Cholera, the Broad Street Pump; Waterborne Diseases Then and Now*, CASE STUDIES IN PUBLIC HEALTH 77, 80, 93 (2018).

<sup>17</sup> Howard-Jones, *supra* note 3, at 17-57; *Contagion: International Sanitary Conferences*, HARV. LIBR. CURIOSITY COLLECTIONS [hereinafter *Contagion*], <https://curiosity.lib.harvard.edu/contagion/feature/international-sanitary-conferences> [<https://perma.cc/WN5W-MQJN>].

emerged: concerns about how disease control would affect trade,<sup>18</sup> travel,<sup>19</sup> and State sovereignty.<sup>20</sup> For example, a central issue of the second through sixth conferences was the regulation of the Suez Canal following outbreaks of cholera among Mecca pilgrims.<sup>21</sup> The British government protested the proposed regulations, citing concerns that lengthy inspections of merchant ships would render the use of the canal “uneconomic.”<sup>22</sup> Additionally, requiring entire passenger ships to quarantine when there may be only one confirmed case of cholera was too restrictive on travelers.<sup>23</sup> Britain’s justification for wanting an exception was that it “d[id] not demand specially favourable treatment; but it wishe[d] that each country should act as it s[aw] fit in regard to its own ship.”<sup>24</sup> Though this sovereignty argument was likely a shroud for another reason Britain wanted unrestricted access to the Suez Canal,<sup>25</sup> it still begged the question posed by medical historian Norman Howard-Jones: “if every country were left free to make its own arrangement, what was the purpose of the international conference?”<sup>26</sup>

It was not until the seventh conference in 1892 that any significant result on international disease control was achieved.<sup>27</sup> States finally agreed on a treaty establishing sanitary and quarantine regulations for ships traveling westward on the Suez Canal that would later become incorporated into the International Sanitary Convention of 1903.<sup>28</sup> From a public health perspective, this treaty was a success: the signing parties unanimously agreed to include a provision that finally put to rest the persistent yet incorrect theory that cholera was an airborne disease.<sup>29</sup> But from an international relations perspective, the treaty was less laudable: it was only

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18 See, e.g., Howard-Jones, *supra* note 3, at 57.

19 See, e.g., *id.* at 28-30.

20 See, e.g., *id.* at 56.

21 *Id.* at 28-57.

22 *Id.* at 56-57.

23 *Id.*

24 *Id.* at 56.

25 At the time the British delegate made this statement to the sixth conference in 1885, the British Empire was in the fledgling years of its occupation of Egypt, including control over the Suez Canal, which gave Britain an advantage in its military and trade interests, as well as its interest in colonizing Africa. *Egypt: The Period of British Domination (1882-1952)*, in ENCYC. BRITANNICA, <https://www.britannica.com/place/Egypt/Renewed-European-intervention-1879-82#ref22393> [<https://perma.cc/79AN-UWX7>]; *Suez Canal*, HIST. (Mar. 30, 2021), <https://www.history.com/topics/africa/suez-canal> [<https://perma.cc/2QFA-NEQH>].

26 Howard-Jones, *supra* note 3, at 56.

27 *Contagion*, *supra* note 17.

28 Howard-Jones, *supra* note 3, at 64-65, 81.

29 *Id.* at 64 (“The germ of cholera is contained in the digestive tracts of patients; its transmission is effected principally by the dejections and vomited matter and, consequently, by linen, clothing, and soiled hands.”).

made with significant arm-bending of, and concessions to, the British Empire.<sup>30</sup> Nevertheless, conferences continued to be held, and Britain continued to participate in the makings of what would eventually become the international health system as we know it today. In 1907, at the urging of the French government, delegates began drafting statutes for the first-ever permanent international health office.<sup>31</sup> In 1909, the Office International d'Hygiène Publique (Office) opened its doors in France, where it remained until it was succeeded by the contemporary World Health Organization in 1948.<sup>32</sup>

WHO is a specialized agency of the United Nations (UN) tasked with the lofty objective of “the attainment by all peoples of the highest possible level of health.”<sup>33</sup> WHO is organized into three branches: the Secretariat, which is responsible for technical and administrative duties; the World Health Assembly (WHA), which is the main decision- and policy-making body; and the Executive Board, which executes WHA actions, advises the WHA on WHO matters, and has authority to take measures to combat health emergencies.<sup>34</sup> The WHO Constitution confers on the WHA the authority to make regulations concerning “sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease.”<sup>35</sup>

In 1951, just three years after its charter and 100 years after the first International Sanitary Conference, the WHA promulgated the International Sanitary Regulations (ISR).<sup>36</sup> The ISR revised and replaced the International Sanitary Convention of 1903 and consolidated other existing international health agreements.<sup>37</sup> Among the revisions were minor changes to definitions of relevant diseases and updated quarantine and vaccination protocols that reflected contemporary scientific consensus.<sup>38</sup> The legal changes, on the other hand, were

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30 *Id.* at 62-64 (“Austria-Hungary had also taken special measures to encourage the participation of an ever-reluctant Britain; in a letter of 27 November 1891 its ambassador in London had assured the British Prime Minister, the Marquis of Salisbury, that, as promised, his Government [which had initiated the conference] ‘would endeavour to exclude from discussions at the Conference everything that might seem unacceptable to English interests.’”).

31 *Id.* at 86.

32 *Id.* at 9, 86-87.

33 U.N. Charter art. 57; WHO, Basic Documents: Constitution of the World Health Organization, 48 WHO 7 (2014), [hereinafter WHO Constitution], <http://apps.who.int/gb/bd/PDF/bd48/basic-documents-48th-edition-en.pdf#page=7> [<https://perma.cc/7CCN-75HS>].

34 WHO Constitution, *supra* note 33, arts. 18(a)-(m), 19, 21, 28(a)-(i), 30.

35 *Id.* art. 21(a).

36 World Health Organization Regulations, A4/60 (2), at 2 (May 21, 1951).

37 *Id.*; Lawrence Gostin & Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Security*, 94 MILBANK Q. 264, 266 (2016).

38 *See, e.g., International Sanitary Regulations*, 257 LANCET 1163, 1163 (1951) (“Measures



more significant.<sup>39</sup> For one, only governments were allowed to be parties to the treaty, whereas the 1903 Convention also applied to autonomous health administrations.<sup>40</sup> In addition, the ISR had an eye toward flexibility and scientific advancement; it included a provision for continuous review and revision rather than repeal and replace.<sup>41</sup> Lastly, the ISR included a dispute-settlement mechanism should “[a]ny question or dispute concerning the interpretation or application of these Regulations or of any Regulations supplementary to these Regulations” arise.<sup>42</sup> In that event, the State concerned may refer the question or dispute to the Director-General of WHO.<sup>43</sup> Should the Director-General be unable to settle the dispute, it may, “by written application, be referred by any State concerned to the International Court of Justice for decision.”<sup>44</sup>

In 1969, the International Sanitary Regulations were changed in name to the International Health Regulations, but the substance of the treaty mostly remained the same.<sup>45</sup> Amendments were made again in 1973 and 1981 to change the provisions regarding cholera and exclude reference to smallpox, which had by then been declared eradicated.<sup>46</sup>

### *B. The Current Version of the International Health Regulations*

In 1995, global events led the WHA to consider revising the IHR for the first time since 1981.<sup>47</sup> Among other things, WHO recognized that the emergence of new international legal regimes for trade, environmental protection, and human rights—all of which intersected with international public health—needed to be reconciled with the IHR.<sup>48</sup> In addition, the rising threat of bioterrorism and new epidemics such as HIV/AIDs led WHO to realize that an exhaustive list of actionable diseases was ineffective at preventing novel outbreaks.<sup>49</sup> Yet, it was not until the 2003 outbreak of SARS that the WHA really kicked the revision process into gear. Finally, in 2005, the WHA completed the version of the IHR that is in

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against yellow fever remain largely unchanged, but there is now a clause that allows local areas which keep the aedes index below 1% to be excluded from the yellow fever endemic zone.”).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*; Howard-Jones, *supra* note 3, at 38 n.58, 56 (“The result of this curious provision was that Austria-Hungary had two votes—one for Austria and the other for Hungary.”).

<sup>41</sup> *International Sanitary Regulations*, *supra* note 38.

<sup>42</sup> World Health Organization Regulations, *supra* note 36, art. 112(1).

<sup>43</sup> *Id.* arts. 112(1), (3).

<sup>44</sup> *Id.*

<sup>45</sup> David P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4 CHINESE J. INT’L L. 325, 333 (2005).

<sup>46</sup> Max Hardiman & Annelies Wilder-Smith, *The Revised International Health Regulations and Their Relevance to Travel Medicine*, 14 J. TRAVEL MED. 141, 141 (2007).

<sup>47</sup> Fidler, *supra* note 45, at 340.

<sup>48</sup> *Id.* at 340-41.

<sup>49</sup> *Id.* at 338.

use today.<sup>50</sup>

The biggest change to the IHR was the shift from an exhaustive list of diseases to an “all-hazards” framework. An “all-hazards” approach represents a significant departure from the exhaustive list model by recognizing that though emergencies vary greatly in nature, they all put a similar strain on health systems, and thus health systems should be generally prepared for emergencies.<sup>51</sup> This, coupled with core capacity-building requirements, opened the door to broaden the IHR’s reporting requirements to include any event that may constitute a PHEIC rather than the specifically enumerated diseases.<sup>52</sup> But despite this substantive overhaul, the drafters maintained their commitment to the same concerns expressed in 1851: public health measures must be achieved in the least restrictive manner to travel and trade.<sup>53</sup> This, in turn, bore directly on the dispute resolution process.<sup>54</sup> With an exhaustive list of diseases, previous iterations of the treaty could include a detailed list of travel and trade restrictions States were allowed to implement in response to a disease outbreak.<sup>55</sup> It was therefore easy to identify when the treaty was violated in this regard. With the change to an “all-hazards” approach, however, including a detailed list of acceptable trade and travel restrictions became impractical if not impossible.<sup>56</sup> Thus, the drafters grappled with how to reconcile the “all-hazards” approach with the continued commitment to minimize travel and trade restrictions.<sup>57</sup>

A provisional draft in 1998 included a compulsory arbitration clause.<sup>58</sup> While compulsory arbitration could be applied to any dispute arising out of the IHR, the proposal was geared primarily toward addressing unwarranted travel and trade restrictions.<sup>59</sup> The drafters believed “WHO’s ability to gather non-governmental sources of surveillance information,” including from unofficial sources such as social media, would remedy failures to notify.<sup>60</sup> This proposal, however, was

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<sup>50</sup> *Id.* at 325-36.

<sup>51</sup> *European Programme of Work*, WORLD HEALTH ORG. EUR., <https://www.euro.who.int/en/health-topics/health-emergencies/from-disaster-preparedness-and-response/policy> [perma.cc/47PQ-AY7G].

<sup>52</sup> Gostin & Katz, *supra* note 37, at 267, 270; Fidler, *supra* note 45, at 350.

<sup>53</sup> Fidler, *supra* note 45, at 344; IHR, *supra* note 2, art. 2 (“The purpose and scope of these Regulations are to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”).

<sup>54</sup> Fidler, *supra* note 45, at 352.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 346, 350, 352.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 347 n.125 (“As WHO worked on and circulated the Provisional 1998 IHR Draft, the

quickly scrapped.<sup>61</sup> Instead, the final version of the 2005 IHR provides WHO with authority to issue temporary recommendations for appropriate travel and trade measures States may take in response to a PHEIC.<sup>62</sup> Compliance with these recommendations is completely voluntary and meant to be achieved by non-legal means, relying on a State's incentive to have a positive public image.<sup>63</sup> Thus, the final version of the formal dispute-settlement mechanism codifies its voluntariness and is framed as a last resort if informal means of negotiation and settlement fail.<sup>64</sup>

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Organization continued to build and use a new platform for global infectious disease surveillance and response. At the heart of this strategy was the Global Outbreak Alert and Response Network (GOARN), which WHO utilized to strengthen global surveillance of infectious disease events. Critical to the functioning of GOARN was WHO's access to sources of information beyond that received from governments. Well before the IHR's government-only information framework of the IHR had been changed, WHO started harnessing the revolution in information technologies for global public health purposes. WHO first informally established its global outbreak alert and response network in 1997 and then formalized the network in the form of GOARN in 2000.”).

61 *Id.* at 352.

62 *Id.* at 352-53.

63 *Frequently Asked Questions about the International Health Regulations (2005)*, WORLD HEALTH ORG. (2009), <https://web.archive.org/web/20220317112700/https://www.who.int/ihr/about/FAQ2009.pdf> [https://perma.cc/DBN9-T8HD] (“The IHR (2005) were agreed upon by consensus among WHO Member States as a balance between their sovereign rights and shared commitment to prevent the international spread of disease. Although the IHR (2005) do not include an enforcement mechanism per se for States which fail to comply with its provisions, the potential consequences of non-compliance are themselves a powerful compliance tool. Perhaps the best incentives for compliance are “peer pressure” and public knowledge. With today’s electronic media, nothing can be hidden for very long. States do not want to be isolated. The consequences of non-compliance may include a tarnished international image, increased morbidity/mortality of affected populations, unilateral travel and trade restrictions, economic and social disruption and public outrage. Working together with WHO to control a public health event and to accurately communicate how the problem is being addressed has helped to protect countries from unjustified measures being adopted unilaterally by other states.”).

64 IHR, *supra* note 2, art. 56(1)-(5) (“1. In the event of a dispute between two or more States Parties concerning the interpretation or application of these Regulations, the States Parties concerned shall seek in the first instance to settle the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation. Failure to reach agreement shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it. 2. In the event that the dispute is not settled by the means described under paragraph 1 of this Article, the States Parties concerned may agree to refer the dispute to the Director-General, who shall make every effort to settle it. 3. A State Party may at any time declare in writing to the Director-General that it accepts arbitration as compulsory with regard to all disputes concerning the interpretation or application of these Regulations to which it is a party or with regard to a specific dispute in relation to any other State Party accepting the same obligation. The arbitration shall be conducted in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States applicable at the time a request for arbitration is made. The States Parties that have agreed to accept arbitration as compulsory shall accept the arbitral award as binding and final. The Director-General shall inform the Health Assembly regarding such action as appropriate. 4. Nothing in these Regulations shall impair the rights of States Parties under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental

*C. The IHR in Practice*

Since the 2005 revisions, the IHR has at various times been subject to scrutiny for its ineffectiveness, particularly regarding noncompliance.<sup>65</sup> But to truly evaluate the success or failure of the IHR in practice, it must first be determined what it means for the IHR to function effectively. This requires examining the fine line between plausibility and practicality in an increasingly globalized and complicated world. As leading global health law scholar David P. Fidler so aptly put it, “[w]e cannot lawyer diseases out of human societies . . . .”<sup>66</sup> Thus, the most practical benchmark for measuring the effectiveness of the IHR is rather simplistic: is pandemic preparedness and response bettered by the existence of the IHR?

There are many factors that fall under this holistic benchmark. From an epidemiologic perspective, one could take any disease outbreak and calculate how many incidences of disease were prevented from prompt reporting or, conversely, how many incidences of disease could have been prevented if reporting happened sooner.<sup>67</sup> From an economic perspective, a country’s investment in disease surveillance and emergency preparedness could be compared. One may also look at social determinants of health such as unemployment caused by a pandemic or whether outbreak response measures are discriminatory.<sup>68</sup> Regardless, attributing any of these outcomes to the IHR necessitates first determining whether the outcomes were caused by compliance or noncompliance with the IHR’s legal requirements. Thus, the remainder of this Article will focus on compliance.

The IHR is legally binding on 196 States, making it one of the most-signed international legal documents.<sup>69</sup> But noncompliance, especially with reporting

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organizations or established under any international agreement. 5. In the event of a dispute between WHO and one or more States Parties concerning the interpretation or application of these Regulations, the matter shall be submitted to the Health Assembly.”).

<sup>65</sup> See, e.g., Andrea Spagnolo, *(Non) Compliance with the International Health Regulations of the WHO from the Perspective of the Law of International Responsibility*, 18 GLOB. JURIST 20170025 (2018).

<sup>66</sup> Fidler, *supra* note 45, at 392.

<sup>67</sup> See generally Wayne W. LaMorte, *Measures of Association: Attributable Proportion*, BOS. U. PUB. HEALTH (Mar. 19, 2018), [https://sphweb.bumc.bu.edu/otlt/mph-modules/ep/ep713\\_association/ep713\\_association6.html](https://sphweb.bumc.bu.edu/otlt/mph-modules/ep/ep713_association/ep713_association6.html) [<https://perma.cc/AT8J-45CL>].

<sup>68</sup> See generally *Social Determinants of Health*, WORLD HEALTH ORG., [https://www.who.int/health-topics/social-determinants-of-health#tab=tab\\_1](https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1) [<https://perma.cc/K2WF-PMTS>].

<sup>69</sup> *International Health Regulations*, WORLD HEALTH ORG., [https://www.who.int/health-topics/international-health-regulations#tab=tab\\_1](https://www.who.int/health-topics/international-health-regulations#tab=tab_1) [<https://perma.cc/H2GN-J4HC>]; see also *Most-Ratified International Treaties*, UN BLOGS (Sept. 24, 2012), <https://blogs.un.org/blog/2012/09/24/most-ratified-international-treaties> [<https://perma.cc/CAQ9-P8A5>].

duties, has been widespread since the first ISR.<sup>70</sup> This is largely because States appear to be more concerned with short-term economic loss than any other repercussion (including the spread of disease), and that fear has, in turn, led to increased noncompliance with obligations to report to WHO information regarding possible PHEICs within their country.<sup>71</sup> Specifically, States are worried that once information about an outbreak or potential outbreak becomes public, WHO may recommend that other States and the private sector make travel and trade restrictions against them, which could hurt their economy.<sup>72</sup>

Under Article 43 of the IHR, in the event of a disease outbreak, States may implement “additional health measures,” i.e., travel and trade restrictions, as long as these additional health measures are based on scientific principles and commensurate with WHO guidance.<sup>73</sup> Any measures that significantly interfere with international travel or trade must be reported to WHO within forty-eight hours of implementation, along with the State’s rationale for implementing such measures.<sup>74</sup> Historically, noncompliance with these obligations has been rampant.<sup>75</sup> For example, after the 1994 plague outbreak in India, unilateral travel and trade restrictions against India resulted in an estimated loss of \$2 billion USD, despite WHO advising against such restrictions.<sup>76</sup> During the 2009 H1N1 outbreak, twenty States adopted bans on pork imports from the United States, Canada, and Mexico despite WHO, the World Trade Organization (WTO), and other intergovernmental organizations’ advice that pork products did not transmit H1N1.<sup>77</sup> During the 2014-2016 Ebola outbreak, there were reports of 570 additional health measures by sixty-nine countries contrary to WHO recommendations.<sup>78</sup> Of these 570 additional measures, forty-one were deemed to have significantly interfered with international traffic.<sup>79</sup> This resulted in a combined estimated loss of \$2.8 billion to Guinea, Sierra Leone, and Liberia.<sup>80</sup> In all of these pandemics, a majority of the States implementing additional health measures did not comply with their IHR obligations to report such measures, nor

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70 Fidler, *supra* note 45, at 335; Gostin & Katz, *supra* note 37, at 279-80.

71 Gostin & Katz, *supra* note 37, at 279-80.

72 *Id.*

73 IHR, *supra* note 2, art. 43.

74 *Id.*

75 Roojin Habibi et al., *Do Not Violate the International Health Regulations During the COVID-19 Outbreak*, 395 LANCET 664 (2020); Steven Hoffman et al., *The Stellenbosch Consensus on Legal National Responses to Public Health Risks*, INT’L ORG. L. REV. (2020), <https://brill.com/view/journals/iolr/aop/article-10.1163-15723747-2020023/article-10.1163-15723747-2020023.xml?language=en> [https://perma.cc/4VET-V2VM].

