

ADMINISTERING POST-COVID INOCULATIONS TO PREVENT PANDEMIC

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In December 2019, a novel coronavirus appeared in Wuhan, China. While it remains disputed whether the virus began in a wet market or a laboratory, it is undisputed that it spread rapidly. COVID-19 has now infected over 500 million people worldwide. China and the World Health Organization (“WHO”) should have been better prepared for this virus after past outbreaks, particularly Severe Acute Respiratory Syndrome (“SARS”) in 2002. Three years after SARS, the WHO revised its International Health Regulations (“IHR”) to demand more accountability from member states. However, these improvements did not prevent China’s delayed reporting or lead to better health standards in its wet markets. In short, China breached Articles 6 and 7 of the IHR and violated the right to health under customary international law. As a result, states could theoretically hold China accountable. But legal mechanisms like settlement, an International Court of Justice decision, or countermeasures will not help prevent another pandemic. Instead, states must encourage changes to the WHO’s informational and financial structure, demand a WHO compliance and accountability committee, amend the IHR to include a settlement provision, and improve state internal health laws. These changes will reinforce global health jurisprudence, which will help prevent or mitigate the next pandemic.

I. INTRODUCTION

*Fortune, goodnight, Smile once more, turn thy wheel.*³⁷⁴

As Fortune turned her wheel over the past eighteen years, the world faced numerous pandemics. Severe Acute Respiratory Syndrome (“SARS”) emerged in Guangdong, China to reach over two dozen nations³⁷⁵ and infect 8,098 persons³⁷⁶. The H1N1 virus infected 60.8 million people

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³⁷⁴ WILLIAM SHAKESPEARE, THE TRAGEDY OF KING LEAR act 2, sc. 2, ll. 155–56 (Jay L. Halio ed., 1992).

³⁷⁵ Swargodeep Sarkar, *The Liability of China and International Adjudication of the COVID-19 Pandemic*, JURIST (Apr. 10, 2020, 10:39 AM), <https://bit.ly/2GOAUDQ>.

³⁷⁶ SARS Basics Fact Sheet, CENTERS FOR DISEASE CONTROL AND PREVENTION [CDC], <https://bit.ly/3kjFuHM> (last updated Dec. 6, 2017).

worldwide.³⁷⁷ Middle East Respiratory Syndrome led to 858 deaths across 27 nations.³⁷⁸ And Ebola, “affect[ing] humans somewhat like nuclear radiation,”³⁷⁹ impacted 28,652 people over 10 countries.³⁸⁰

The global community responded. In 2005, the World Health Organization (“WHO”) adopted the International Health Regulations (“IHR”),³⁸¹ the first binding regulations for disease reporting and prevention.³⁸² The IHR’s mission was to “prevent, protect against, control and provide a public health response to the international spread of disease”³⁸³ Yet the regulations did not prevent COVID-19. As of April 18, 2022, there have been 500,186,525 confirmed cases and 6,190,349 deaths reported to the WHO.³⁸⁴

COVID-19 has shown that the current international framework is insufficient to deal with global pandemics.³⁸⁵ While there are ways to hold China accountable for breaching obligations under IHR and the right to health, blame will not prevent pandemics. Instead, nations should work together to improve global health rather than punishing China.

³⁷⁷ *The Burden of the Influenza A H1N1pdm09 Virus Since the 2009 Pandemic*, CDC, <https://www.cdc.gov/flu/pandemic-resources/burden-of-h1n1.html> (last updated June 10, 2019) (estimating 60.8 million cases, 274,304 hospitalizations, and 12,467 deaths in the United States).

³⁷⁸ *Middle East Respiratory Syndrome Coronavirus (MERS-CoV)*, WHO, <https://bit.ly/3n9AuHK> (last visited Mar. 22, 2022).

³⁷⁹ RICHARD PRESTON, *THE HOT ZONE* 23 (1994).

³⁸⁰ *2014–2016 Ebola Outbreak in West Africa*, CDC, <https://bit.ly/38y21P3> (last reviewed March 8, 2019) (the 28,652 number includes suspected, probable, and confirmed cases).

³⁸¹ Sarkar, *supra* note 375.

³⁸² Stefania Negri, *Communicable Disease Control* 265, 268, in *RESEARCH HANDBOOK ON GLOBAL HEALTH LAW* (Gian Luca Burci & Brigit Toebes eds., 2018).