76 Hoffman et al., *supra* note 75, at 34.

77 *Id.* at 36.

78 *Id.*

79 *Id.*

80 *Id.* at 37; Gostin & Katz, *supra* note 37.

did they comply with the requirement to provide WHO with the scientific rationale for each measure.<sup>81</sup>

Because of these very real and very devastating economic repercussions, States are incentivized to delay or withhold reporting until they can get the situation under control and prepare for the economic impact. This incentive to delay or withhold reporting is, in turn, exacerbated by the lack of enforcement by or repercussions from WHO.<sup>82</sup> In other words, since WHO has no power other than to make recommendations, offer technical and logistical assistance (which is discretionary and can easily be solicited from other sources), and shame violators in press releases, States have little if anything to lose by not complying with *any* of the regulations.<sup>83</sup> In addition, the dispute-settlement mechanism remains voluntary.<sup>84</sup> In fact, as of 2016, WHO reported that the Article 56 dispute-settlement mechanism had never been invoked.<sup>85</sup> Therefore, it can be inferred that non-compliance is, at least in part, driven by a status quo of States unwilling to hold other States accountable for violations.

#### *D. Legacy and Criticism*

In 1979, Louis Henkin asserted that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>86</sup> More than forty years later, global health experts point out that “it appears that most states remain in compliance with the IHR most of the time,”<sup>87</sup> lamenting that attention is mostly paid to violators rather than to compliers.<sup>88</sup> But when it comes to such a fundamental part of existence as health, attention *should* be paid to non-compliance because, as we have seen, the provisions that are not complied with are severely consequential to health and well-being. The problem with the IHR, however, is that it is, as it always has been, less about health than about economics and sovereignty. Reporting on the seventh International Sanitary Conference in 1892, the *Lancet* noted that “[s]o many incidental interests are involved in anything relating to the Suez Canal that science can hardly be expected

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<sup>81</sup> *Id.*

<sup>82</sup> Fidler, *supra* note 45, at 390.

<sup>83</sup> IHR, *supra* note 2.

<sup>84</sup> *Id.* art. 56.

<sup>85</sup> WHO, Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response, A69/21 (13 May 2016), 37 ¶ 83 [hereinafter WHO Report].

<sup>86</sup> LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted).

<sup>87</sup> Hoffman et al., *supra* note 75.

<sup>88</sup> *Id.*

to find itself paramount in any conclusions that may be arrived at.”<sup>89</sup> The same can certainly be said about the competitive medical diplomacy surrounding the Panama Canal today.

Overall, the 2005 revisions to the IHR took one step forward and two steps back. One major addition to the 2005 IHR was the requirement that States implement thirteen domestic core capacities for emergency preparedness and response, such as disease surveillance systems, risk communication, and IHR coordination.<sup>90</sup> As of 2018, annual scorecards show that global progress was made in all thirteen capacities, though significant disparities persist in poor countries with weak health systems.<sup>91</sup> In addition, changing the applicability of the IHR from an exhaustive list of diseases to an all-hazards approach led six disease outbreaks that were previously not actionable to be declared as PHEICs (H1N1, poliovirus, Ebola twice, Zika, and COVID-19).<sup>92</sup> Declaration of these disease outbreaks as PHEICs led to streamlined approaches for funding and “development of therapeutics, vaccines and/or diagnostics under emergency use authorization.”<sup>93</sup>

However, the switch to the all-hazards approach has arguably created more harm than good. In making this landmark change, the drafters of the 2005 IHR scrapped the idea of compulsory dispute settlement because it was impossible to codify every potential instance of non-compliance for a non-exhaustive list of health hazards.<sup>94</sup> They also believed that the nonreporting of PHEICs took care of itself with WHO’s increased surveillance ability in light of technological advancements.<sup>95</sup> They believed a State’s concern for its reputation would be enough to deter it from violating the IHR.<sup>96</sup> Unfortunately, this turned out not to be the case. Instead, States are much more concerned with avoiding economic repercussions than anything else, which has led to delayed reporting.<sup>97</sup> In the case of COVID-19, this problem was not rectified by WHO’s own surveillance since it did not learn of anything going on in China until weeks after the first cluster of patients was identified.<sup>98</sup> In addition, WHO’s surveillance system is, at its best,

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89 Howard-Jones, *supra* note 3, at 63.

90 IHR, *supra* note 2, Annex 1; *IHR Core Capacities*, WORLD HEALTH ORG., <https://www.euro.who.int/en/health-topics/health-emergencies/international-health-regulations/capacity-building/ihr-core-capacities> [<https://perma.cc/7MCE-WEV3>].

91 Director-General, *Public Health Emergencies: Preparedness and Response: Annual Report on the Implementation of the International Health Regulations (2005)*, ¶ 35, World Health Org. Doc. A72/8 (Apr. 4, 2019).

92 Annelies Wilder-Smith & Sarah Osman, *Public Health Emergencies of International Concern: A Historic Overview*, 27 J. TRAVEL MED. 1, 3 (2020).

93 *Id.* at 10.

94 See *supra* notes 53-60 and accompanying text.

95 See *supra* notes 53-60 and accompanying text.

96 See *supra* notes 53-60 and accompanying text.

97 See *supra* pp. 10-11.

98 See *supra* Section II.A.

only as good as the information available. If a State suppresses or censors official and unofficial information at the beginning of an outbreak, as it is alleged China did, then relying on WHO surveillance instead of State reporting is useless. Furthermore, even if WHO does learn of an outbreak through its surveillance system, it is still at the mercy of a State to be forthcoming with information and allow it to come into the country to investigate.

The real legacy of the 2005 IHR is not a system where reputational concern deters noncompliance but rather where noncompliance (delayed reporting) begets noncompliance (travel and trade restrictions) with impunity. This document that was meant to be hard law is instead treated like a soft law instrument where States can pick and choose which aspects they comply with and which they do not. It is clear from State practice that some, such as the United States and China, follow an “act now and apologize later” approach where they continuously violate the IHR when it is advantageous and then employ similarly advantageous damage control diplomacy tactics. The result of this is unchecked competition between the United States and China that has been likened to Cold War geopolitics.<sup>99</sup> The problem is that in this game, the losers are not the United States or China—they are the poor countries whose health and economic well-being are often at the mercy of and most affected by the actions of wealthier countries.

### III. THE UNITED STATES VS. CHINA

The outbreak of COVID-19, which most likely originated in China, came at an interesting time for international law and policy scholars, as the United States’ approach to U.S.-China relations was undergoing one of its most drastic shifts in history.<sup>100</sup> Specifically, the Trump Administration sought to break the historically cooperative approach to U.S.-China relations in pursuit of more aggressive actions.<sup>101</sup> Dubbed “America first,” the Trump Administration’s policy was particularly concerned with pushing back on problematic Chinese behavior and advancing U.S. interests in technology, investment, and trade.<sup>102</sup>

The emergence of COVID-19 from China gave the Trump Administration a golden opportunity to criticize China in front of an international audience.<sup>103</sup> And

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<sup>99</sup> See *infra* Section IV.C.3.

<sup>100</sup> David Dollar, Ryan Hess & Jeffrey A. Bader, *Assessing U.S.-China Relations 2 Years into the Trump Presidency*, BROOKINGS (Jan. 15, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/01/15/assessing-u-s-china-relations-2-years-into-the-trump-presidency> [<https://perma.cc/7DDV-XARR>].

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See Scott Neuman, *In U.N. Speech, Trump Blasts China and WHO, Blaming Them For Spread of COVID-19*, NAT’L PUB. RADIO (Sept. 22, 2020),



though many of his speeches were mired in lies, nationalism, and racist overtones, Trump did manage to call attention to the fact that China likely did not comply with the IHR for various reasons.<sup>104</sup> For the first time ever, a State was now attempting to hold another State responsible for potential malfeasance in a pandemic.<sup>105</sup> By spring 2020, lawsuits against the Chinese government began trickling into U.S. courts.<sup>106</sup> These lawsuits included national class actions filed in U.S. district courts, state-specific class actions filed in U.S. state courts, lawsuits filed by states themselves, and lawsuits filed by individuals.<sup>107</sup> While most cases allege China failed to notify WHO of a PHEIC in a timely manner and subsequently withheld information,<sup>108</sup> only some of the lawsuits mention the IHR specifically.<sup>109</sup> Just one lawsuit (which was voluntarily dismissed) included a specific count for “negligence per se for violation of the IHR legally binding mandates.”<sup>110</sup>

Many of these U.S.-based lawsuits have already been dismissed, and the filing itself has been sharply criticized as political posturing by the Republican party.<sup>111</sup> One major problem with these suits is that China enjoys sovereign immunity in U.S. courts.<sup>112</sup> The irony, however, is that the call for lawsuits against China, heavily led by the party historically against global governance,<sup>113</sup> brought renewed

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<https://www.npr.org/sections/coronavirus-live-updates/2020/09/22/915630892/in-u-n-speech-trump-blasts-china-and-who-blaming-them-for-spread-of-covid-19> [https://perma.cc/564B-3J5K].

<sup>104</sup> *Id.*; see also *China Delayed Releasing Coronavirus Info, Frustrating WHO*, AP NEWS (June 2, 2020), <https://apnews.com/article/united-nations-china-public-health-only-on-ap-virus-outbreak-fed0f89a3b46cfa401e62ce7386f0cfb> [perma.cc/8E3K-RBQ3]; STEPHEN MULLIGAN, CONG. RSCH. SERV., LSB10525, CAN THE UNITED STATES SUE CHINA OVER COVID-19 IN AN INTERNATIONAL COURT? (2020).

<sup>105</sup> Sienho Yee, *To Deal with a New Coronavirus Pandemic: Making Sense of the Lack of Any State Practice in Pursuing State Responsibility for Alleged Malfeasances in a Pandemic-Lex Specialis or Lex Generalis at Work?*, 19 CHINESE J. INT’L L. 237 (2020).

<sup>106</sup> Sean Mirski & Shira Anderson, *What’s in the Many Coronavirus-Related Lawsuits Against China?*, LAWFARE (June 24, 2020), <https://www.lawfareblog.com/whats-many-coronavirus-related-lawsuits-against-china> [https://perma.cc/Z9XS-RSQQ].

<sup>107</sup> *Id.*

<sup>108</sup> See, e.g., *Patella v. People’s Republic of China*, No. 1:20-cv-433 (M.D.N.C. May 15, 2020); *Missouri v. People’s Republic of China*, No. 1:20-cv-99, (E.D. Mo. Apr. 21, 2020); *Mississippi v. People’s Republic of China*, No. 1:20-cv0168 (S.D. Miss. May 12, 2020).

<sup>109</sup> See, e.g., *Patella v. People’s Republic of China*, No. 1:20-cv-433 (M.D.N.C. May 15, 2020).

<sup>110</sup> Amended Complaint Count IV, *Bella Vista LLC v. People’s Republic of China*, No. 2:20-cv-574 (D. Nev. June 5, 2020).

<sup>111</sup> Jan Wolfe, *In a First, Missouri Sues China over Coronavirus Economic Losses*, REUTERS (Apr. 21, 2020), <https://www.reuters.com/article/us-health-coronavirus-china-lawsuit/in-a-first-missouri-sues-china-over-coronavirus-economic-losses-idUSKCN2232US> [https://perma.cc/LYM4-YVMS].

<sup>112</sup> *Id.*

<sup>113</sup> Colin Dueck, *Republican Party Foreign Policy: 2016 and Beyond*, FOREIGN POL’Y RSCH. INST. (July 22, 2016), <https://www.fpri.org/article/2016/07/republican-party-foreign-policy-2016-beyond> [https://perma.cc/83YJ-PCW5].

attention to the formal Article 56 dispute-settlement mechanisms of the IHR. Subsequently, Congressmembers, international law scholars, and practitioners alike began discussing whether there *are* viable legal options to hold China accountable for its IHR violations.<sup>114</sup> While many inquiries focus solely on U.S.-based lawsuits, others have considered the international-based dispute settlement possibilities that are actually envisioned by Article 56.<sup>115</sup> What would an Article 56 adjudication look like? What are plausible theories of liability? Where can the case be adjudicated? Could China *actually* be made to pay? The following section will attempt to answer these questions by walking through a hypothetical case against China by the United States.<sup>116</sup> This, in turn, will help evaluate whether an Article 56 adjudication could be used in the future as an effective IHR compliance tool.

The calls for legal accountability for China's handling of COVID-19 have stirred renewed discussion about the Article 56 dispute-settlement mechanisms of the IHR as a compliance tool. But because Article 56 has never been invoked, there is no precedent for how a dispute may unfold. As such, there are several considerations involved in a State bringing an international adjudication that need to be contemplated, and each poses difficulties for the complainant. This is because an international adjudication is not just a function of pure law but of geopolitical considerations weighed by States. The first consideration is having a valid reason to sue or a theory of legal liability. In the case against China for its handling of COVID-19, this is the easiest hurdle to pass as a good argument can be made that China did not comply with its reporting duties and was not forthcoming with necessary information. From there, however, the likelihood of seeing an adjudication through to the end diminishes. The second consideration is to find a proper venue that will accept jurisdiction over the claim and the defendant (and, as will be discussed, that the defendant will accept the jurisdiction of). Here, China may easily refuse to show up to court. The next consideration is what type of remedy would achieve the goal of the lawsuit, which in this case would be to hold China fiscally accountable for potential IHR violations and ensure future compliance. However, these types of remedies are rarely awarded. Lastly, should an award be made in the complaining party's favor, the award would either need to be voluntarily complied with or enforced, neither of which is likely. The following section will address each of these considerations in more detail, starting with liability.

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<sup>114</sup> Yee, *supra* note 105, at 238.

<sup>115</sup> MULLIGAN, *supra* note 104.

<sup>116</sup> It is important to note that the United States's official understanding is that the IHR does not create privately enforceable judicial rights. IHR, *supra* note 2, Appendix 2.

### A. *Theory of Liability*

The prevailing theory of liability is that China violated Articles 6 and 7 of the IHR in its handling of COVID-19.<sup>117</sup> Articles 6 and 7 prescribe the notification and information-sharing procedures when a State suspects an event within its territory that may lead to a PHEIC.<sup>118</sup> Under Article 6, a State is responsible for assessing when an event is notifiable using a decision instrument (Annex 2).<sup>119</sup> In general, the decision-making criteria are broad and suggest that States should be over-inclusive in their reporting. Should an event be deemed notifiable under Annex 2 criteria, the State must then notify WHO within twenty-four hours.<sup>120</sup> Following notification, the State must continue to keep WHO apprised by continuing

to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event, where possible including case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed; and report, when necessary, the difficulties faced and support needed in responding to the potential [PHEIC].<sup>121</sup>

Similarly, Article 7 requires States to notify WHO of “all relevant public health information” if the State has “evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a [PHEIC].”<sup>122</sup> In the event a State is in possession of such evidence, the provisions of Article 6, including reporting within twenty-four hours, apply.<sup>123</sup>

#### 1. *Failure to Notify*

The timeline of what China knew about COVID-19 and when they knew it is complicated and, for some events, remains unclear.<sup>124</sup> This makes it difficult to determine the exact date China’s Article 6 or 7 notification duties would be triggered, but based on public information, a window can be determined. A conservative date to trigger Article 6 and 7 duties would be in the time range between December 27–31, 2019. On December 24, 2019, after clusters of patients

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<sup>117</sup> See, e.g., MULLIGAN, *supra* note 104.

<sup>118</sup> IHR, *supra* note 2, arts. 6-7.

<sup>119</sup> *Id.* art. 6(1), Annex 2.

<sup>120</sup> *Id.* art. 6(1).

<sup>121</sup> *Id.* art. 6(2).

<sup>122</sup> *Id.* art. 7.

<sup>123</sup> *Id.*

<sup>124</sup> SUSAN V. LAWRENCE, CONG. RSCH. SERV., R46354, COVID-19 AND CHINA: A CHRONOLOGY OF EVENTS (DECEMBER 2019-JANUARY 2020), at 13 (2020).

with pneumonia-like symptoms were identified in Wuhan, China, Wuhan Central Hospital sent a genomics company, Vision Medicals, a fluid sample from an ill patient.<sup>125</sup> Three days later, Vision Medicals reported back to the hospital that the sample was “a new coronavirus.”<sup>126</sup> That same day, Wuhan Central Hospital sent a sample from another patient with pneumonia-like symptoms to a different laboratory, CapitalBio Medlab.<sup>127</sup> On December 30, 2019, CapitalBio reported that the sample tested positive for Severe Acute Respiratory Disease (SARS).<sup>128</sup> By then, Wuhan-based doctors had already confirmed seven other local cases of SARS (which would later be re-classified as COVID-19), and the Wuhan Municipal Health Commission was made aware of these cases.<sup>129</sup> Annex 2 does not specifically name coronaviruses in its list of reportable diseases, but the fact that other clusters of patients were already hospitalized for similar unknown illnesses may have fallen under Annex 2’s catch-all category and triggered Article 7 duties on December 27. In addition, SARS is an immediately reportable disease under Annex 2, so it can also be argued that China’s Article 6 and 7 duties were triggered when the Wuhan Municipal Health Commission was made aware of confirmed SARS cases on December 30, 2019.<sup>130</sup>

For its part, the Wuhan Municipal Health Commission reported these cases to China’s National Health Commission and the China CDC in Beijing within twenty-four hours.<sup>131</sup> This is important because, under the IHR, China designated its National Health Commission as the National Focal Point in charge of communicating with WHO.<sup>132</sup> Thus, it may also be argued that China’s Article 6 and 7 duties were triggered on December 31, 2019. For the sake of an actual

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 15.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 16.

<sup>129</sup> *Id.* at 15-16.

<sup>130</sup> Under the IHR, China designated its “local health administrative authorities [as] the health authorities responsible for the implementation of the IHR in their respective jurisdictions.” The Wuhan Municipal Health Commission would fall under this category and thus be responsible for IHR duties. IHR, *supra* note 2, at 62, Annex 2.

<sup>131</sup> LAWRENCE, *supra* note 124, at 17.

<sup>132</sup> China’s declaration in the 2005 IHR names the Ministry of Health as its National Focal Point. In 2013, the Ministry of Health was merged into the National Health and Family Planning Commission, and in 2018 was reorganized into the National Health Commission. IHR, *supra* note 2, at 62, art. 4; Deng Shasha, *China to Merge Health Ministry, Family Planning Commission*, XINHUANET (Mar. 10, 2013), [https://web.archive.org/web/20130313112946/http://news.xinhuanet.com/english/china/2013-03/10/c\\_132221724.htm](https://web.archive.org/web/20130313112946/http://news.xinhuanet.com/english/china/2013-03/10/c_132221724.htm) [perma.cc/NM5K-SPLX]; Hai Fang, *China*, COMMONWEALTH FUND (June 5, 2020), <https://www.commonwealthfund.org/international-health-policy-center/countries/china> [https://perma.cc/RSY5-PK47].

adjudication, however, the difference between December 27 and December 31 is moot. The Chinese National Health Commission (or any other Chinese entity) did not alert WHO of any information it had within twenty-four hours of December 31.<sup>133</sup>

## 2. Failure to Share Information

Another theory of liability stems from China's unwillingness to share information with WHO at the beginning of 2020. On December 31, 2019, WHO learned of the outbreak in Wuhan, China—but not from Chinese health authorities.<sup>134</sup> Instead, WHO picked up a post on a U.S. listserv, ProMED, which contained a translation of two “urgent notices” sent by the Wuhan Municipal Health Commission to local medical institutions “instructing them on how to manage patients with pneumonia of unknown cause and ordering them to track such cases and report them in a timely fashion to district CDCs and the Wuhan Municipal Health Commission.”<sup>135</sup> WHO was also notified directly of the situation in Wuhan by Taiwan's CDC, which asked WHO to share any relevant information it may have.<sup>136</sup>

Learning this information on December 31, 2019 triggered IHR duties for WHO itself.<sup>137</sup> Under Article 9, WHO may take into consideration and assess evidence of PHEICs from sources other than Article 6 and 7 notifications.<sup>138</sup> After receiving this information, WHO may request verification from the State about which such reports are made pursuant to Article 10.<sup>139</sup> The requestee State must

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<sup>133</sup> LAWRENCE, *supra* note 124, at 19.

<sup>134</sup> *Id.* at 18-19.

<sup>135</sup> *Id.* at 16-18.

<sup>136</sup> *Id.* at 18 (“Taiwan’s Centers for Disease Control sends an email to WHO. It reads, ‘News resources today indicate that at least seven atypical pneumonia cases were reported in Wuhan, CHINA. Their health authorities replied to the media that the cases were believed not SARS; however the samples are still under examination, and cases have been isolated for treatment. I would greatly appreciate if you have relevant information to share with us.’ Taiwan’s Central Epidemic Command Center later notes, ‘To be prudent, in the email we took pains to refer to atypical pneumonia, and specifically noted that patients had been isolated for treatment. Public health professionals could discern from this wording that there was a real possibility of human-to-human transmission of the disease.’”) (citations omitted).

<sup>137</sup> *Id.* at 19.

<sup>138</sup> As an aside, some Republican leaders believe WHO violated its duties under Articles 9-11 to share information with other State parties once it received information from ProMED and Taiwan. However, the legal considerations to hold WHO accountable are different than holding China accountable and are therefore outside the scope of this paper. IHR, *supra* note 2, arts. 9-11; Kevin McCarthy, *Holding China Accountable: A Republican Call to Action & Roadmap for Covid-19 Accountability*, REPUBLICAN LEADER (June 21, 2021), <https://www.republicanleader.gov/holding-china-accountable> [https://perma.cc/4XX8-4DM9].

<sup>139</sup> IHR, *supra* note 2, art. 10.

respond to WHO's Article 10 request within twenty-four hours.<sup>140</sup> WHO sent their Article 10 request to the Chinese government on January 1, 2020.<sup>141</sup> China, however, did not respond to WHO's request until January 3, 2020, thereby violating Article 10.<sup>142</sup>

China not only failed to respond to WHO's Article 10 request within twenty-four hours, but whistleblowers have accused Chinese authorities of suppressing information and destroying evidence in the early stages of the outbreak.<sup>143</sup> Perhaps one of the most famous whistleblowers was Dr. Li Wenliang, an ophthalmologist at Wuhan Central Hospital, who, on December 30, 2019, posted on social media about "7 confirmed SARS cases from the Huanan Fruit and Seafood Market."<sup>144</sup> On January 3, 2020, Dr. Li was detained by Wuhan's Public Security Bureau and made to sign a letter of admonition saying that statements he made on social media were false.<sup>145</sup> He was also ordered to stop talking or face legal consequences.<sup>146</sup> Government-run agencies such as the Wuhan Municipal Public Security Bureau, Wuhan Municipal Health Commission, and Chinese Central Television subsequently made public statements claiming reports by whistleblowers such as Dr. Li were "inaccurate" "rumors" spread by "lawbreakers."<sup>147</sup> The agencies also made public statements that there was no evidence of human-to-human transmission or cases among health workers, both of which were later proven to be untrue at the time they were made.<sup>148</sup> This failure to share information in a timely manner, especially after specifically requested, further violates Articles 6 and 7.<sup>149</sup>

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140 *Id.* art. 10(2).

141 LAWRENCE, *supra* note 124, at 19.

142 *Listing of WHO's Response to COVID-19*, WORLD HEALTH ORG. (June 29, 2020), <https://www.who.int/news/item/29-06-2020-covidtimeline> [<https://perma.cc/Z5GK-VDYX>].

143 LAWRENCE, *supra* note 124, at 19, 21 (citing Gao Yu et al., *In Depth: How Early Signs of a SARS-Like Virus Were Spotted, Spread, and Throttled*, CAIXIN GLOBAL (Feb. 29, 2020), <https://caixinglobal.com/2020-02-29/in-depth-how-early-signs-of-a-sars-like-virus-were-spotted-spread-and-throttled-101521745.html> [<https://perma.cc/BL7K-JZ4P>]) ("The Hubei Provincial Health Commission reportedly orders genomics companies to stop testing samples from Wuhan and to destroy existing samples . . . China's National Health Commission issues a directive on management of biological samples in major infectious disease outbreaks. The directive reportedly 'ordered institutions not to publish any information related to the unknown disease, and ordered labs to transfer any samples they had to designated testing institutions, or to destroy them.'"); AP NEWS, *supra* note 104 ("China in fact sat on releasing the genetic map, or genome, of the virus for more than a week after three different government labs had fully decoded the information.").

144 LAWRENCE, *supra* note 124, at 16.

145 *Id.* at 20; Andrew Green, *Li Wenliang*, 395 LANCET P682 (2020).

146 Green, *supra* note 145, at P682.

147 LAWRENCE, *supra* note 124, at 19.

148 *Id.* at 24-28.

149 MULLIGAN, *supra* note 104, at 2-3.

Finally, it has also been argued that this withholding of information violates Articles 63 and 64 of the WHO Constitution.<sup>150</sup> Article 63 states that “[e]ach Member [of WHO] shall communicate promptly to [WHO] important laws, regulations, official reports, and statistics pertaining to health which have been published in the state concerned.”<sup>151</sup> Article 64 states that “[e]ach Member [of WHO] shall provide statistical and epidemiological reports in a manner to be determined by the Health Assembly [WHA].”<sup>152</sup> Since the WHA promulgated the IHR as a manner to share statistical and epidemiological information about PHEICs, it can be argued that a violation of Articles 6 and 7 of the IHR is linked to a violation of Article 64 of the WHO Constitution.<sup>153</sup> In the same vein, Article 22 of the WHO Constitution enforces upon all members any regulations promulgated by the WHA, such as the IHR.<sup>154</sup>

### 3. Liability Defenses

China denies any wrongdoing in its handling of COVID-19, calling the suggestion that it delayed information sharing “totally untrue.”<sup>155</sup> In addition, in a July 6, 2020, press conference, Chinese foreign ministry spokesperson Zhao Lijian seemed to assert that China satisfied its Article 6 reporting duties on December 31, 2019, when the Wuhan Municipal Health Commission posted on its website about its investigation into twenty-seven cases of pneumonia.<sup>156</sup> However, this defense is very clearly at odds with the text of Article 6, which specifies that WHO must be informed “by way of the National IHR Focal Point.”<sup>157</sup> Furthermore, raising this defense in an adjudication would inherently concede that WHO *should* have been notified by December 31, 2019, instead of the official notification date of January 3, 2020.

Instead, a more legitimate defense for China may be to dispute the timeline and argue that its reporting duties were not triggered until the Chinese CDC (as

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<sup>150</sup> *Id.*

<sup>151</sup> WHO Constitution, *supra* note 33, art. 63.

<sup>152</sup> *Id.* art. 64.

<sup>153</sup> MULLIGAN, *supra* note 104, at 2-3.

<sup>154</sup> WHO Constitution, *supra* note 33, art. 21-22.

<sup>155</sup> Cate Cadell, *China Rejects Report that it Delayed COVID-19 Information Sharing with WHO*, REUTERS (June 3, 2020, 3:48 AM), <https://www.reuters.com/article/us-health-coronavirus-china-who/china-rejects-report-that-it-delayed-covid-19-information-sharing-with-who-idUSKBN23A0YM> [<https://perma.cc/YNE4-ZJ3N>].

<sup>156</sup> See Foreign Ministry Spokesperson Zhao Lijian’s Regular Press Conference on July 6, 2020, MINISTRY OF FOREIGN AFFS. CHINA (July 6, 2020), <https://www.mfa.gov.cn/ce/ceus/eng/fyrth/t1795337.htm> [<https://perma.cc/VY68-9MXC>]; *Timeline of China Releasing Information on COVID-19 and Advancing International Cooperation*, NAT’L HEALTH COMM’N PEOPLE’S REPUBLIC OF CHINA (Apr. 6, 2020), [http://en.nhc.gov.cn/2020-04/06/c\\_78861\\_2.htm](http://en.nhc.gov.cn/2020-04/06/c_78861_2.htm) [<https://perma.cc/2R94-4BBY>].

<sup>157</sup> IHR, *supra* note 2, art. 6.

opposed to a private lab) completed the genome sequence for COVID-19. This, in turn, would give China room to argue why, under Annex 2, it did not believe it needed to report to WHO until the genome was fully sequenced. After all, the initial lab results concluding that COVID-19 was a SARS virus and not a novel coronavirus turned out to be incorrect.<sup>158</sup> And while there are conflicting reports on whether the Chinese CDC had sequenced the virus on January 3 or January 7, that factual dispute would not need to be resolved as China did report to WHO by January 4.<sup>159</sup> The question for the adjudicators to decide then would be whether it mattered that the initial reports that concluded the outbreak was caused by SARS, and thus immediately reportable, were ultimately incorrect and not yet verified by a government lab.

Unfortunately for China, even if this defense—which is likely its best<sup>160</sup>—was viable, it still does not address nor absolve liability for continuing to withhold and suppress information once WHO was involved.<sup>161</sup> Thus, there is a strong incentive for China to avoid litigating these claims. Consequently, this brings up the question of jurisdiction—is there a dispute settlement body that *could* make China litigate?

### *B. Jurisdiction and Venue*

As discussed, the IHR does not have a compulsory dispute-settlement

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158 Zaheer Allam, *The First 50 Days of COVID-19: A Detailed Chronological Timeline and Extensive Review of Literature Documenting the Pandemic*, ELSEVIER PUB. HEALTH EMERGENCY COLLECTION (July 24, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7378494> [https://perma.cc/DQ9H-RF88].

159 Compare AP NEWS, *supra* note 104, and LAWRENCE, *supra* note 124, at 21, with Chen Wang, Peter W Horby, Frederick G Hayden & George F Gao, *A Novel Coronavirus Outbreak of Global Health Concern*, 395 LANCET P470 (2020), and *Novel Coronavirus (2019-nCov) Situation Report*, WORLD HEALTH ORG. (Jan. 21, 2020), <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf> [https://perma.cc/9NN9-VK5L].

160 China could also argue that the December 31, 2019 notification to WHO by Taiwan counted as its own notification because of China's assertion that Taiwan is a part of China. However, Taiwan's status internationally is still ambiguous and China would likely not want an international tribunal to rule on territory claims after recently being dealt a blow by the Permanent Court of Arbitration regarding its maritime claims in the South China Sea, so it would not subject itself to that consideration by raising that defense. See Robert D. Williams, *Tribunal Issues Landmark Ruling in South China Sea Arbitration*, LAWFARE (July 12, 2016, 11:28 AM), <https://www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration> [https://perma.cc/TNW8-Z4VW].

161 Emily Feng, *Critics Say China has Suppressed and Censored Information in Coronavirus Outbreak*, NAT'L PUB. RADIO (Feb. 8, 2020, 9:00 AM), <https://www.npr.org/sections/goatsandsoda/2020/02/08/803766743/critics-say-china-has-suppressed-and-censored-information-in-coronavirus-outbreak> [https://perma.cc/3Q33-RJQV].



mechanism.<sup>162</sup> Instead, the current iteration contains four provisions for disputing States, though the voluntary nature of all four provisions function more like suggestions than prescriptions.<sup>163</sup> First, the IHR implores disputing States to settle their dispute through “negotiation or any other peaceful means of their own choice.”<sup>164</sup> This may involve informal negotiations or a formal request for a consultation by a State impacted by another State’s health measures, such as travel restrictions.<sup>165</sup> If negotiation fails, States may refer the dispute to the WHO Director General, “who shall make every effort to settle it.”<sup>166</sup> Alternatively, States may opt in to arbitration at the Permanent Court of Arbitration (PCA).<sup>167</sup> Lastly, the IHR include a provision that states, “[n]othing in these Regulations shall impair the rights of States Parties under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement.”<sup>168</sup>

Assuming negotiation fails, the United States could either refer the dispute to the Director-General, attempt to arbitrate, or find another international agreement to establish jurisdiction under. Referral to the Director-General, however, would likely not satisfy those hoping for true legal recourse. First of all, it is unclear what exact authority “every effort to settle” a dispute confers on the Director-General.<sup>169</sup> Neither the IHR nor the WHO Constitution answers this question.<sup>170</sup> In addition, no State has ever even tried to refer a dispute to the Director-General, so there is no guidance by way of precedent.<sup>171</sup> But considering that WHO itself has no enforcement mechanism, it would not make much sense to assume the Director-General has the power to enforce dispute resolutions single-handedly. Furthermore, what States are involved in the dispute, and what State the Director-General is a citizen of, may influence a State’s decision to go to or accept the Director-General as a conciliator due to perceived geopolitical biases. Instead, States seeking an enforceable resolution would have better luck in arbitration or another judicial body.

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162 World Health Organization Regulations, *supra* note 36, art. 112(1); International Health Regulations, art. 93, Jan. 1, 1982, 1286 U.N.T.S. 390 [hereinafter, IHR 1982]; IHR, *supra* note 2, art. 56.

163 IHR, *supra* note 2, art. 56(1)-(4).

164 *Id.* art. 56(1).

165 *Id.* art. 43(7).

166 *Id.* art. 56(2).

167 *Id.* art. 56(3).

168 *Id.* art. 56(4).

169 *Id.* art. 56(2).

170 *Id.*; WHO Constitution, *supra* note 33.

171 WHO Report, *supra* note 85, at 81.

### 1. Arbitration

The IHR expressly gives the PCA jurisdiction to settle disputes between two States.<sup>172</sup> Arbitration under this provision would be governed by the PCA's Optional Rules for Arbitrating Disputes between Two States.<sup>173</sup> To exercise this option, States must declare in writing to the Director-General that they accept compulsory arbitration either regarding *all* disputes that may arise out of the IHR, or for a specific dispute in which case the disputed State must also affirmatively accept compulsory arbitration.<sup>174</sup> To this day, there is no record that any State has accepted compulsory arbitration regarding any or all disputes.<sup>175</sup>

It is unlikely that China would accept compulsory arbitration in the PCA. This is mainly because China is only recently beginning to engage in international dispute-settlement mechanisms.<sup>176</sup> When it does engage, it stays clear of arbitrating issues involving sovereignty; most cases involve commercial and trade disputes, and these cases mainly take place in the WTO's dispute-settlement body.<sup>177</sup> In fact, the public record shows that the government of China has only been a party to a PCA arbitration three times.<sup>178</sup> These three cases—*Radio Corporation of America*, *Jason Yu Song*, and *South China Sea*—highlight China's differing attitudes toward cases about commerce and trade and cases about sovereignty.<sup>179</sup> China accepted PCA jurisdiction in *Radio Corporation*—a contract dispute<sup>180</sup>—and in *Yu Song*, an

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<sup>172</sup> IHR, *supra* note 2, art. 56(3).

<sup>173</sup> In addition, in its understandings of the IHR, “the Government of the United States of America does not believe that the IHR was intended to create judicially enforceable private rights: The United States understands that the provisions of the Regulations do not create judicially enforceable private rights.” *Id.* art. 53(3), Appendix 2.

<sup>174</sup> *Id.*

<sup>175</sup> Yee, *supra* note 105.

<sup>176</sup> See Harriet Moynihan, *China's Evolving Approach to International Dispute Settlement*, CHATHAM HOUSE (Mar. 2017), <https://www.chathamhouse.org/sites/default/files/publications/research/2017-03-29-chinas-evolving-approach-international-dispute-settlement-moynihan-final.pdf> [<https://perma.cc/8BJR-Q7L6>].

<sup>177</sup> *Id.*

<sup>178</sup> Information about cases in the Permanent Court of Arbitration (PCA) are based on agreements by the parties to release case information publicly. Thus, there may be additional cases involving the Chinese government that are not of public record. *Cases*, PERMANENT CT. ARB., <https://pca-cpa.org/en/cases/> [<https://perma.cc/2EHC-J34Z>] (last visited July 29, 2021).

<sup>179</sup> *Radio Corporation of America v. China*, PERMANENT CT. ARB., <https://pca-cpa.org/en/cases/16> [<https://perma.cc/CBG4-WL29>]; *Yu Song (United Kingdom) v. People's Republic of China*, PERMANENT CT. ARB., <https://pca-cpa.org/en/cases/241> [<https://perma.cc/LHU7-ZPKA>]; *The South China Sea Arbitration*, PERMANENT CT. ARB., <https://pca-cpa.org/en/cases/7> [<https://perma.cc/RUM5-LNVP>].

<sup>180</sup> Charter of the United Nations and Statute of the International Court of Justice, Oct. 15, 1946 U.N.T.S. No. 993, at Endnote 1 [hereinafter Statute of the ICJ] (“In a communication received

investment dispute.<sup>181</sup> On the other hand, China vehemently opposed PCA jurisdiction in *South China Sea*, believing the claims brought against it by the Philippines were for territorial sovereignty.<sup>182</sup> The case proceeded in the PCA without China's participation pursuant to a provision in the relevant treaty that expressly allows the PCA to do so.<sup>183</sup> There is no such provision in the IHR. The PCA found for the Philippines and China subsequently ignored the award.<sup>184</sup>

In explaining why China is more likely to engage in international dispute-settlement for trade disputes than issues of sovereignty, observers have noted that China believes "trade issues are not that sensitive; you may gain or lose it's a balance [sic]. If you lose on territory, you do not gain something."<sup>185</sup> In other words, China has more to gain in the long run from cooperating in global trade and investment mechanisms by way of reciprocity.<sup>186</sup> The status quo ebbs and flows—in fact, "China has revised over 3,000 laws at central government level, and many more at [the] local level, in order to bring its legal system into compliance with WTO standards."<sup>187</sup>

On the other hand, China has more to lose than to gain by defending itself against failure to notify and share information claims under the IHR. The interests at issue here for China are the integrity of its governmental and economic institutions.<sup>188</sup> China steadfastly maintains the narrative that it handled the pandemic exceedingly well.<sup>189</sup> Arbitrating claims for noncompliance would take a

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by the Secretary-General on 5 December 1972, the Government of the People's Republic of China indicated that it does not recognize the statement made by the defunct Chinese government on 26 October 1946 in accordance with paragraph 2 of Article 36 of the Statute of the International Court of Justice concerning the acceptance of the compulsory jurisdiction of the Court."); Moynihan, *supra* note 176, at 3 ("In most cases, when China enters into a treaty, it will opt out of any provisions referring disputes under the treaty to international courts or tribunals."); *Radio Corporation*, *supra* note 179.

181 Yu Song, *supra* note 179.

182 Moynihan, *supra* note 176; *The South China Sea Arbitration*, *supra* note 179; The South China Sea Arbitration, Case No. 2013-19, Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2013).

183 The South China Sea Arbitration, Case No. 2013-19, Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2013), ¶¶ 11-12.

184 Nguyen Hong Thao & Nguyen Thi Lan Huong, *The South China Sea Arbitration Award: 5 Years and Beyond*, THE DIPLOMAT (July 12, 2021), <https://thediplomat.com/2021/07/the-south-china-sea-arbitration-award-5-years-and-beyond> [<https://perma.cc/ZN4F-GKKP>].