³⁸³ WHO, *International Health Regulations art. 2* (3d ed. 2005), <https://www.who.int/publications/i/item/9789241580496> [hereinafter IHR].

³⁸⁴ *WHO Coronavirus Disease (COVID-19) Dashboard*, WHO, <https://covid19.who.int/> (last visited Apr. 22, 2022) [hereinafter *Dashboard*].

³⁸⁵ See, e.g., David Gregosz, Thomas Köster, Oliver Morwinsky & Martin Schebesta, *Coronavirus Infects the Global Economy: The Economic Impact of an Unforeseeable Pandemic*, 384 *KONRAD ADENAUER STIFTUNG* 1 (2020) (“The economic impact of COVID-19 is far worse than that of the 2008 financial crisis. The shockwave has hit almost every industry, sector and region in Germany, as well as its major trading partners.”).

This Note outlines a clear path to prevention. Part I gives background on COVID-19, the international health framework, and customary international law.³⁸⁶ Part II reviews China’s breach under IHR Articles 6 and 7,³⁸⁷ violation of Chinese citizens’ right to health,³⁸⁸ and possible faults under the Draft Articles for Internationally Wrongful Acts.³⁸⁹ Part III evaluates accountability mechanisms against China: settlement,³⁹⁰ recourse from the International Court of Justice (“ICJ”),³⁹¹ and countermeasures.³⁹² Finally, Part IV urges the strengthening of WHO,³⁹³ amending the IHR with settlement and ICJ provisions,³⁹⁴ and invigorating global health jurisprudence domestically and internationally.³⁹⁵

II. BACKGROUND

A. BRIEF HISTORY OF COVID-19

COVID-19 is a novel strain of coronavirus commonly traced to animals.³⁹⁶ When the virus transmits to humans, its effects range from cold symptoms to death.³⁹⁷ The virus’s origins can be

³⁸⁶ See *infra* Part I.

³⁸⁷ See *infra* Section II.A

³⁸⁸ See *infra* Section II.B.

³⁸⁹ See *infra* Section II.C.

³⁹⁰ See *infra* Section III.A.

³⁹¹ See *infra* Section III.B.

³⁹² See *infra* Section III.C.

³⁹³ See *infra* Section IV.A.

³⁹⁴ See *infra* Section IV.B.

³⁹⁵ See *infra* Section IV.C.

³⁹⁶ Lauren M. Sauer, *What is Coronavirus?*, JOHNS HOPKINS MED., <https://bit.ly/3lhHUI7> (last updated Feb. 24, 2022).

³⁹⁷ *Id.*

traced to China's Wuhan province between November and December 2019.³⁹⁸ It spread rapidly, reaching the United States³⁹⁹ and Europe a few weeks later.⁴⁰⁰

There are two theories for the virus's emergence. Either it started in a Wuhan wet market or it came from an infectious disease laboratory.⁴⁰¹ Most support the wet market theory,⁴⁰² because as researchers explain, "the presence of a large reservoir of SARS-CoV-like viruses in horseshoe bats, together with the culture of eating exotic mammals in southern China, is a time bomb."⁴⁰³ Experts speculate that COVID-19 originated in bats, spread to pangolins, and then humans.⁴⁰⁴ This is not the first time that an animal-to-human transmission occurred in a Chinese wet market.⁴⁰⁵ As one virologist states, with a "vast diversity of wild and domestic animals living in close proximity

³⁹⁸ E.g., Helen Davidson, *First COVID-19 Case Happened in November, China Government Records Show*, GUARDIAN (Mar. 13, 2020, 2:39 AM), <https://bit.ly/36iLBXP>; SCMP Graphics, *Coronavirus: The Disease COVID-19 Explained*, S. CHINA MORNING POST, <https://bit.ly/32r8fMM> (last visited Mar. 22, 2022; updated daily); see Valerio de Oliveira Mazzuoli, *Responsabilidade internacional dos Estados por epidemias e pandemias transnacionais: o caso da Covid-19 provinda da República Popular da China*, 23 REVISTA DE DIREITO CIVIL CONTEMPORÂNEO 2 (2020) (Br.), <https://bit.ly/3D8pZgV>; Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (March 17, 2021), <https://nyti.ms/3o3BM7j>.

³⁹⁹ Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, NEW ENG. J. MED. (Jan. 31, 2020), <https://bit.ly/32sxpL> (describing how a man returning from Wuhan complained of a fever).