185 Moynihan, *supra* note 176.

186 *Id.*

187 *Id.*

188 Yanzhong Huang et al., *China's Approach to Global Governance*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/china-global-governance> [<https://perma.cc/DS43-GGS8>].

189 David Stanway, *China Doubles Down on COVID Narrative as WHO Investigation Looms*, REUTERS (Jan. 5, 2021, 1:02 AM), <https://www.reuters.com/article/health-coronavirus-china-who-int/china-doubles-down-on-covid-narrative-as-who-investigation-looms-idUSKBN29A0LX> [<https://perma.cc/MY4Y-YRXN>]; *China Covid-19: How State Media and Censorship Took On*

huge gamble with this narrative. If China does not arbitrate, it will not have to relinquish any control over its narrative, and it can easily defend criticism of non-cooperation by saying it is still open to settling through diplomacy. Thus, the factors weigh against China accepting compulsory arbitration.

## 2. *International Court of Justice*

Since the IHR does not impair a State's right to pursue dispute settlement under other international agreements or with other international bodies, some scholars have considered pursuing jurisdiction in the International Court of Justice (ICJ).<sup>190</sup> Under Article 75 of the WHO Constitution, "[a]ny question of dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the [ICJ] in conformity with the Statute of the Court."<sup>191</sup> Whether a dispute concerns the interpretation or application of an instrument can be complicated. The ICJ defines such a dispute as one where the States:

'Hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations [citations omitted]. The claim of one party must be 'positively opposed' by the other [citations omitted]. In order to determine, even prima facie, whether a dispute exists, the Court 'cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it' [citations omitted] . . . . [T]he Court must ascertain whether 'the acts complained of by [the Applicant] are prima facie capable of falling within the provisions of [those] instruments[s] and . . . as a consequence, the dispute is one which the Court has jurisdiction *ratione materie* to entertain [citations omitted]'.<sup>192</sup>

The ICJ has only considered Article 75 jurisdiction in a contentious case one time. In *Armed Activities on the Territory of the Congo*, the Democratic Republic of the Congo (DRC) tried to establish Article 75 jurisdiction in the ICJ because it alleged Rwanda's aggression in Congolese territory harmed the health of its

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*Coronavirus*, BBC NEWS (Dec. 29, 2020), <https://www.bbc.com/news/world-asia-china-55355401> [<https://perma.cc/LP55-EN2C>] [hereinafter *China Covid-19*].

<sup>190</sup> MULLIGAN, *supra* note 104, at 2-3.

<sup>191</sup> WHO Constitution, *supra* note 33, art. 75.

<sup>192</sup> Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Order, 2017 I.C.J. Rep. 104, ¶ 22 (Apr. 19).

citizens.<sup>193</sup> Siding with Rwanda, the ICJ denied Article 75 jurisdiction because the DRC did not specify which WHO Constitution obligation Rwanda violated, noting that a Member State's failure to carry out the general object and purpose of WHO was not "a question concerning the interpretation or application of the WHO Constitution on which [the DRC] and Rwanda had opposing views, or that [the DRC] had a dispute with [Rwanda] in regard to this matter."<sup>194</sup>

As discussed in the previous section on liability, WHO Constitution violations by China may be established through two theories: directly via Article 63 or indirectly via Articles 22 and 64's application to the IHR. Whether the ICJ would think either sufficiently concerns the interpretation and application of the WHO Constitution is unknown, but the prospect is more likely than in *Armed Territories*, especially concerning the direct violation of Article 63. Unlike the general claims of bad faith in *Armed Territories*, Articles 63 and 64 prescribe affirmative obligations on the Member Parties, and Article 22 binds Member Parties to the prescriptions in the IHR.<sup>195</sup>

Whether or not the ICJ would accept jurisdiction over an IHR case is only one piece of the puzzle; China may also refute jurisdiction. The modern Chinese government has never been a party to a case in the ICJ.<sup>196</sup> In fact, the only involvement China has ever had with the ICJ was in 2009, when it submitted a statement on its position regarding the legality of Kosovo's declaration of independence.<sup>197</sup> And while ICJ jurisdiction in cases arising out of the WHO Constitution is compulsory upon China because of its WHO membership, China otherwise does not recognize compulsory jurisdiction of the ICJ.<sup>198</sup> Therefore, what China may do in response to a unilateral application against it is unprecedented. Given China's preference for diplomacy when settling disputes and general disdain for unilateral measures, it would likely have a negative reaction to being served in the ICJ, nor would it likely voluntarily accept jurisdiction for

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193 Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, ¶ 97 (Feb. 3) ("The DRC alleges that Rwanda, in resorting to the spreading of AIDS as an instrument of war and in engaging in large-scale killings on Congolese territory, has not 'in good faith carried out the Constitution of the WHO, which aims at fostering the highest possible level of health for all peoples of the world'; the DRC further claims to have made an ample showing that a number of international organizations, both governmental and other, 'have published detailed reports on the serious deterioration of the health situation in the DRC as a consequence of the war of aggression' waged by Rwanda.").

194 *Id.* ¶ 99.

195 WHO Constitution, *supra* note 33, art. 63-4.

196 Moynihan, *supra* note 176.

197 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement by the People's Republic of China, 2009 I.C.J. II-III (Apr. 6) (invoking principles of sovereignty and limitations of self-determination, China, unsurprisingly, opposed Kosovo's "secession" from Yugoslavia).

198 WHO Constitution, *supra* note 33, app. 1; Statute of the ICJ, *supra* note 180.

reasons stated earlier.<sup>199</sup> It is quite possible that China may simply refuse to show up to court. However, as the PCA did in *South China Sea*, the ICJ can continue proceedings without the respondent party.<sup>200</sup>

The prospect of China willingly accepting jurisdiction and participating in adjudication is uncertain at best. Balancing the factors that China may consider when engaging in international dispute settlement mechanisms, it is unlikely that China would voluntarily accept the jurisdiction of the PCA or the ICJ when it does not have to. But what if it did? Assuming for the sake of the hypothetical that China *did* accept jurisdiction, the next step is to consider what remedy would be appropriate for the United States to ask for and conceivably be awarded.

### C. Remedies

#### 1. Legal Basis for Remedies

In 2001 the International Law Commission of the UN adopted Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles).<sup>201</sup> The ILC Articles serve as a codification of previously relied-on principles of international law and have subsequently served as the theoretical basis for decisions of arbitral tribunals and the ICJ.<sup>202</sup> Chapter II lays out principles for remedies that are considered when making a judgment or award in favor of the complaining State.<sup>203</sup> Forms of remedies fall into three categories: restitution,

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199 See *supra* text accompanying notes 172-188; see also Moynihan, *supra* note 176; *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*, MFA RUSSIA (June 25, 2016, 17:07), [https://www.mid.ru/en/foreign\\_policy/position\\_word\\_order/1530748](https://www.mid.ru/en/foreign_policy/position_word_order/1530748) [hereinafter *Declaration of Russia & China*]; *The Costs of International Advocacy*, HUMAN RTS. WATCH (Sept. 5, 2017), <https://www.hrw.org/report/2017/09/05/costs-international-advocacy/chinas-interference-united-nations-human-rights#> [<https://perma.cc/Z329-GVSM>]; *China Calls for Avoiding Unilateral Moves over Kashmir*, CGTN (Aug. 10, 2019), <https://news.cgtn.com/news/2019-08-09/China-calls-for-avoiding-unilateral-moves-over-Kashmir-J1BVPLxrq0/index.html> [<https://perma.cc/YE5Y-RHYZ>].

200 *How the Court Works*, INT'L CT. JUST., <https://www.icj-cij.org/en/how-the-court-works> [<https://perma.cc/2MB7-GX6Q>].

201 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, <https://www.refworld.org/docid/3ddb8f804.html> [<https://perma.cc/6PH2-BLBZ>] [hereinafter *ILC Articles*].

202 SIMON OLLESON, THE IMPACT OF THE ILC'S ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS 19 (Oct. 10, 2007), [https://www.biiicl.org/files/3107\\_impactofthearticlesonstate\\_responsibilitypreliminarydraftfinal.pdf](https://www.biiicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf) [<https://perma.cc/5RFV-HMW6>].

203 *Id.* at 212.

compensation, or satisfaction (or a combination of the three).<sup>204</sup> Restitution should be looked to first before compensation and satisfaction, though satisfaction is frequently awarded.<sup>205</sup> It should also be noted that there is no precedent for damages in infectious disease cases in international law.<sup>206</sup> In addition, neither the IHR nor the WHO Constitution specifically addresses remedies; however, the ICJ has maintained that “[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.”<sup>207</sup>

## 2. Restitution

Under Article 35 of the ILC Articles, restitution is meant to “re-establish the situation which existed before the wrongful act was committed.”<sup>208</sup> In drafting Article 35, the ILC considered whether its definition of restitution would be as stated or, alternatively, “the establishment or re-establishment of the situation that *would have* existed if the wrongful act had not been committed.”<sup>209</sup> The ILC concluded that it would adopt the narrower definition so that courts or tribunals would not have to speculate about what might have been.<sup>210</sup> The ILC also noted limitations to restitution. Namely, States are not obligated to make restitution when doing so is “materially impossible” or the burden of making restitution outweighs the benefit received.<sup>211</sup> Common awards of restitution include the return of property, persons, territory, or other assets illegally seized or detained, as well as specific performance, contract renegotiation, and juridical revision.<sup>212</sup>

The situation before China’s alleged breach of the IHR was that COVID-19 existed in Wuhan and was beginning to spread. Had China performed its

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<sup>204</sup> ILC Articles, *supra* note 201, art. 34.

<sup>205</sup> OLLESON, *supra* note 202, at 213-15; Juliette McIntyre, *The Declaratory Judgment in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?*, 29 LEIDEN J. INT’L L. 177, 177 (2016).

<sup>206</sup> MULLIGAN, *supra* note 104, at 4.

<sup>207</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, art. 31 ¶ 1, U.N. Doc. A/56/10 (2008), [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [<https://perma.cc/QBV8-4C38>] [hereinafter *ILC Commentary*].

<sup>208</sup> *Id.* at 96.

<sup>209</sup> *Id.* (emphasis added).

<sup>210</sup> *Id.*

<sup>211</sup> OLLESON, *supra* note 202, at 215.

<sup>212</sup> The ILC describes “juridical restitution” as a situation where “restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State.” *Id.* at 215-21; ILC Articles, *supra* note 201, at 96; OLLESON, *supra* note 202, at 215-21.

obligations under the IHR, COVID-19 *may* have been contained to the point where it did not spread to the United States. In that case, economists could predict the shape of the U.S. economy had COVID-19 been contained, and epidemiologists could predict how many fewer people would have contracted COVID-19.<sup>213</sup> Yet, the IHR requirements are not total insurance; even if China perfectly performed all of its duties under the IHR, it would be difficult to determine exactly how much COVID-19 would have been contained. Regardless, that calculation would be the exact kind of speculative damages that the ILC intended to preclude. In addition, there is nothing China took that it could give back, no contract with the United States to renegotiate, nor anything China could do (specific performance) to re-establish the situation before China breached the IHR.

There is, however, a possibility for juridical restitution. On January 27, 2020, Wuhan Mayor Zhou Xianwang gave an interview claiming that he did not report on the situation in Wuhan to the public sooner because, under China's Law on the Prevention and Control of Infectious Diseases, he was forbidden to without permission from higher authorities.<sup>214</sup> While there is disagreement about whether Mayor Zhou interpreted the law correctly, if an adjudicator found that the law *did* prohibit Wuhan officials from reporting, then it could be in violation of the IHR because of China's IHR declaration that "local health administrative authorities [such as the Wuhan Health Commission] are the health authorities responsible for the implementation of the IHR in their respective jurisdictions."<sup>215</sup> China, conversely, could argue that it did not intend to give local health authorities reporting authority but rather solely reserve that authority to China's National Focal Point, the National Health Commission. The adjudicator would have to interpret China's law and whether it is incompatible with the IHR. If the law was found to be incompatible with the IHR, China could be made to repeal or revise the law.<sup>216</sup>

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213 See *Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships*, CTR. BUDGET & POL'Y PRIORITIES (June 16, 2021), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> [<https://perma.cc/RX4Z-QYGK>]; *What is the Economic Cost of COVID-19?*, ECONOMIST (Jan. 9, 2021), <https://www.economist.com/finance-and-economics/2021/01/09/what-is-the-economic-cost-of-covid-19> [<https://perma.cc/4N7G-2YP5>].

214 LAWRENCE, *supra* note 124, at 11 (citing David Cowhig, *Wuhan Mayor Zhou: Reporting Delays Caused by Center, I Acted Fast Once I Got Authorization*, DAVID COWHIG'S TRANSLATION BLOG (Jan. 27, 2020), <https://gaodawei.wordpress.com/2020/01/27/wuhan-mayor-zhou-reporting-delays-caused-by-center-i-acted-fast-once-i-got-authorization> [<https://perma.cc/7QJ8-4GE8>]).

215 IHR, *supra* note 2, at 62.

216 ILC *Commentary*, *supra* note 207, at 57, 97.



### 3. Compensation

When restitution is not possible or does not make complete reparations for the injury caused, compensation is considered next.<sup>217</sup> Under ILC Article 36, compensation “shall cover any financially assessable damage including loss of profits insofar as it is established.”<sup>218</sup> The use of the phrase “financially assessable” damage was meant to exclude compensation for non-material injury, however, non-material damages such as mental suffering have been awarded as compensation.<sup>219</sup> Financially assessable damages can include incidental damage such as medical expenses and loss of earning potential.<sup>220</sup> Compensation is not meant to be punitive.<sup>221</sup> In addition, compensation can consider both financial damage incurred by the State itself as well as financial damage suffered by its nationals, which includes both persons and companies.<sup>222</sup>

The biggest hurdle to establishing a right to compensation is that complaining parties often fail to establish a causal link between the wrongful act and the injury suffered.<sup>223</sup> For example, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide)*, the ICJ denied compensation to Applicants Bosnia and Herzegovina because the court was not “able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would, in fact, have been averted if the Respondent had acted in compliance with its legal obligations.”<sup>224</sup> In addition, dispute settlement bodies often will refrain from awarding compensation when they believe a declaratory judgment is sufficient to satisfy the claim for compensation.<sup>225</sup>

The consideration in the hypothetical case against China is similar to *Genocide*. The United States would have to establish with a sufficient degree of certainty that the spread of COVID-19 in the United States would have been averted if China had notified WHO earlier and shared more information sooner. This, however, is already disproven. The first case of COVID-19 in the United

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<sup>217</sup> *Id.* at 98.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 99, 101-02.

<sup>220</sup> For example, in the *Corfu Channel* case, the ICJ awarded compensation to naval personnel and their families for injuries and death suffered by the explosion of British destroyers after the ICJ found Albania responsible for the explosions. *Id.* at 100-01; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, INT’L CT. J., [https://www.icj-cij.org/en/case/1\[https://perma.cc/C5Y8-APQ3\]](https://www.icj-cij.org/en/case/1[https://perma.cc/C5Y8-APQ3]).

<sup>221</sup> *ILC Commentary*, *supra* note 207, at 99.

<sup>222</sup> *Id.*

<sup>223</sup> OLLESON, *supra* note 202, at 222-30.

<sup>224</sup> *Id.* at 227.

<sup>225</sup> *Guy. v. Surin., Award*, ¶ 450-52 (Perm. Ct. Arb. 2007), <https://pcacases.com/web/sendAttach/902> [https://perma.cc/B3E7-BB38] (citing *Cameroon/Nigeria*, Judgment, 2002 I.C.J. Rep. 303, ¶ 319 (Oct. 10)).

States was confirmed on January 21, 2020, from a passenger who flew from Wuhan to Washington on January 15.<sup>226</sup> WHO reported that China had notified them by January 4, 2020.<sup>227</sup> Thus, earlier reporting would not have prevented the spread of COVID-19 to the United States because the first case was brought there 11 days *after* the notification was made. The consideration might be different if China had only reported to WHO after the passenger arrived in the United States. In this counterfactual, the United States might argue that measures could have been taken to prevent that passenger from traveling. Alas, that is not the case.

International adjudicators will reduce compensation owed to the complainant when the complainant either failed to mitigate or contributed to the damage caused by the respondent.<sup>228</sup> In this case, China can allege that the United States failed to mitigate. On February 20, 2021, the Lancet Commission on Public Policy and Health in the Trump Era (Commission) published a seminal report noting that if the U.S. death rate from COVID-19 mirrored the weighted average of other G7 nations, about 40 percent of deaths would have been averted.<sup>229</sup> The Commission, as well as other public health experts, attribute these preventable deaths directly to the policies of the Trump Administration.<sup>230</sup> Thus, if the United States were to be awarded compensation from China, that compensation may be reduced significantly because of the United States's own actions.

#### 4. Satisfaction

Lastly, when restitution or compensation is not possible, or in addition to restitution or compensation, a State may be ordered to give satisfaction.<sup>231</sup> According to the ILC Articles, “[s]atisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality” as long as it is in proportion to the injury and not humiliating to the responsible state.<sup>232</sup> Satisfaction can also include affirmative declarations of

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226 LAWRENCE, *supra* note 124, at 34; Press Release, Centers for Disease Control and Prevention, First Travel-Related Case of 2019 Novel Coronavirus Detected in the United States (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> [<https://perma.cc/RE4R-GC8N>].

227 LAWRENCE, *supra* note 124, at 21.

228 See ILC Commentary, *supra* note 207, at 93; Aceris Law LLC, *Contributory Negligence in Investment Arbitration*, ACERIS L. (June 6, 2018), <https://www.acerislaw.com/contributory-negligence-in-investment-arbitration> [<https://perma.cc/3REK-H9HE>].

229 Steffie Woolhandler et al., *Public Policy and Health in the Trump Era*, 397 LANCET 705, 711 (2021).

230 *Id.*; Drew Altman, Essay, *Understanding the US Failure on Coronavirus*, 370 BMJ 3417 (2020).

231 ILC Commentary, *supra* note 207, at 105.

232 *Id.*

wrongdoing by the court or tribunal as well as assurances or guarantees of non-repetition.<sup>233</sup> Satisfaction is generally reserved for injuries that are not financially assessable or otherwise cannot be made better with restitution or compensation.<sup>234</sup>

If the adjudicators found that China was liable on the claims of failing to notify in a timely manner and withholding information about COVID-19, it would make sense from a public health perspective to order China to make a guarantee of non-repetition. This is especially so as pandemic frequency, especially for emerging diseases, is rising.<sup>235</sup> However, ICJ precedent establishes “[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed.”<sup>236</sup> The court does make a caveat for “special circumstances,” however, there is not a clear standard or definition of what circumstances are considered “special.”<sup>237</sup> Thus, whether an adjudicator would consider this hypothetical case a special circumstance is unknown, but it would most likely only award a declaration of wrongdoing.

The most likely remedies the PCA or ICJ would award are either juridical revision, which is uncertain at best, or a declaration of wrongdoing. If compensation were to be awarded, there is a viable argument that it may be reduced because of the United States’s failure to mitigate. But just because a remedy is awarded does not necessarily mean it will be conferred by the losing party. The next section will discuss enforcement and compliance with judgments.

#### *D. Enforcement and Compliance*

The problem of enforcement was predicted as early as 1951 by the Special Committee on the Draft International Sanitary Regulations, with the delegate from India noting “WHO had no means of imposing sanctions following a judgment of the [ICJ].”<sup>238</sup> Unlike domestic courts, which can, *inter alia*, garnish wages or seize

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<sup>233</sup> *Id.* at 106-07.

<sup>234</sup> *Id.*

<sup>235</sup> Editorial, *A Pandemic Era*, LANCET (Jan. 2021), [https://www.thelancet.com/pdfs/journals/lanplh/PIIS2542-5196\(20\)30305-3.pdf](https://www.thelancet.com/pdfs/journals/lanplh/PIIS2542-5196(20)30305-3.pdf) [<https://perma.cc/HAA5-E6HR>].