⁴⁰⁰ Gianfranco Spiteri et al., *First Cases of Coronavirus Disease 2019 (COVID-19) in the WHO European Region, 24 January to 21 February 2020*, 25 EUROSURVEILLANCE (2020), <https://bit.ly/3lxlfa2>.

⁴⁰¹ See, e.g., Mark Mazzetti, Julian E. Barnes, Edward Wong, & Adam Goldman, *Trump Officials are Said to Press Spies to Link Virus and Wuhan Labs*, N.Y. TIMES (May 14, 2020), <https://nyti.ms/3n94jll>.

⁴⁰² Dina Fine Maron, *"Wet Markets" Likely Launched the Coronavirus. Here's What you Need to Know*, NAT'L GEOGRAPHIC (Apr. 15, 2020), <https://on.natgeog.com/3n6LyFo>.

⁴⁰³ A. Alonso Aguirre et al., *Illicit Wildlife Trade, Wet Markets, and COVID-19: Preventing Future Pandemics*, World Med. & Health Pol'y (July 5, 2020), <https://bit.ly/2LnowMY> (citation omitted).

⁴⁰⁴ Kristian G. Andersen et al., *The Proximal Origin of SARS-CoV-2*, 26 NATURE MED., 450, 450–51 (2020), <https://go.nature.com/2JKMD3W>. It is disputed, however, whether COVID-19 originated in a wet market or if the market only accelerated the virus's spread. See Chaolin Huang et al., *Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China*, 395 LANCET 497 (2020), <https://bit.ly/3eKknxd>.

⁴⁰⁵ See Patrick C. Y. Woo et al., *Infectious Diseases Emerging from Chinese Wet-Markets: Zoonotic Origins of Severe Respiratory Viral Infections*, 19 CURRENT OP. INFECTIOUS DISEASES 401, 401 (2006), <https://bit.ly/32u3n9q>.

to humans, it is likely that China has the greatest potential for . . . infectious diseases worldwide.”⁴⁰⁶

Starting on December 8, 2019, China experienced “pneumonia of unknown [cause]” centered on the Huanan Seafood Wholesale Market in Wuhan.⁴⁰⁷ However, China did not report these cases of “viral pneumonia” to external health agencies until December 31.⁴⁰⁸ On January 1, 2020, the WHO requested information from authorities as it activated an Incident Management Support Team.⁴⁰⁹ Chinese health officials then provided detailed information seventy-two hours after the first internal reports.⁴¹⁰ Using this information, the WHO reported on the IHR Event Information System and issued a Disease Outbreak News report.⁴¹¹ Finally, the WHO reported that Chinese authorities “determined that the outbreak [was] caused by a novel coronavirus” ten days after the initial notification.⁴¹²

Over the next few weeks, the virus spread worldwide. On January 22, 2020, the WHO Emergency Committee convened to discuss the outbreak.⁴¹³ However, the committee decided not to issue a warning.⁴¹⁴ A week later, the committee reconvened and declared a Public Health Emergency of International Concern (“PHEIC”).⁴¹⁵ The WHO Director-General, Tedros

⁴⁰⁶ Heinz Feldmann, *Truly Emerging – A New Disease Caused by a Novel Virus*, 365 NEW ENG. J. MED. 1561, 1562 (2011), <https://bit.ly/2UNrpJm>.

⁴⁰⁷ Nanshan Chan et al., *Epidemiological and Clinical Characteristics of 99 Cases of 2019 Novel Coronavirus Pneumonia in Wuhan, China: A Descriptive Study*, LANCET 1 (Jan. 30, 2020), <https://pubmed.ncbi.nlm.nih.gov/32007143/>.

⁴⁰⁸ *Timeline: WHO’s COVID-19 Response*, WHO, <https://bit.ly/36i2Usd> (last visited Apr. 20, 2022) [hereinafter *Timeline*]; Huang et al., *supra* note 404.

⁴⁰⁹ *Timeline*, *supra* note 408.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* China first publicly reported a COVID-19 death on January 11, 2020. *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* A PHEIC is defined as “an extraordinary event which is determined . . . (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a

Adhanom Ghebreyesus, exhorted the international community to “work together in a spirit of solidarity and cooperation.”⁴¹⁶ COVID-19 then spread exponentially.⁴¹⁷

As the WHO stirred, Chinese officials took some measures to combat the virus. On January 1, 2020, they closed Wuhan wet markets,⁴¹⁸ canceled New Year’s events, and locked down Wuhan.⁴¹⁹ Nevertheless, international travel remained open until March 28, 2020,⁴²⁰ and state authorities purportedly silenced a vocal critic of the government’s response.⁴²¹ Leaked documents also reveal “numerous inconsistencies in what [Chinese] authorities believed to be happening and what was revealed to the public.”⁴²²

B. INTERNATIONAL HEALTH FRAMEWORK

Global health threats have shaped history: typhoid fever in 430 BC, bubonic plague in 1350 AD, and influenza in 1918 AD.⁴²³ Despite the WHO’s efforts over the last fifteen years,

coordinated international response[.]” IHR, *supra* note 383, at 9 (art. 1). *See id.* at 43–46 (annex 2) (PHEIC decision matrix).