<sup>236</sup> Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213 ¶ 150 (July 13) (citations omitted).

<sup>237</sup> It should be clarified that when the ICJ considered nonrepetition in the *LaGrand Case*, it did not affirmatively grant Germany’s request of non-repetition but rather “considers that the commitment expressed by the United States to ensure implementations of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (*b*), must be regarded as meeting Germany’s request for a general assurance of non-repetition.” *Id.*; *LaGrand Case* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 124 (June 27).

<sup>238</sup> World Health Organization Regulations, *supra* note 36, at 149.

assets from a debtor, international dispute settlement bodies cannot do the same.<sup>239</sup> Seizing China's assets in the United States without China's consent would be considered a grave violation of sovereignty. Interestingly, many if not most arbitral awards are complied with (with notable exceptions such as the *South China Sea* award); however, ICJ decisions are met with mixed results.<sup>240</sup>

ICJ judgments are theoretically enforced through Article 94(2) of the UN Charter, which states that ICJ judgments may be referred to the Security Council for enforcement.<sup>241</sup> However, it is unknown what the Security Council would (or could) actually do to enforce a judgment—States have very rarely invoked Article 94(2), and in the rare cases they have, the Security Council has declined to act.<sup>242</sup> It has been suggested that the Security Council may be able to order WHO to “withhold its programs and information from the debtor,” but that remains to be seen.<sup>243</sup> In addition, since China is a permanent member of the Security Council, it could veto a resolution to enforce the judgment as the United States did when Nicaragua asked the Security Council to enforce a judgment against it.<sup>244</sup> Regardless, since China has never been a party to the ICJ, there is no precedent to predict how it might react to a judgment against (or even for) it.

Arbitration awards are enforced by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>245</sup> The United States and China are both parties to the New York Convention; however, both States declared that they will only apply the convention to “differences arising out of legal relationships, whether contractual or not, which are considered as *commercial* under the national law of the [United

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239 Aloysius Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815, 846 (2007).

240 Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 437-56 (2004); Jae Hee Suh, *Compliance with Arbitral Awards*, JUS MUNDI (Apr. 23, 2021), <https://jusmundi.com/en/document/wiki/en-compliance-with-arbitral-awards> [<https://perma.cc/8RDJ-V5J5>]; Dorothy Murray, Daisy Mallet & Charlotte Angwin, *Enforcing Arbitration Awards: The How, the Why and Latest Developments*, LEXOLOGY (Sept. 15, 2016), <https://www.lexology.com/library/detail.aspx?g=0bc6cc2c-82e5-4a98-925e-76d777fcf356> [<https://perma.cc/WR7M-DATS>].

241 Llamzon, *supra* note 239, at 847.

242 *Id.*

243 Mary Ellen O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States*, 30 VA. J. INT'L L. 891, 911 (1990).

244 *Id.* at 908-09; Aman Mishra, *Problems in Enforcing ICJ's Decisions and the Security Council*, 15 GLOB. J. HUM.-SOC. SCI. 1, 2 (2015).

245 *The New York Convention*, N.Y. ARB. CONVENTION, <https://www.newyorkconvention.org> [<https://perma.cc/V3QK-2N5F>]; *Dispute Settlement: General Topics: 1.3 Permanent Court of Arbitration*, U.N. CONF. TRADE & DEV. (2003), [https://unctad.org/system/files/official-document/edmmisc232add26\\_en.pdf](https://unctad.org/system/files/official-document/edmmisc232add26_en.pdf) [<https://perma.cc/5EQV-RFTP>].

States/China].”<sup>246</sup> Failure to notify WHO of a PHEIC and subsequently withholding information is certainly not a commercial dispute.<sup>247</sup> In addition, under Article III of the New York Convention, “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . .”<sup>248</sup> In other words, should an award be granted to the United States, the award would need to be recognized and enforced in the domestic courts of either the United States or China, using their respective domestic laws.<sup>249</sup> This is problematic, because both China and the United States recognize sovereign immunity in their domestic courts—China absolutely<sup>250</sup> and the United States with limited exceptions.<sup>251</sup> While U.S. courts have, as recently as 2018, allowed PCA awards against sovereign nations to be enforced in the United States,<sup>252</sup> China can, and almost certainly will, just ignore the award.<sup>253</sup>

In conclusion, a case can be made that China did violate the IHR. But just because China likely committed violations does not mean it can be held accountable in a meaningful way. With every step in the adjudication process, the possibility of seeing a case through to the end becomes less probable. It is unlikely that China would voluntarily appear in front of an international dispute settlement body. The balance of factors China considers before consenting to arbitrate other types of cases, such as trade disputes, does not weigh in favor of the likelihood of this situation. In addition, the dispute settlement body may also refute jurisdiction on the grounds that the dispute does not sufficiently concern the interpretation or application of the IHR. Should a case pass through this hurdle, then it confronts the problem of appropriate remedies. Some may think victims of COVID-19 should be entitled to compensation from China. From the perspective of disease

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<sup>246</sup> *Declarations and Reservations*, N.Y. ARB. CONVENTION, <https://www.newyorkconvention.org/countries> [<https://perma.cc/2NA3-AALM>] (emphasis added).

<sup>247</sup> See *Commercial Law*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/commercial\\_law](https://www.law.cornell.edu/wex/commercial_law) [<https://perma.cc/GA8Y-RY2S>].

<sup>248</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, July 6, 1988, 330 U.N.T.S. 3.

<sup>249</sup> *Id.* art. III; *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Article III*, U.N. COMM’N INT’L TRADE L. (Sept. 2016), [https://newyorkconvention1958.org/index.php?lvl=cmsspage&pageid=10&menu=619&opac\\_view=-1](https://newyorkconvention1958.org/index.php?lvl=cmsspage&pageid=10&menu=619&opac_view=-1) [<https://perma.cc/A8Y8-HEB7>].

<sup>250</sup> Xianglin Chen, *Challenging and Enforcing Arbitration Awards: China*, GLOB. ARB. REV. (Feb. 28, 2021), <https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/china> [<https://perma.cc/8FWA-PKDL>].

<sup>251</sup> David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges*, FED. JUD. CTR. INT’L LITIG. GUIDE (2013), <https://www.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf> [<https://perma.cc/SN75-V8JT>].

<sup>252</sup> See, e.g., *Balkan Energy Limited v. Republic of Ghana*, 302 F. Supp. 3d 144 (D.D.C. 2018); *Tatneft v. Ukraine*, 301 F. Supp. 3d 175 (D.D.C. 2018).

<sup>253</sup> Chen, *supra* note 250, § 49.

prevention, an assurance of nonrepetition would also seem appropriate. However, the most likely remedy a dispute settlement body would award is satisfaction through a declaration of wrongdoing. A declaration of wrongdoing would, essentially, be the end of the road. If a tangible remedy such as compensation *was* awarded, the United States would likely never see that award anyway.

The overarching lesson from the hypothetical lawsuit against China in an international dispute-settlement body is that it is not an effective tool to promote compliance with IHR duties. At any point, the violator can simply refuse to participate or otherwise recognize the outcome of the proceeding. The state of global health has not been improved by its existence, as it does not in practice, nor as we have now seen, in theory, deter noncompliance. While international legal systems have become more robust since the International Sanitary Conferences of the nineteenth and twentieth centuries, the IHR has not caught up as legitimate hard law.

Because of the recognized inefficiencies, some scholars have proposed reforms to the IHR's dispute settlement process.<sup>254</sup> Ching-Fu Lin suggests compulsory arbitration.<sup>255</sup> Steve Hoffman suggests a complete overhaul of the dispute settlement process and advocates for "a three-tiered model of dispute resolution . . . includ[ing] an advisory body review on appeal if a decision is unsatisfactory to one of the parties, with an adjudicative body for final resolution."<sup>256</sup> However, as Lin correctly notes, these reforms still rely on a State's incentives to initiate a dispute, including time and costs.<sup>257</sup> Furthermore, while these reforms include compulsory participation, it would be conceptually difficult to mandate *cooperation*. Lin instead argues for a "Compliance and Accountability Committee," a standing body composed of health law experts that answers directly to the WHA.<sup>258</sup> The Committee would primarily be tasked with "monitor[ing], assess[ing], and comment[ing] upon compliance information of State Parties' measures, or lack thereof."<sup>259</sup> The concept of a compliance committee is similarly echoed in amendments proposed by the United States to WHO in January 2022.<sup>260</sup>

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254 See, e.g. Ching-Fu Lin, *COVID-19 and the Institutional Resilience of the IHR (2005): Time for a Dispute Settlement Redesign?*, 13 CONTEMP. ASIA ARB. J. 269, 281-85 (2020).

255 *Id.* at 282.

256 *Id.* (citing Steven J. Hoffman, *Making the International Health Regulations Matter: Promoting Compliance Through Effective Dispute Resolution*, in ROUTLEDGE HANDBOOK ON GLOBAL HEALTH SECURITY 239, 247 (Simon Rushton & Jeremy Youde eds., 2014).

257 *Id.*

258 *Id.*

259 *Id.*

260 World Health Org., *Proposal for Amendments to the International Health Regulations (2005)*, 8-10, C.L.2.2022 (Jan. 10, 2022), <https://healthpolicy-watch.news/wp-content/uploads/2022/02/C.L.2.2022-IHR-amendments-English.pdf> [<https://perma.cc/852E-RJZQ>].

However, while this Committee would provide a welcome addition of technical input, any resolution made by the Committee would not be legally binding and thus, if anything, serves as another layer of bureaucracy.

In late 2021, the WHO's Working Group on Strengthening WHO Preparedness and Response to Health Emergencies, with support from many European States, approved discussions for an entirely new pandemic response treaty.<sup>261</sup> The Working Group noted the need for strengthened compliance with the IHR; however, "there remains divergence on how best to do that as part of strengthening the IHR (2005) or as part of a new instrument."<sup>262</sup> This thus circles back to the underlying issue with such health-related treaties: while beefing up global capacities for detection, surveillance, and response are all necessary improvements, their existence on paper is just lip service without complementary support, enforcement, and compliance mechanisms.

This clear lack of enforcement of the IHR does not mean States do nothing when faced with PHEICs. Instead, what has come to be is an informal system where global health is influenced by soft power diplomacy. This further weighs against implementing a formal dispute settlement mechanism, as there is no incentive for powerful States to undermine their already-existing geopolitical influence by agreeing to a compulsory process. The next section will discuss how China's experience with pandemics has shaped its brand of global health diplomacy, as well as how other States have responded in the context of the IHR.

#### IV. EFFICACY OF INFORMAL MECHANISMS

Because legal mechanisms of dispute resolution under the IHR are improbable, in practice, States defer to informal mechanisms of dispute resolution. China is one country that very much prefers diplomatic tactics over hard law. Over time, China has developed a robust brand of global health diplomacy. Examination of the changes between China's response to the 2003 SARS outbreak and COVID-19 reveals a conscious strategy in the realms of economics, geopolitics, and public relations. It is also clear that China is gaining increased confidence in its position as a global health influencer. Many States, particularly in the Global South, look to China as a leader in the global health arena—which has not gone unnoticed by the United States and other Western countries. These Western States have subsequently taken retaliatory measures against China that themselves violate the IHR, such as travel and trade restrictions. In addition, ramped-up rhetoric by U.S.

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261 World Health Org., *Draft Report of the Member States Working Group on Strengthening WHO Preparedness and Response to Health Emergencies to the Special Session of the World Health Assembly*, A/WGPR/5/2 (2021),

[https://apps.who.int/gb/wgpr/pdf\\_files/wgpr5/A\\_WGPR5\\_2-en.pdf](https://apps.who.int/gb/wgpr/pdf_files/wgpr5/A_WGPR5_2-en.pdf) [<https://perma.cc/8H9A-S372>].

262 *Id.* at 3.

and Chinese media outlets, as well as targeted distribution of vaccines, has stirred tensions globally and domestically in both countries respectively.

*A. Chinese Diplomacy and Global Health—Overview*

As has been already discussed, China prefers to settle disputes with other States through diplomacy.<sup>263</sup> It is suggested that part of the reason why China prefers diplomacy over adherence to hard law is that, historically, China has viewed the development of international law as “a tool of Western imperialism,” with many treaties implicitly favoring Western powers.<sup>264</sup> For its part, China is not alone in this stance. Many countries in the Global South feel the same.<sup>265</sup> Interestingly, however, not all countries considered the Global South have shied away from formal mechanisms of international law. For example, Nicaragua alone has instituted eight contentious proceedings before the ICJ.<sup>266</sup> This difference in attitudes may, perhaps, reflect an amalgamation of historical, economic, and geopolitical factors that ultimately affect a State’s perceived efficacy in international systems. Regarding China, the Council on Foreign Relations notes:

In the first decade of the twenty-first century, China often proved willing to play by international rules and norms. As its economy grew, however, Beijing assumed a more active role in global governance, signaling its potential to lead and to challenge existing institutions and norms. The country boosted its power in four ways: it took on a bigger role in international intuitions, advertised its increasing influence, laid the groundwork to create some of its own organizations, and sometimes subverted global governance rules.<sup>267</sup>

This description accurately portrays China’s emerging brand of global health diplomacy. Through its soft power tactics, it has established itself as a leader in WHO and other global health institutions as well as increased its influence among the Global South by presenting itself as an alternative investor to the United States.<sup>268</sup> Generally, China’s soft power tactics fit into two categories: information

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263 Moynihan, *supra* note 176; *Declaration of Russia & China*, *supra* note 199.

264 Moynihan, *supra* note 176; *Declaration of Russia & China*, *supra* note 199.

265 See, e.g., Brian-Vincent Ikejiaku, *International Law is Western Made Global Law: The Perception of Third-World Category*, 6 AFR. J. LEGAL STUD. 337, 340-55 (2013).

266 *Contentious Cases Organized by State*, INT’L CT. J., <https://www.icj-cij.org/en/cases-by-country> [https://perma.cc/SA5E-TD8S].

267 Huang et al., *supra* note 188.

268 *Id.*



control and influence on poorer States. These tactics predate COVID-19, with the next-most recent example from China being the SARS outbreak in the early 2000s. Comparing and contrasting China's response to SARS with its response to COVID-19 will highlight how China has fine-tuned its global health diplomacy in the face of PHEICs and whether its actions help promote the purpose of the IHR.

## *B. Chinese Diplomacy: From SARS to COVID-19*

### *1. Historical Background of SARS*

The factual background of the SARS pandemic is incredibly similar to COVID-19. In November 2002, clusters of atypical respiratory disease (atypical pneumonia) were discovered in the Guangdong Province of China.<sup>269</sup> By January 2003, the increasing incidence of this mysterious outbreak was known to China's Ministry of Health, but China did not share its report containing information regarding the atypical pneumonia outbreaks with WHO.<sup>270</sup> Reports of the outbreaks were labeled "top secret" under Chinese law which made public disclosure illegal, though information about it leaked on the internet, causing panic among citizens.<sup>271</sup> In February 2003, a text message that read "There is a fatal flu in Guangzhou" was circulated millions of times, and similar messages were shared via email and internet chat rooms.<sup>272</sup> These messages were eventually picked up by ProMED, and on February 10, 2003, the son of a former WHO employee in China contacted WHO about these reports directly, noting that over 100 people were already dead.<sup>273</sup> WHO reached out to China that day, and the following day China reported to WHO that there was "an outbreak of acute respiratory syndrome with 300 cases and five deaths in Guangdong Province."<sup>274</sup> Chinese officials then told the public about the situation for the first time, assuring them, as well as WHO, that the outbreak was under control and cases were declining.<sup>275</sup> However, by mid-February, doctors in China began raising the alarm that Chinese officials may be silencing reports of the outbreak, and China subsequently ordered a news blackout.<sup>276</sup> In late February 2002, China reported to WHO that it believed the

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269 David Fidler, *Brief History of the Global SARS Outbreak of 2002-03 in SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE* 71, 73 (2004), [https://link.springer.com/content/pdf/10.1057%2F9780230006263\\_5.pdf](https://link.springer.com/content/pdf/10.1057%2F9780230006263_5.pdf) [https://perma.cc/AF4Z-MMET].

270 *Id.*

271 *Id.*

272 *Id.* at 74.

273 *Id.*

274 *Id.*

275 *Id.* at 74-75.

276 *Id.* at 83; LEARNING FROM SARS: PREPARING FOR THE NEXT DISEASE OUTBREAK – WORKSHOP SUMMARY (Stacey Knobler et al. eds., 2004), <https://pubmed.ncbi.nlm.nih.gov/22553895>

outbreak was caused by *Chlamydia pneumoniae* and officially declared the outbreak over by February 27.<sup>277</sup>

By March 2003, cases of atypical pneumonia were reported in several Asian countries and Canada.<sup>278</sup> Toward the end of March, WHO named the new disease Severe Acute Respiratory Syndrome (SARS), and contact traced it back to the original outbreak in Guangdong that was previously considered chlamydia.<sup>279</sup> On March 25, WHO complained that it was getting insufficient information from China.<sup>280</sup> Following WHO complaints that were published in Western news outlets, China's Minister of Health again announced on national television that the outbreak was under control, and on April 3, a pamphlet was circulated entitled "SARS is Nothing to Be Afraid Of."<sup>281</sup> Interestingly, China appeared to make an about-face the very next day. It pledged to cooperate more with WHO's requests for information, and the head of China's CDC even publicly apologized for "failing to inform the public about a sometime fatal respiratory illness that has infected more than 2,000 people worldwide."<sup>282</sup> However, behind the scenes in China, another story was developing, one that David Fidler characterized as "duplicitous."<sup>283</sup> Doctors in China were accusing the government of underreporting, and WHO investigation teams were not being granted full access to hospitals.<sup>284</sup> WHO responded by not just publicly shaming China's actions but stating in a worldwide press conference, "[w]e do believe that the [Chinese] government has not invested in health in the last 30 years."<sup>285</sup> This appeared to be a wake-up call for China, but, as Fidler noted,

this transformation did not occur without the help of one final, embarrassing incident for the Chinese government. On 16 April, Chinese officials allowed the WHO's experts to begin visiting military and other hospitals in the Beijing area. As later reported in *Time*, 'hospital officials removed dozens of SARS patients from their isolation wards and transferred them to locations where they

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[<https://perma.cc/2BUY-RP5N>] [hereinafter LEARNING FROM SARS].

<sup>277</sup> Fidler, *supra* note 269, at 75.

<sup>278</sup> *Id.* at 78.

<sup>279</sup> *Id.* at 82.

<sup>280</sup> *Id.* at 83.

<sup>281</sup> *Id.* at 93.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 94.

<sup>284</sup> *Id.* at 94-95.

<sup>285</sup> *Id.* at 97.

could not be observed by the inspectors.<sup>286</sup>

After the hospital incident was exposed, China ordered officials to stop covering up the spread of SARS, became more transparent about the confirmed number of SARS cases, and fired top officials involved in the coverup.<sup>287</sup> It also began a public health campaign to actually control the SARS virus, which proved very effective. As the *Wall Street Journal* put it, “China is as good at fighting SARS as at hiding it.”<sup>288</sup>

## 2. Information Control

China has long been criticized by Western States for its media censorship, propaganda, and revisionist history.<sup>289</sup> Restrictive media policies have allowed it to regulate and control the information put out on the international stage.<sup>290</sup> While the age of the internet has threatened this control, China shows no signs of stopping. Instead, its strategy has evolved. During the SARS crisis, China attempted to control what information was available to the public through blackouts and strict secrecy laws. When it did address the public, it appeared to be less concerned with its image and more about quelling public disorder. It learned, however, that suppressing information altogether was not possible with the internet.<sup>291</sup> Reflecting on the COVID-19 pandemic, it seems that China now focuses not on *what* information comes out but on *how* the information comes out. While government officials are no longer restricted by secrecy laws from reporting public health emergencies, it is still illegal to spread “rumors,” which, as evidenced by the case of Dr. Li, may include anything construed as a threat to China’s official narrative.<sup>292</sup> In addition, government censorship still persists in China, particularly on social media platforms.<sup>293</sup>

Furthermore, State media in China has closely echoed the narrative of State officials. Following Chinese media sources such as *Global Times*, *Beijing News*, and *Xinhua* throughout the COVID-19 pandemic, the BBC has documented how China quickly turned the narrative of COVID-19 from a disaster into a victory.<sup>294</sup>

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 97-98.

<sup>288</sup> *Id.* at 101.

<sup>289</sup> Beina Xu & Eleanor Albert, *Media Censorship in China*, COUNCIL FOREIGN RELS. (Feb. 17, 2017), <https://www.cfr.org/backgroundunder/media-censorship-china> [<https://perma.cc/Y73K-G6X6>].

<sup>290</sup> *Id.*

<sup>291</sup> LEARNING FROM SARS, *supra* note 276.

<sup>292</sup> *Id.*; Laney Zhang, *FALQS: Spreading Rumors and Police Reprimand under Chinese Law*, LIBR. CONG. (March 2, 2020), <https://blogs.loc.gov/law/2020/03/falqs-spreading-rumors-and-police-reprimand-under-chinese-law> [<https://perma.cc/NCH6-2H35>].

<sup>293</sup> *China Covid-19*, *supra* note 189.

<sup>294</sup> *Id.*; John Sudworth, *Wuhan Marks its Anniversary with Triumph and Denial*, BBC (Jan. 23,

Blame for the virus shifted from being pointed in multiple directions to being pointed at Wuhan specifically to being pointed at sources outside China while at the same time promoting a pro-China narrative.<sup>295</sup> For example, in August 2020, *Global Times* tweeted “@WHO’s admission that Wuhan may not be the origin of #COVID19 may offset conspiracy theories that have put the central Chinese city and China under a bad light over virus origin: Chinese epidemiologists.”<sup>296</sup> Furthermore, State media has worked to promote stories about how well the government handled the virus in order to saturate the media space with positive messaging.<sup>297</sup>

China has also used this positive COVID-19 messaging in a larger, ongoing narrative about China’s place in the international system. In a speech on April 4, 2021, China’s Foreign Minister Wang Yi highlighted China’s commitment and dedication to the UN and international law.<sup>298</sup> Wang Yi denied accusations by the United States that China uses “coercive diplomacy,” saying instead that China itself has “[fallen] prey” to foreign coercion and aggression.<sup>299</sup> At the same time, China vehemently denies accusations of unilateralism and considers itself a cooperative, global player. Recently, China has engaged in joint statements with Russia “pledg[ing] to protect global strategic security and stability, support and practice true multilateralism, oppose interference in other countries’ affairs under the guise of ‘democracy’ and ‘human rights,’ and resist unilateral coercive sanctions.”<sup>300</sup> Messaging has also been blatantly ideological at times; for example, an exhibition in China remembering the one-year anniversary of COVID-19 reads “[t]he strategic success achieved in this battle [against COVID-19] fully manifested the strong leadership of the Communist Party of China and the significant advantages of the socialist system of our country.”<sup>301</sup> This pro-China

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2021), <https://www.bbc.com/news/world-asia-china-55765875> [<https://perma.cc/C8E3-ENC7>].

<sup>295</sup> *China Covid-19*, *supra* note 189.

<sup>296</sup> *Id.*

<sup>297</sup> Sudworth, *supra* note 294.

<sup>298</sup> H.E. Wang Yi, *Focusing on Cooperation and Managing Differences: Bringing China-U.S. Relations Back to the Track of Sound and Steady Development*, MINISTRY FOREIGN AFF. CHINA (Apr. 24, 2021), [https://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/zyjh\\_665391/202104/t20210424\\_9170543.html](https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/202104/t20210424_9170543.html) [<https://perma.cc/2T46-W2XT>].

<sup>299</sup> *Id.*

<sup>300</sup> Xi, *Putin Announce Extension of China-Russia Friendly Cooperation Treaty*, XINHUA (June 29, 2021), [http://www.xinhuanet.com/english/2021-06/29/c\\_1310032860.htm](http://www.xinhuanet.com/english/2021-06/29/c_1310032860.htm) [<https://perma.cc/3LZ4-VVDE>]; *Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions*, LAW INFO. CHINA (March 23, 2021), <https://lawinfochina.com/display.aspx?id=8058&lib=tax&SearchKeyword=&SearchCKeyword=&EncodingName=big5> [<https://perma.cc/6FZA-J25X>].

<sup>301</sup> Sudworth, *supra* note 294.

messaging has at the same time been juxtaposed with messages about how “U.S. media have turned on each other, how politicians have prioritized spending on election campaigns over health care, and how a messy, endless election has led to extreme polarization.”<sup>302</sup> It is unclear whether this messaging is aimed directly at the United States, at States seen as potential allies to China, or at both.

While it was immediately clear that China’s information blackouts during SARS were considered an international embarrassment, the overall influence of China’s narrative control in the wake of COVID-19 has yet to be seen. Pew research reveals that international opinion of China has dropped, but it is important to note that this poll only included fourteen wealthy countries that already had unfavorable views of China.<sup>303</sup> There is no research on how countries in the Global South currently view China, though research suggested that poorer countries viewed China more favorably before the pandemic.<sup>304</sup> Research does indicate, however, that Chinese citizens view their own government more favorably after its handling of COVID-19, which one professor from Georgia State University believes is because China’s brand of diplomacy “doesn’t work well in the Western context, but [is] often oriented toward domestic audiences within China because it makes China seem stronger and withstanding Western pressures.”<sup>305</sup> This messaging may also work with other countries that have historically felt Western pressure.

### 3. External Influence

Before SARS, China’s emergence as a global health leader was slow as China itself was considered an aid-recipient country.<sup>306</sup> But after SARS revealed the severe deficiencies in China’s own public health, China recovered quickly. First, it made dramatic investments in its health system, which in turn poised it to become a leader both economically and by example.<sup>307</sup> Then, it opened itself to engaging

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302 *China Covid-19*, *supra* note 189.

303 Amy Mackinnon, Darcy Palder & Colum Lynch, *China’s Global Image Plummets After Coronavirus*, FOREIGN POL’Y (Oct. 6, 2020), <https://foreignpolicy.com/2020/10/06/chinas-global-image-plummets-covid-coronavirus-pandemic> [<https://perma.cc/539E-X73P>].

304 *Id.*

305 Emily Feng, *As U.S. Views of China Grow More Negative, Chinese Support for Their Government Rises*, NAT’L PUB. RADIO (Sept. 23, 2020, 11:14 AM), <https://www.npr.org/2020/09/23/913650298/as-u-s-views-of-china-grow-more-negative-chinese-support-for-their-government-ri> [<https://perma.cc/8SAK-W57U>]; Mackinnon et al., *supra* note 303.

306 Peilong Liu et al., *China’s Distinctive Engagement in Global Health*, 384 LANCET 793, 794 (2014).

307 Jennifer Bouey, *Strengthening China’s Public Health Response System: From SARS to COVID-19*, 100 AM. J. PUB. HEALTH 939 (2020); Susan Brink, *New Research: China is Winning Some Health-Care Battles—And Losing Others*, NAT’L PUB. RADIO (Oct. 5, 2019), <https://www.npr.org/sections/goatsandsoda/2019/10/05/767274984/new-research-china-is-winning-some-health-care-battles-and-losing-others> [<https://perma.cc/S7GH-9YJL>].

with global health governance bodies such as WHO, UNICEF, UNFPA, UNAIDS, and multilateral health funds, as well as regularly sending delegates to the WHA.<sup>308</sup> In 2007, China backed Margaret Chan, a Hong Kong national, in her election for Director General of WHO.<sup>309</sup> Despite criticism about how she handled the SARS crisis when she was the Director of Health of Hong Kong, Chan was well respected at WHO for having shared updates about SARS when WHO was pressing China for more information, and so the move to back her election “came off as a mea culpa for covering up the SARS crisis” that curried favor for China in Geneva.<sup>310</sup>

While U.S. development assistance for health has been declining, China has increasingly made significant health-related investments in the Global South.<sup>311</sup> Through initiatives such as the South-South Collaboration and the One Belt One Road Initiative, which aims to connect countries in the Global South together, China is leading what one scholar calls a “paradigm shift in global health assistance as we currently know it.”<sup>312</sup> These initiatives not only stand to rival the traditional mechanisms of aid used by wealthy countries in terms of size of the check but also in philosophy.<sup>313</sup> In its most general sense, aid from the United States and other wealthy nations often comes with strings attached—recipients must become more like their donors politically (i.e., democratize and open their markets).<sup>314</sup> Aid from these countries is usually facilitated through nongovernmental organizations (such as the Red Cross) and has been criticized for being too bureaucratic, driven by the interests of the donor instead of the needs of the recipient, and generally ineffective.<sup>315</sup> China, on the other hand, gives aid with “no strings attached” by emphasizing independent development projects meant to help poor States

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308 Liu et al., *supra* note 306, at 799; Titiporn Tuangratananon et al., *China: Leapfrogging to Become a Leader in Global Health?*, 9 J. GLOB. HEALTH 1, 3 (2019).

309 Natalie Huet, *World Looks for a Better Doctor: Margaret Chan's Controversial Legacy Shapes Search for New Head of World Health Organization*, POLITICO (Jan. 22, 2017, 10:12 PM), <https://www.politico.eu/article/world-looks-for-a-better-doctor> [https://perma.cc/576K-RF2H]; Chan Wai Yin & Ma Shu Yun, *The Making of a Chinese Head of the WHO: A Study of the Media Discourse on Margaret Chan's Contest for the WHO Director-Generalship and its Implications for the Collective Memory of SARS*, 39 INT'L J. HEALTH SERVS. 587, 592-95 (2009).

310 Huet, *supra* note 309.

311 Liu et al., *supra* note 306, at 794-97; Tuangratananon et al., *supra* note 308; Elanah Uretsky, Jennifer Bouey & Rebecca Katz, *China's Emerging Role In Global Health*, HEALTH AFFS. (Jan. 17, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180109.759800/full> [https://perma.cc/YBN9-2D9P].

312 Uretsky et al., *supra* note 311.

313 *Id.*; Liu et al., *supra* note 306, at 794-97; Tuangratananon et al., *supra* note 308.

314 Liu et al., *supra* note 306; Uretsky et al., *supra* note 311.

315 Thomas Dichter, *When Criticism Falls on Deaf Ears: The Case of U.S. Foreign Aid*, AM. FOREIGN SERV. ASS'N (Nov. 2017), <https://afsa.org/when-criticism-falls-deaf-ears-case-us-foreign-aid> [https://perma.cc/73S2-26ZQ].

transform from recipients into future economic partners.<sup>316</sup> In other words, because healthier populations lead to greater economic development and sustainability,<sup>317</sup> China believes that investing in another country's health now will yield an economic (and possibly political) return on investment later. In contrast to aid from the United States, aid from China is usually given directly from government to government and has been criticized for being non-transparent and turning a blind eye to corruption.<sup>318</sup> Global health aid from the United States is typically targeted toward specific diseases, with about half of its aid spent on HIV, whereas aid from China targets specific countries, with about half going to the African continent.<sup>319</sup>

It is no surprise that since COVID-19 has hit poor countries the hardest, China has seized the pandemic as an opportunity to bolster its image as a leader in global health.<sup>320</sup> In a government white paper from May 2020, China claims it donated much-needed medical supplies to over 150 countries as well as sent medical teams to twenty-seven.<sup>321</sup> It has offered technical assistance to many countries, including Iran, Italy, Spain, and India.<sup>322</sup> China has provided low-cost vaccines to nearly

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<sup>316</sup> Liu et al., *supra* note 306; Uretsky et al., *supra* note 311.

<sup>317</sup> Jaana Remes, Matt Wilson & Aditi Ramdorai, *How Investing in Health has a Significant Economic Payoff for Developing Economies*, BROOKINGS (July 21, 2020), <https://www.brookings.edu/blog/future-development/2020/07/21/how-investing-in-health-has-a-significant-economic-payoff-for-developing-economies> [<https://perma.cc/4FCH-NQU9>].

<sup>318</sup> Huang et al., *supra* note 188; Becky Carter, *A Literature Review on China's Aid*, K4D HELPDESK REP. (Sept. 7, 2017), [https://gsdrc.org/wp-content/uploads/2017/10/177\\_China\\_aid.pdf](https://gsdrc.org/wp-content/uploads/2017/10/177_China_aid.pdf) [<https://perma.cc/6QWD-HG6Q>].

<sup>319</sup> Uretsky et al., *supra* note 311; *Breaking Down the U.S. Global Health Budget by Program Area*, KAISER FAM. FOUND. (May 10, 2021), <https://www.kff.org/global-health-policy/fact-sheet/breaking-down-the-u-s-global-health-budget-by-program-area/#top> [<https://perma.cc/T8YR-XQSZ>]; *The U.S. Government and Global Health*, KAISER FAM. FOUND. (July 30, 2019), <https://www.kff.org/global-health-policy/fact-sheet/the-u-s-government-and-global-health> [<https://perma.cc/W2DF-U434>]; Reuters Staff, *China Says More than Half of Foreign Aid Given to Africa*, REUTERS (July 10, 2014), <https://www.reuters.com/article/us-china-aid/china-says-more-than-half-of-foreign-aid-given-to-africa-idUSKBN0FF0YN20140710> [<https://perma.cc/P7WY-7699>].

<sup>320</sup> Akihiko Nishio, *COVID-19 is Hitting Poor Countries the Hardest. Here's How World Bank's IDA is Stepping Up to Support*, WORLD BANK BLOGS (Jan. 28, 2021), <https://blogs.worldbank.org/voices/covid-19-hitting-poor-countries-hardest-heres-how-world-banks-ida-stepping-support> [<https://perma.cc/4LJN-SBVP>]; Kathy Gilsinan, *The Problem With China's Victory Lap*, ATLANTIC (March 28, 2020), <https://www.theatlantic.com/politics/archive/2020/03/china-wuhan-xi-victory-coronavirus/608977> [<https://perma.cc/85RG-JXDT>]; Huang et al., *supra* note 188.

<sup>321</sup> Jacob Kurtzer & Grace Gonzales, *China's Humanitarian Aid: Cooperation Amidst Competition*, CTR. STRATEGIC & INT'L STUD. (Nov. 17, 2020), <https://www.csis.org/analysis/chinas-humanitarian-aid-cooperation-amidst-competition> [<https://perma.cc/YMK2-BF42>].

<sup>322</sup> Huang et al., *supra* note 188; Nectar Gan & Jessie Yeung, *China Offered Covid Aid to India While US Dragged its Feet, but Delhi isn't that Keen*, CNN (Apr. 28, 2021, 3:34 AM), <https://www.cnn.com/2021/04/28/china/china-india-covid-relief-mic-intl-hnk/index.html> [<https://perma.cc/3WXC-A883>].

forty African countries and has overall pledged about half a billion vaccines to over forty-five countries.<sup>323</sup> It believes filling the void left by the United States and other wealthy countries that are hoarding vaccines will improve its image among poorer countries.<sup>324</sup> It has also announced \$50 million USD in donations to WHO and the UN Global Humanitarian Response Plan to COVID-19 since March 2020,<sup>325</sup> and in May 2021, President Xi Jinping pledged \$3 billion USD to help developing countries recover from COVID-19 over the next three years.<sup>326</sup> In November 2021, Xi pledged another one billion COVID-19 vaccine doses to Africa and also called on Chinese companies to invest billions of dollars in the continent over the next three years.<sup>327</sup> These doses would be provided through donations and joint production with African countries.<sup>328</sup>

While, on its face, China's response seems helpful, it has been met by skepticism in many recipient countries and has been highly scrutinized by the United States.<sup>329</sup> In Zimbabwe, where about 90 percent of the vaccine supply comes from China, vaccine hesitancy is strongly fueled by a general distrust of the Chinese government.<sup>330</sup> India has been reluctant to engage Chinese offers for assistance at all.<sup>331</sup> In June 2021, China threatened to block a shipment of 500,000 vaccines to Ukraine unless Ukraine withdrew its support for increased

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323 *China Says Providing Vaccines to Almost 40 African Nations*, AP NEWS (May 20, 2021), <https://apnews.com/article/united-nations-africa-china-business-coronavirus-pandemic-ad395006fe0c4daf0e13c3be02f07cc7> [https://perma.cc/5E3T-F9ZK].

324 Amanda McGowan, *China's 'Vaccine Diplomacy' Fills Void in Developing World Left by US 'Vaccine Nationalism'*, THE WORLD (Jan. 12, 2021, 4:00 PM), <https://www.pri.org/stories/2021-01-12/china-s-vaccine-diplomacy-fills-void-developing-world-left-us-vaccine-nationalism> [https://perma.cc/X3B4-8M3L].

325 Kurtzer & Gonzales, *supra* note 321.

326 *China's Xi Pledges \$3 Bln Pandemic Aid for Poor Nations*, REUTERS (May 21, 2021, 7:35 AM), <https://www.reuters.com/business/healthcare-pharmaceuticals/chinas-xi-pledges-3-bln-international-aid-proposes-vaccine-cooperation-forum-2021-05-21> [https://perma.cc/2U9H-755A].

327 Edward Mcallister & Tom Daly, *China's Xi Pledges Another 1 Bln COVID-19 Vaccine Doses for Africa*, REUTERS (Nov. 30, 2021, 8:26 AM), <https://www.reuters.com/world/africa/chinas-xi-pledges-10-bln-credit-line-african-financial-institutions-2021-11-29> [https://perma.cc/WF98-4P6L].

328 *Id.*

329 See, e.g., Antony Sguazzin & Katarina Hoijs, *China Suspicion, 'Foreign Plot' Fears Hamper Africa Vaccine Plan*, BLOOMBERG (Apr. 20, 2021, 12:00 AM), <https://www.bloomberg.com/news/articles/2021-04-20/china-suspicion-foreign-plot-fears-hamper-africa-vaccine-plan> [https://perma.cc/M47H-NWXQ]; Gan & Yeung, *supra* note 322; Kurtzer & Gonzales, *supra* note 321; Gilsinan, *supra* note 320.

330 Sguazzin & Hoijs, *supra* note 329; Fortune Moyo, Kudzai Mazvarirwofa & Vimbai Chinenbiri, *Vaccines are a Tough Sell. Their Chinese Origin Doesn't Help.*, GLOB. PRESS J. (May 22, 2021), <https://globalpressjournal.com/africa/zimbabwe/vaccines-tough-sell-chinese-origin-doesnt-help> [https://perma.cc/62NC-ABW5].

331 Gan & Yeung, *supra* note 322.



watchfulness of human rights abuses in China.<sup>332</sup> It has also not gone unnoticed that many of China's public pledges to poorer countries are coupled with statements criticizing the United States. In April 2021, reporters from CNN noted how Chinese leaders and State media ramped up their criticism of the United States for its "America first" approach to COVID-19 aid, attributing values from the Trump Administration to the new Biden Administration.<sup>333</sup> China has called the United States's public support of struggling countries such as India disingenuous,<sup>334</sup> claiming that the United States has "fully exposed its selfishness in refusing to offer substantial help to India and is obstructing global efforts in vaccine distribution to developing and needy countries."<sup>335</sup> At the same time, China continues to characterize itself "as a responsible global power" "not driven by 'selfish geopolitical interests,'" while the United States believes China is just posturing to divert attention away from its own missteps handling the pandemic.<sup>336</sup>

Before discussing China's global health diplomacy in the context of the IHR, it should be noted that during the SARS pandemic, the only diseases subject to the regulations were the plague, cholera, and yellow fever.<sup>337</sup> Therefore, China did not violate the IHR at that time (though its actions may have violated the WHO Constitution). However, had the IHR as it exists today been in force at the time, China would have violated it. Let us not forget that the SARS epidemic was the impetus for the WHA to kick the IHR revisions they started in 1995 into gear. The question, then, is whether the evolution of China's global health diplomacy was influenced by the IHR revisions and whether its actions promote the purpose of the IHR.

After the SARS crisis, many believed China was turning a page in its engagement with the international system.<sup>338</sup> Because China eventually cooperated with WHO and even issued a formal apology for its coverup (which is notably uncharacteristic for any country, let alone China), observers were cautiously optimistic about China's future cooperation.<sup>339</sup> In retrospect and considering

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332 Jamey Keaten, *AP: Exclusive: Diplomats Say China Puts Squeeze on Ukraine*, AP NEWS (June 25, 2021), <https://apnews.com/article/united-nations-china-europe-ukraine-health-a0a5ae8f735b92e39c623e453529cbb9> [https://perma.cc/K6XP-96ZL].

333 Gan & Yeung, *supra* note 322.

334 Liu Zongyi, *Will US 'Crocodile Tears' Prompt Indian Elites to Reflect on Who Their Allies Are*, GLOB. TIMES (Apr. 25, 2021, 10:51 PM), <https://www.globaltimes.cn/page/202104/1222059.shtml> [https://perma.cc/Y3CA-AADQ].

335 Liu Xin & Chenq Qingqing, *US Slammed for 'Selfish,' 'Indifferent' Response to India's Call for Help Amid Devastating COVID-19 Crisis*, GLOB. TIMES (Apr. 26, 2021, 12:51 AM), <https://www.globaltimes.cn/page/202104/1222068.shtml> [https://perma.cc/PMB6-D9GZ].

336 Kurtzer & Gonzales, *supra* note 321; Gilsinan, *supra* note 320.

337 World Health Organization Regulations, *supra* note 36; IHR 1982, *supra* note 162; IHR, *supra* note 2.

338 LEARNING FROM SARS, *supra* note 276.

339 *Id.*

China's COVID-19 response, these observers were spot-on with their predictions. Before SARS, China was far less engaged in the international system and was less concerned about its international image. As discussed, in between SARS and COVID-19, China made great strides economically as well as in the formal and informal international system. Its response to COVID-19 adjusted accordingly and suggests that China knows it now has a lot more to lose economically and geopolitically than it did during SARS. Thus, it was faced with a tricky situation that highlights the biggest fundamental flaw of the IHR: how can a country be expected to comply with its reporting requirements when compliance is likely to be punished with disproportionate trade restrictions? In light of this legitimate fear, China was practically left with no choice but to do what it did—cooperate minimally with WHO but maintain the narrative that it was cooperating to the full extent. It is reasonable to believe that any other country would have done the same under the same circumstances. In fact, China is not the only country that may have violated the IHR during the COVID-19 pandemic.<sup>340</sup>

### *C. The World Responds to China*

#### *1. Additional Health Measures*

While this Article has focused on China's handling of COVID-19, it is important to address the elephant in the international room: many of the countries that have criticized China have done so while actively violating the IHR themselves. Throughout the pandemic, WHO consistently advised against travel and trade restrictions that would significantly interfere with international traffic.<sup>341</sup> Yet, many countries implemented travel and trade restrictions anyway.<sup>342</sup> In April 2020, 91 percent of the world's population lived in countries with travel restrictions, and as of March 2022, 453 notifications of trade measures had been reported by WTO member States.<sup>343</sup> Many of these restrictions are still in place

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<sup>340</sup> Habibi et al., *supra* note 75.

<sup>341</sup> *All Updates for Travellers*, WORLD HEALTH ORG., <https://www.who.int/travel-advice/all-updates-for-travellers> [<https://perma.cc/PWQ4-9CFD>].

<sup>342</sup> *Public Health Considerations While Resuming International Travel*, WORLD HEALTH ORG. (July 30, 2020), <https://www.who.int/news-room/articles-detail/public-health-considerations-while-resuming-international-travel> [<https://perma.cc/PJ6T-XKE5>].

<sup>343</sup> Phillip Connor, *More Than Nine-in-Ten People Worldwide Live in Countries with Travel Restrictions Amid COVID-19*, PEW RSCH. CTR. (Apr. 1, 2020), <https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19> [<https://perma.cc/XF7C-ATL5>]; *WTO Members' Notifications on COVID-19*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/covid19\\_e/notifications\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/notifications_e.htm) [<https://perma.cc/7U7Y-QEEH>].

today. For example, the Biden Administration has yet to lift certain Trump-era border restrictions despite bipartisan calls to do so.<sup>344</sup> Between January 2020 and April 2021, States collectively made over 220 export bans or limits, citing COVID-19-related reasons.<sup>345</sup> Most of the restricted products were medical goods and foodstuffs, further exacerbating the pandemic's damage.<sup>346</sup>

Data is still being collected on the breadth of these measures, but initial reports show that a significant amount are against WHO's advice or otherwise not based in science, thereby violating Article 43 of the IHR.<sup>347</sup> It is also important to note that many of these actions may also violate WTO agreement rules that emergency trade restrictions must be "targeted, proportionate, temporary, and transparent."<sup>348</sup> In addition, one report shows that "two thirds of states that had implemented additional health measures were again reported to have neglected their obligation to inform the WHO of such measures."<sup>349</sup> Similarly, many WTO members violated their obligation to notify the WTO Secretariat of the restrictive trade measures.<sup>350</sup>

Furthermore, some scholars argue that these additional health measures also violate Article 3 of the IHR, which requires that the Regulations shall be implemented "with full respect for the dignity, human rights and fundamental freedoms of persons."<sup>351</sup> WTO agreements similarly have provisions that allow for flexibility when making trade restrictions to protect health so long as these restrictions "do not 'constitute a means of arbitrary or unjustifiable discrimination,' or a 'disguised restriction on international trade.'"<sup>352</sup> Some restrictions, however, are likely based in xenophobia or racism rather than science. For example, in March 2020, the Trump Administration instituted a ban on migrants crossing the border from Mexico to the United States, citing a U.S. public health law called Title 42.<sup>353</sup> Trump cited concerns about "unscreened" and "unvetted" people who may cross the border with COVID-19, but anti-Mexican rhetoric and policies were a cornerstone of Trump's platform well before COVID-19.<sup>354</sup>

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344 Priscilla Alvarez, *Pressure Mounts on Biden Administration to Lift Restrictions on US Borders*, CNN (July 7, 2021, 8:08 AM), <https://www.cnn.com/2021/07/07/politics/us-mexico-border-restrictions/index.html> [<https://perma.cc/93QM-RXMC>].

345 CHRISTOPHER CASEY & CATHLEEN CIMINO-ISAACS, CONG. RSCH. SERV., IF11551, EXPORT RESTRICTIONS IN RESPONSE TO THE COVID-19 PANDEMIC (2021).

346 *Id.*

347 Hoffman et al., *supra* note 75.

348 CASEY & CIMINO-ISAACS, *supra* note 345.

349 Hoffman et al., *supra* note 75.

350 CASEY & CIMINO-ISAACS, *supra* note 345.

351 IHR, *supra* note 2, art. 3(1).

352 CASEY & CIMINO-ISAACS, *supra* note 345.

353 Alvarez, *supra* note 344; 42 U.S.C. 2 § 1.

354 Priscilla Alvarez, Geneva Sands, Betsy Klein & Jennifer Hansler, *Trump Administration Limits Nonessential Travel Between US and Mexico*, CNN (Mar. 20, 2020, 3:05 PM), <https://www.cnn.com/2020/03/20/politics/us-mexico-border/index.html> [<https://perma.cc/87GV->

While non-compliance with WHO and WTO rules on international traffic is in and of itself an immediate issue, the bigger issue is the long-term effect these unchecked restrictions will have on developing countries. In April 2020, the IMF and WTO issued a joint statement warning of the potential effect of export restrictions.<sup>355</sup> They noted that

Taken collectively, export restrictions can be dangerously counterproductive. What makes sense in an isolated emergency can be severely damaging in a global crisis. Such measures disrupt supply chains, depress production, and misdirect scarce, critical products and workers away from where they are most needed. Other governments counter with their own restrictions. The result is to prolong and exacerbate the health and economic crisis — with the most serious effects likely on the poorer and more vulnerable countries.<sup>356</sup>

As of May 2020, forty-two WTO countries pledged to lift their emergency restrictions, but the United States, China, and European Union did not make a similar pledge.<sup>357</sup> By October 2020, G-20 countries, which make up 80 percent of world GDP and 75 percent of global trade, only lifted 30 percent of their trade restrictions.<sup>358</sup> One industry severely hurt by these restrictions is tourism, with a disproportionate impact felt in developing countries where tourism is often a large part of their economy.<sup>359</sup> For example, “in Vanuatu, where tourism accounts for 40 percent of GDP, 70 percent of tourism jobs have been lost since mid-March 2020.”<sup>360</sup> Rwanda lost an estimated \$8 million USD solely for the cancellation of twenty conferences in March and April 2020.<sup>361</sup> In addition, poor countries are having difficulty importing foodstuffs and have incurred significant losses from

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Q2RL]; Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016, 11:35 AM), <https://time.com/4473972/donald-trump-mexico-meeting-insult> [https://perma.cc/3XV4-GLE3].

<sup>355</sup> CASEY & CIMINO-ISAACS, *supra* note 345.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*; *About the G20*, G20, <https://www.g20.org/about-the-g20> [https://perma.cc/4WDW-UVB2].

<sup>359</sup> Asif Khan et al., *Tourism and Development in Developing Economies: A Policy Implication Perspective*, 12 SUSTAINABILITY 1, 15 (2020); *Cross-Border Mobility, COVID-19 and Global Trade*, WTO (Aug. 25, 2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/mobility\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/mobility_report_e.pdf) [https://perma.cc/Y3YS-LKCF].

<sup>360</sup> *Cross-Border Mobility*, *supra* note 359, at 4.

<sup>361</sup> *Id.*

difficulties in exporting seasonal products.<sup>362</sup> Foreign direct investment in developing economies fell by 42 percent in 2020, and emerging market currencies depreciated by 15 percent.<sup>363</sup> Overall, developing economies are expected to lose at least \$220 billion USD in income and incur between \$2.6 and \$3.4 trillion USD of total public external debt in the next two years, setting back decades of progress.<sup>364</sup>

If affected developing nations consider pursuing actions against Western countries in the WTO's dispute settlement body, they might find an ally in China, which has increasingly engaged in that forum. In June 2021, when asked to respond to a statement by the Australian Prime Minister that the WTO should penalize bad behavior, Chinese Foreign Ministry Spokesperson Wang Wenbin replied, "as is well known, major Western countries formulate most of the rules of world trade. It is their customary practice to maintain their hegemony and contain the growth of developing countries."<sup>365</sup> He also noted, however, that trade restrictions taken by China "are in strict compliance with Chinese laws and regulations as well as WTO rules and are completely justified and lawful."<sup>366</sup> Thus, any country looking to take China to the WTO over trade restrictions can expect a fight.

## 2. *Ramped-Up Rhetoric*

In addition to trade and travel restrictions, some Western countries are meeting China's narrative control tactics by ramping up anti-Chinese sentiment. Central to the narrative is the increasing demand to determine the origin of COVID-19.<sup>367</sup> From a public health standpoint, determining the origin of COVID-19 is important for a variety of reasons, including preventive policymaking, as it is anticipated that future viruses will emerge from the same regions.<sup>368</sup> But public debate on origin is clearly more political in nature than scientific. China insisted that WHO investigate potential origins outside China (including in Western

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<sup>362</sup> *Id.* at 6.

<sup>363</sup> Sung Lee, *COVID-19 Brief: Impact on the Economies of Developing Countries*, U.S. GLOB. LEADERSHIP COAL. (Apr. 8, 2021), <https://www.usglc.org/coronavirus/economies-of-developing-countries> [https://perma.cc/6SCK-BQV5].

<sup>364</sup> *Id.*

<sup>365</sup> *Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on June 10, 2021*, MINISTRY FOREIGN AFFS. CHINA (June 10, 2021), <https://www.mfa.gov.cn/ce/cohk/eng/Topics/fyrbt/t1882905.htm> [https://perma.cc/F8S7-MTT5] [hereinafter *Wang's Press Conference*].

<sup>366</sup> *Id.*

<sup>367</sup> Guy Faulconbridge & Steve Holland, *G7 Chides China on Rights, Demands COVID Origins Investigation*, REUTERS (June 13, 2021, 10:05 AM), <https://www.reuters.com/world/china/china-cautions-g7-small-groups-dont-rule-world-2021-06-13> [https://perma.cc/J6CL-KHJH].

<sup>368</sup> David M. Morens et al., *The Origin of COVID-19 and Why It Matters*, 103 AM. J. TROPICAL MED. & HYGEINE 955 (2020).

countries), while Western countries called for WHO to investigate and settle a dispute between two origin theories: namely, whether COVID-19 occurred naturally or as the result of a lab leak.<sup>369</sup> But cohesion on this narrative has been a lot more difficult for the United States in particular because, unlike in China, where the government influences media, media in the United States often influences politicians.<sup>370</sup>

For example, the theory that COVID-19 unintentionally leaked from the Wuhan Institute of Virology (Wuhan Institute) was first suggested by Chinese researchers in February 2020.<sup>371</sup> U.S. Republicans quickly seized on this theory to fuel their hard-on-China platform, some even suggesting the virus was intentionally leaked.<sup>372</sup> But shortly thereafter, a prominent zoologist with financial and research ties to the Wuhan Institute, Peter Daszak, began publishing articles in well-respected scientific journals and media outlets labeling the lab leak theory a “conspiracy.”<sup>373</sup> Daszak and his colleagues hoped that associating the theory with Donald Trump would quell interest in the lab he was invested in—and it worked.<sup>374</sup> News media outlets such as CNN repeated the notion that the lab leak theory was a “conspiracy,” with Facebook labeling stories that COVID-19 was “man-made or manufactured” as misinformation.<sup>375</sup> However, as investigative journalist Paul Thacker notes, when Trump left office, “the framing of the lab leak hypothesis as a partisan issue was harder to sustain.”<sup>376</sup> Subsequently, media outlets, including ones that previously reported the lab leak as a conspiracy theory, have since been entertaining the theory.<sup>377</sup>

In addition, in March 2021, WHO released a report following its January

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<sup>369</sup> *Id.*

<sup>370</sup> Paul Thacker, *The Covid-19 Lab Leak Hypothesis: Did the Media Fall Victim to a Misinformation Campaign?*, 374 *BMJ* 1 (2021); Alice Miranda Ollstein, *Virus Lab Leak Theory Dogs Democrats Eager to Keep Focus on Trump’s Covid Failings*, POLITICO (July 4, 2021, 7:00 AM), <https://www.politico.com/news/2021/07/04/wuhan-lab-leak-theory-democrats-497902> [<https://perma.cc/EN6F-BBDU>].

<sup>371</sup> The original report, which was posted on ResearchGate, was removed shortly after publication. It is unclear who removed it or why. Thacker, *supra* note 370.

<sup>372</sup> *Id.*; Philip Elliott, *How Distrust of Donald Trump Muddled the COVID-19 ‘Lab Leak’ Debate*, TIME (May 26, 2021, 3:37 AM), <https://time.com/6051414/donald-trump-wuhan-laboratory-leak/> [<https://perma.cc/4ZJW-WXYK>]; Amy Davidson Sorkin, *The Battle Over the Coronavirus Lab-Leak Theory*, NEW YORKER (June 13, 2021), <https://www.newyorker.com/magazine/2021/06/21/the-battle-over-the-coronavirus-lab-leak-theory> [<https://perma.cc/RB7X-WF8P>].

<sup>373</sup> Thacker, *supra* note 370.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

investigation in China that the lab leak theory was the least likely scenario, *though not impossible*.<sup>378</sup> This report was met with skepticism by Western countries.<sup>379</sup> The Director-General of WHO even admitted himself that the investigation was not extensive enough, warranting further research.<sup>380</sup> Underlying this skepticism is the valid concern that China was not as forthcoming with its data as it should have been.<sup>381</sup> Fourteen nations, including the United States, Australia, Canada, Denmark, Japan, and the United Kingdom, subsequently issued a joint statement expressing concern about China's influence on WHO's January investigation.<sup>382</sup> This call was also coupled with increasing criticism by G7 allies of China's economic practices and human rights abuses, which China denies.<sup>383</sup>

Amid upcoming pressure from the 2022 mid-term elections, President Biden launched a U.S.-led intelligence investigation into the origins of COVID-19.<sup>384</sup> But this investigation was no more revealing than WHO's January investigation, again likely due to China's lack of cooperation.<sup>385</sup> In October 2021, WHO announced the launch of the new Scientific Advisory Group for the Origins of Novel Pathogens (SAGO), a diverse and well-qualified team of twenty-six scientists selected by WHO to further investigate the origins of COVID-19 as well as future pandemics.<sup>386</sup> While the creation of SAGO is an important step toward a more

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378 *Id.*; *Coronavirus: More Work Needed to Rule out China Lab Leak Theory Says WHO*, BBC NEWS (Mar. 31, 2021), <https://www.bbc.com/news/world-asia-china-56581246> [<https://perma.cc/LRY2-NRKT>].

379 Peter Beaumont, *UK and US Criticise WHO's Covid Report and Accuse China of Withholding Data*, GUARDIAN (Mar. 30, 2021, 2:08 PM), <https://www.theguardian.com/world/2021/mar/30/who-criticises-chinas-data-sharing-as-it-releases-covid-origins-report> [<https://perma.cc/H2R6-FP6W>].

380 *WHO Director-General's Remarks at the Member State Briefing on the Report of the International Team Studying the Origins of SARS-CoV-2*, WORLD HEALTH ORG. (Mar. 30, 2021), <https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-at-the-member-state-briefing-on-the-report-of-the-international-team-studying-the-origins-of-sars-cov-2> [<https://perma.cc/7BUP-D339>].

381 Beaumont, *supra* note 379.

382 Office of the Spokesperson, *Joint Statement on the WHO-Convened COVID-19 Origins Study*, U.S. DEP'T STATE (Mar. 30, 2021), <https://www.state.gov/joint-statement-on-the-who-convened-covid-19-origins-study> [<https://perma.cc/QS7Q-AF6G>].

383 Faulconbridge & Holland, *supra* note 367; Franco Ordonez & Asma Khalid, *Biden Pushes G-7 Allies to Take a Tougher Stance on China*, NAT'L PUB. RADIO (June 13, 2021, 1:58 PM), <https://www.npr.org/2021/06/13/1005969393/biden-spends-the-weekend-trying-to-persuade-g-7-leaders-to-push-back-on-china> [<https://perma.cc/HV98-Q4XD>].

384 Press Release, Statement by President Joe Biden on the Investigation into the Origins of COVID-19 (Aug. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/27/statement-by-president-joe-biden-on-the-investigation-into-the-origins-of-covid> [<https://perma.cc/BB9C-M6DT>].

385 *Unclassified Summary of Assessment on COVID-19 Origins*, OFFICE OF THE DIR. OF NAT'L INTEL., <https://www.dni.gov/files/ODNI/documents/assessments/Unclassified-Summary-of-Assessment-on-COVID-19-Origins.pdf> [<https://perma.cc/929Z-T2YJ>].

386 Amy Maxmen, *WHO Names Researchers to Reboot Outbreak Origin Investigations*,

transparent and less objectionable investigation, concerns about China's cooperation still loom as an ultimate barrier to getting to the bottom of the issue.<sup>387</sup>

The ramped-up rhetoric is not as effective of a diplomacy tool for the United States as it is for China, largely because it has stirred up internal division.<sup>388</sup> This is especially so for the United States, which has the highest level of division over its government's handling of COVID-19 out of thirteen other wealthy countries, according to one survey.<sup>389</sup> Public opinion about media coverage of COVID-19 is correlated with political party.<sup>390</sup> And public opinion, in turn, influences foreign policy.<sup>391</sup> In regards to global health, most European countries and the United States want to cooperate with China to prevent the spread of infectious disease.<sup>392</sup> However, while cooperation with China on epidemics is a top foreign policy priority in several EU countries, only a slim majority of Americans believe "many of the problems facing our country can be solved by working with other countries."<sup>393</sup> Additionally, U.S.-China competition is still a cornerstone of the Biden Administration's foreign policy (albeit much less so than his predecessor's).<sup>394</sup>

As discussed earlier, China has called out the United States for its political

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NATURE (Oct. 18, 2021), <https://www.nature.com/articles/d41586-021-02813-y> [https://perma.cc/ED3V-4S3V].

<sup>387</sup> *Id.*

<sup>388</sup> Michael Dimock & Richard Wike, *America is Exceptional in the Nature of its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide> [https://perma.cc/J6WJ-QRQS].

<sup>389</sup> *Id.*; Claudia Deane et al., *A Year of U.S. Public Opinion on the Coronavirus Pandemic*, PEW RSCH. CTR. (Mar. 5, 2021), <https://www.pewresearch.org/2021/03/05/a-year-of-u-s-public-opinion-on-the-coronavirus-pandemic> [https://perma.cc/27KC-JU6D].

<sup>390</sup> Deane et al., *supra* note 389.

<sup>391</sup> William A. Galston, *A Momentous Shift in US Public Attitudes Toward China*, BROOKINGS (Mar. 22, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/03/22/a-momentous-shift-in-us-public-attitudes-toward-china> [https://perma.cc/7KGV-GFXR].

<sup>392</sup> Carroll Doherty et al., *Majority of Americans Confident in Biden's Handling of Foreign Policy as Term Begins*, PEW RSCH. CTR. (Feb. 24, 2021), <https://www.pewresearch.org/politics/2021/02/24/majority-of-americans-confident-in-bidens-handling-of-foreign-policy-as-term-begins/#americans-narrowly-see-solutions-to-u-s-problems-through-international-cooperation> [https://perma.cc/APE4-LHR7]; Richard Turcsányi et al., *European Public Opinion on China in the Age of COVID-19*, CENTRAL EUR. INST. ASIAN STUD. (2020), [https://ceias.eu/wp-content/uploads/2020/11/COMP-poll-report\\_3.pdf](https://ceias.eu/wp-content/uploads/2020/11/COMP-poll-report_3.pdf) [https://perma.cc/HSA4-V7VV].

<sup>393</sup> Doherty et al., *supra* note 392.

<sup>394</sup> *Id.*; Turcsányi et al., *supra* note 392; Cheng Li, *Biden's China Strategy: Coalition-Driven Competition or Cold War-Style Confrontation?*, BROOKINGS (May 2021), <https://www.brookings.edu/research/bidens-china-strategy-coalition-driven-competition-or-cold-war-style-confrontation> [https://perma.cc/P63X-36NX].



divides as well as its poor handling of the pandemic. Interestingly, many of the United States's allies agree with China in this regard.<sup>395</sup> Out of seventeen nations surveyed, only Italy had a higher than 50 percent approval rating of how the United States handled the pandemic and every country surveyed except Japan believes that China handled the pandemic better than the United States.<sup>396</sup> In addition, Americans and Europeans are not united on a COVID-19 origin theory.<sup>397</sup> As of fall 2020, the prevailing origin theory in the United Kingdom, Sweden, and other European countries is that COVID-19 was spread through a Chinese person eating an infected bat.<sup>398</sup> The prevailing theory in Germany and Russia in this same time period is that COVID-19 jumped naturally from animals to humans.<sup>399</sup> As of summer 2021, polls show the prevailing theory in the United States and Poland is the lab leak theory (intentional and unintentional).<sup>400</sup> Similar to the lack of data on how the Global South views China post-COVID-19, there is no robust data on how the Global South views the United States and its allies. In the same vein, however, it is likely that the anti-China rhetoric is more effective with domestic audiences than worldwide, though it may contribute to the vaccine hesitancy in some States receiving Chinese vaccines.<sup>401</sup>

### 3. “Vaccine Diplomacy”—*The United States Counters*

China's efforts to vaccinate the world have not gone unnoticed by the United States.<sup>402</sup> But until recently, the United States's vaccination efforts prioritized vaccinating Americans first.<sup>403</sup> In February 2021, President Biden announced a \$2 billion USD commitment to COVAX, a program co-led by WHO to accelerate country readiness and vaccine delivery with a focus on the most vulnerable

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395 Kat Devlin, Moira Fagan & Aidan Connaughton, *Global Views of How U.S. has Handled Pandemic have Improved, but Few Say it's Done a Good Job*, PEW RSCH. CTR. (June 10, 2021), <https://www.pewresearch.org/fact-tank/2021/06/10/global-views-of-how-u-s-has-handled-pandemic-have-improved-but-few-say-its-done-a-good-job> [https://perma.cc/X5JQ-DN6T].

396 *Id.*

397 Turcsányi, *supra* note 392.

398 *Id.*

399 *Id.*

400 *Id.*; Alice Miranda Ollstein, *POLITICO-Harvard Poll: Most Americans Believe Covid Leaked from Lab*, POLITICO (July 9, 2021, 6:00 AM), <https://www.politico.com/news/2021/07/09/poll-covid-wuhan-lab-leak-498847> [https://perma.cc/ML8Z-GLAR].

401 Huizhong Wu & Kristen Gelineau, *Chinese Vaccines Sweep Much of the World, Despite Concerns*, AP (Mar. 1, 2021), <https://apnews.com/article/china-vaccines-worldwide-0382aefa52c75b834fbaf6d869808f51> [https://perma.cc/E3ZJ-AHXC].

402 Ciara Nugent & Charlie Campbell, *The U.S. and China are Battling for Influence in Latin America, and the Pandemic has Raised the Stakes*, TIME (Feb. 4, 2021, 6:07 AM), <https://time.com/5936037/us-china-latin-america-influence> [https://perma.cc/SN2R-PJHK].

403 *Id.*

countries.<sup>404</sup> In June 2021, the Biden Administration announced a framework to ship at least eighty million vaccines globally by the end of June, 75 percent through COVAX and 25 percent government-to-government.<sup>405</sup> Of those, the first twenty-five million doses will be distributed to specifically targeted countries, and the rest will prioritize countries in Latin America and the Caribbean.<sup>406</sup>

As of July 1, 2021, the United States fell about fifty-six million doses short of its eighty million dose goal, citing regulatory hurdles, though shipments have picked up since then.<sup>407</sup> This may be considered by some as a blow to the United States as it attempts to play catch-up with China, which had delivered over 350 million doses globally as of this date (China has now allegedly delivered 1.56 billion doses worldwide).<sup>408</sup> Interestingly, the two competing countries have sung very different tunes when it comes to this so-called “vaccine diplomacy.” On the

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404 Press Release, White House, Fact Sheet: President Biden to Take Action on Global Health through Support of COVAX and Calling for Health Security Financing (Feb. 18, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/18/fact-sheet-president-biden-to-take-action-on-global-health-through-support-of-covax-and-calling-for-health-security-financing> [<https://perma.cc/7QFD-PUUR>].

405 Press Release, White House, Fact Sheet: Biden-Harris Administration Unveils Strategy for Global Vaccine Sharing, Announcing Allocation Plan for the First 25 Million Doses to be Shared Globally (June 3, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/fact-sheet-biden-harris-administration-unveils-strategy-for-global-vaccine-sharing-announcing-allocation-plan-for-the-first-25-million-doses-to-be-shared-globally> [<https://perma.cc/3CBC-TDHM>].

406 *Id.*

407 Zeke Miller, *Biden Misses Vaccine-Sharing Goal, Cites Local Hurdles*, AP (July 1, 2021), <https://apnews.com/article/joe-biden-coronavirus-pandemic-coronavirus-vaccine-health-government-and-politics-37174e3cc360d56550b3d5f90477ad01> [<https://perma.cc/Y3G5-VD6G>]; Susan Heavey, *Moldova Gets 500,000 Doses of J&J's COVID-19 Vaccine from U.S. State Dept.*, REUTERS (July 13, 2021, 8:53 AM), <https://www.reuters.com/world/europe/moldova-gets-500000-doses-jjs-covid-19-vaccine-us-state-dept-2021-07-13> [<https://perma.cc/Q9PP-SY2J>]; Andrea Shalal, *U.S. Shipping COVID-19 Vaccines to Indonesia, Bhutan, Nepal*, REUTERS (July 9, 2021, 11:41 AM), <https://www.reuters.com/world/asia-pacific/us-shipping-covid-19-vaccines-bhutan-nepal-friday-2021-07-09> [<https://perma.cc/929H-3K3E>].

408 Jonah Shepp, *The U.S. is Playing Catch-Up at Vaccine Diplomacy*, N.Y. MAG. (May 9, 2021), <https://nymag.com/intelligencer/2021/05/the-u-s-is-playing-catch-up-at-vaccine-diplomacy.html> [<https://perma.cc/NX75-UUAK>]; Wang's Press Conference, *supra* note 365; *China COVID-19 Vaccine Tracker*, BRIDGE BEIJING (Apr. 11, 2022), <https://bridgebeijing.com/our-publications/our-publications-1/china-covid-19-vaccines-tracker> [<https://perma.cc/T35H-GERQ>]. It should be noted that there is a discrepancy on reporting of whether the United States or China has shipped more doses of vaccines as of July 1, 2021. Zeke Miller of the AP News reported that the 24 million doses the United States has shipped is more than China, though the Chinese Foreign Ministry claims it has shipped over 350 million doses, which was also reported by CNN. Compare Miller, *supra* note 407, with Julia Hollingsworth, Saruul Enkhbold & Amy Sood, *Why Covid-19 Outbreaks in Countries Using Chinese Vaccines Don't Necessarily Mean the Shots have Failed*, CNN (July 3, 2021, 12:56 AM), <https://www.cnn.com/2021/07/02/china/vaccines-sinovac-sinopharm-intl-hnk-dst/index.html> [<https://perma.cc/95J3-7WUL>].

one hand, when asked in June to comment on President Biden's pledge to donate millions of vaccine doses to COVAX, Spokesperson Wang replied, "[a]s we all know, until recently, the US has been stressing that its top priority with vaccines is domestic rollout. Now that it has announced donation to COVAX, we hope it will honor its commitment as soon as possible."<sup>409</sup> He stressed the cooperation and solidarity of the international community in fighting the virus.<sup>410</sup> Wang has otherwise denied China's use of vaccines for geopolitical purposes.<sup>411</sup> On the other hand, U.S. officials have taken digs at China while simultaneously denying "vaccine diplomacy." For example, in March 2021, U.S. Navy Admiral Craig Fuller testified before the Senate that China is "taking advantage of the pandemic, deploying medical diplomacy and disinformation campaigns."<sup>412</sup> On June 3, 2021, Biden stated, "[w]e are sharing these doses not to secure favors or extract concessions. We are sharing these vaccines to save lives and to lead the world in bringing an end to the pandemic, with the power of our example and with our values."<sup>413</sup>

In reality, the United States's targeted vaccine delivery is certainly its own brand of vaccine diplomacy, though it is less about being seen as a leader in global health than a global leader in general. In a particularly telling piece, *TIME* Magazine reported that

The U.S. State Department is engaged in its own counter-operation, sources tell *TIME*. By cross-referencing pure numbers of PPE dispatched by Beijing and private Chinese entities like the Jack Ma Foundation with medical need and existing cordial ties, Washington is learning where China is placing strategic bets and deciding where to send its own coronavirus aid to compete most effectively.<sup>414</sup>

It noted that Latin America, as the United States's neighbor, has always been an important locus of U.S. foreign policy since the 1823 Monroe Doctrine and the

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<sup>409</sup> Wang's Press Conference, *supra* note 365.

<sup>410</sup> *Id.*

<sup>411</sup> *Xinhua Commentary: Accusing China of "Vaccine Diplomacy" Simply Groundless*, XINHUA (Dec. 31, 2020), [http://www.xinhuanet.com/english/2020-12/31/c\\_139631853.htm](http://www.xinhuanet.com/english/2020-12/31/c_139631853.htm) [<https://perma.cc/299G-2G2Z>].

<sup>412</sup> *Southcom's Posture Statement to Congress Before the S. Armed Serv. Comm.*, 117th Cong. (2021) (statement of Admiral Craig S. Faller), [https://www.armed-services.senate.gov/imo/media/doc/Faller\\_03-16-21.pdf](https://www.armed-services.senate.gov/imo/media/doc/Faller_03-16-21.pdf) [<https://perma.cc/ED9Y-TRAV>].

<sup>413</sup> Press Release, White House, Statement by President Joe Biden on Global Vaccine Distribution (June 3, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/statement-by-president-joe-biden-on-global-vaccine-distribution> [<https://perma.cc/25XS-NSNF>].

<sup>414</sup> Nugent & Campbell, *supra* note 402.

Cold War.<sup>415</sup> In particular, the Panama Canal and the free trade zone the United States helped establish around it have historically been a boon to U.S.-based businesses.<sup>416</sup> Yet, in the past few years, China has made giant in-roads with Latin American countries. Most significantly, nineteen countries in Latin America and the Caribbean have joined China's Belt and Road Initiative, and in the past four years, four countries have switched their official recognition of the Chinese government from Taiwan to Beijing.<sup>417</sup> One expert warns that these in-roads, in conjunction with the negative actions of the Trump Administration, may lead some Latin American countries to "stick with China" if forced to choose between it and the United States.<sup>418</sup> However, it may simply be the case that developing nations see through the veil. Commentators from Latin America to Africa have called out both the United States and China for their "[C]old-[W]ar adjacent behavior"—they simply want to end the pandemic.<sup>419</sup>

## V. CONCLUSION

Since COVID-19, global health law experts are once again calling for revisions of the IHR.<sup>420</sup> As noted above, the global health community has even gone so far as to seriously discuss an entirely new treaty on pandemic preparedness. But needing to revise the IHR after every major disease outbreak is a sign that the concept itself is not working. Even if a revised treaty contained more stringent obligations or a compulsory dispute settlement mechanism, there is no guarantee that perpetual violators such as the United States and China would recognize those obligations or processes, and they may even withdraw altogether.

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<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> Winnie Makau, *The Impact of COVID-19 on the Growing North-South Divide*, E-INT'L. RELS. (Mar. 15, 2021), <https://www.e-ir.info/2021/03/15/the-impact-of-covid-19-on-the-growing-north-south-divide> [<https://perma.cc/4TTT-PAHM>]; see also Nugent & Campbell, *supra* note 402 ("In January, Sixto Pereira, an opposition Senator in Paraguay who earlier coordinated the Chinese donation of PPE, accused the country's government in local media of bowing to U.S. pressure in rejecting offers of vaccine support from China. 'We must overcome political and ideological barriers if we're going to fight the evil of the pandemic,' he says. It may be a simple reading of geopolitics, but it's a frustration that many in Latin America are feeling as the region navigates not only its path out of COVID-19, but also its road to future trade and development in the emerging world order. 'The Berlin Wall fell, the Cold War finished,' Pereira says. 'In this globalized world, we don't want to be any country's backyard.'"); Liu et al., *supra* note 306.

<sup>420</sup> See, e.g., Lawrence O. Gostin, Roojin Habibi & Benjamin Mason Meier, *Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats*, 48 J. L. MED. & ETHICS 376 (2020), <https://scholarship.law.georgetown.edu/facpub/2264/> [<https://perma.cc/CMM7-Z3X9>].

The biggest failure with the current IHR is the unchecked ability of countries to implement harmful trade and travel restrictions after an outbreak. These travel and trade restrictions incentivize delayed reporting and have a disproportionate impact on poorer countries. Decades of State practice have shown that the motivating factor for State actions is not reputational but economic concern. Thus, WHO should consider compliance mechanisms with economic, and not reputational, stakes.

One potential solution suggested by Lawrence Gostin, a global health law expert, is a global funding mechanism that would allow for “the development of new or global governance institutions to pool international funding and bolster technical support for the development of sustainable national public health systems to prevent, detect, and respond to outbreaks.”<sup>421</sup> Going further, assistance from these development programs could be tied to compliance, thus creating more tangible incentives than reputational concerns. For example, member States with good track records for compliance with any of the IHR requirements may qualify for additional financial, technical, or logistical support from WHO for WHO programs. This would promote compliance for several reasons. For one, it rewards good State behavior but does not punish bad behavior. Punishing noncompliance by, say, withholding WHO assistance would be contrary to the overall goal of improving global health and may further incentivize States to cover up concerning health situations. Rewarding positive behavior, however, would promote cooperation and may also create domestic pressure from residents who stand to benefit from WHO programs.

Another potential solution is for WHO to do more to encourage bilateral or multilateral agreements among member States to encourage feelings of reciprocal obligations, which are more likely to be observed. Article 57 of the IHR provides that “nothing in these Regulations shall prevent States Parties having certain interests in common owing to their health, geographical, social or economic conditions from concluding special treaties or arrangements in order to facilitate the application of these Regulations . . . .”<sup>422</sup> This would be particularly helpful in the management of trade relations. Whereas the expansion to a non-exhaustive list of health hazards made it impossible for the IHR to include an exhaustive list of appropriate additional health measures, the parameters of bilateral or multilateral agreements would be significantly pared down to country or region-specific considerations. States could mutually agree on a forum to settle disputes, which would increase the likelihood of submitting to jurisdiction (i.e., China may select the WTO dispute settlement body). In addition, the WHA may consult in the agreement-making process as a safeguard against agreements by powerful States

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<sup>421</sup> *Id.*

<sup>422</sup> IHR, *supra* note 2.

that may have the potential to negatively affect poor States. This could be achieved through an amendment to Article 57 of the IHR that specifically allows for and confers on WHA the ability to consult with States on public-health-related treaties. It is likely not possible, however, to mandate WHA approval of such treaties, though there is nothing to stop the WHA from commenting on other treaties' compatibility with IHR requirements. In addition, while future revision to the IHR is highly plausible, there are too many factors weighing against the consensus necessary to pass a compulsory dispute settlement mechanism. Similarly, the other proposed reforms to promote compliance are not legally binding, and even if implemented, their likely impact, at best, would be more influence on soft power behaviors.

The current version of the IHR has led to some health improvements, such as core capacity-building. But its ineffectiveness as a legal tool to combat the international spread of infectious disease has proven how just one violation can contribute to the decimation of a health system. In addition, the IHR has not been effective at preventing unnecessarily restrictive trade and travel measures in the face of crises. Without legitimate repercussions, States have the unfettered ability to implement restrictions that benefit themselves at the expense of other countries that often have much more to lose. Furthermore, efforts at global health diplomacy have helped to pick up the slack when most needed but have also contributed to rising geopolitical tensions. Ideally, the IHR should function in a way that mitigates the opportunities for powerful countries such as the United States and China to take advantage of global health needs for political and economic gain. Whether that change comes from within the existing framework of the IHR or a more innovative solution is up to WHO and its Member States, but the current status quo leaves the world woefully unprepared for the next major pandemic.