⁴¹⁶ Press Release, WHO, *WHO Director-General’s Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)* (Jan. 30, 2020), <https://bit.ly/3eIA8Vf>.

⁴¹⁷ *See Dashboard, supra* note 384 (COVID-19 cases since Dec. 30, 2019: Feb 1, 2020; 23,014; Mar. 2, 2020: 21,138; Apr. 6, 2020: 559,344; July 6, 2020: 1,429,526).

⁴¹⁸ Huang et al., *supra* note 404.

⁴¹⁹ *China Cancels Lunar New Year Events Over Deadly Virus Fears*, DW (Jan. 23, 2020), <https://bit.ly/3eJq7XX>.

⁴²⁰ *See, e.g., id.* (“One passenger at Beijing international airport traveling for the Lunar New Year said she felt uneasy about boarding a plane, but wouldn’t cancel her travel plans.”).

⁴²¹ *See* Stephanie Hegarty, *The Chinese Doctor Who Tried to Warn Others About Coronavirus*, BBC (Feb. 6, 2020), <https://bbc.in/36konAz> (“[Dr. Li Wenliang] was summoned to the Public Security Bureau where he was told to sign a letter. In the letter he was accused of ‘making false comments’ that had ‘severely disturbed the social order’ ‘We solemnly warn you: If you keep being stubborn, with such impertinence, and continue this illegal activity, you will be brought to justice – is that understood?’ . . . He was one of eight people who police said were being investigated for ‘spreading rumours.’”).

⁴²² Nick Paton Walsh, *The Wuhan Files: Leaked Documents Reveal China’s Mishandling of the Early Stages of COVID-19*, CNN (Dec. 1, 2020), <https://cnn.it/2LfxTOB> (last updated Dec. 1, 2020, 3:39 AM). CNN identifies four key findings from the leaked document: (1) Chinese officials reported overly optimistic data in February; (2) it took on average twenty-three days to diagnose COVID-19 patients in late December and January; (3) audits showed “underfunding, understaffing, poor morale and bureaucratic models of governance”; and (4) in early December, there was an influenza outbreak in Yichang and Xianning. *Id.*

⁴²³ *Pandemics that Changed History*, HISTORY (Apr. 1, 2020), <https://bit.ly/3pcNIOG>.

communicable diseases are among the top ten causes of death.⁴²⁴ Yet there is hope. The WHO and IHR represent 170 years of progress in global health.⁴²⁵ This section now delves into the history of that progress, the WHO Constitution, and the 2005 IHR.

1. General History

Health threats prompted European nations in the nineteenth century to convene sanitary conferences.⁴²⁶ The goal was to fight cholera epidemics, strengthen border security against disease, and balance quarantines with trade.⁴²⁷ While narrowly focused, these conferences sparked a slow “shift from domestic jurisdiction and exclusive sovereignty over health issues to inter-State cooperation.”⁴²⁸

A major milestone in global health law was the WHO’s birth on April 7, 1948.⁴²⁹ The body “took upon itself the responsibility for the management of the international regime of disease control” and “engaged in an onerous work of revision and consolidation of the existing sanitary conventions.”⁴³⁰ Similar to the approach of the first health conferences,⁴³¹ the WHO focuses on cooperative health among States.⁴³²

⁴²⁴ Negri, *supra* note 382, at 266 (citing *The Top 10 Causes of Death*, WHO (May 24, 2018), <https://bit.ly/35jxsut>).

⁴²⁵ See *infra* Section I.B.1.

⁴²⁶ Negri, *supra* note 382, at 269 (citing *The Top 10 Causes of Death*, WHO (May 24, 2018), <https://bit.ly/35jxsut>).

⁴²⁷ *Id.*

⁴²⁸ Negri, *supra* note 382, at 269 (citing *The Top 10 Causes of Death*, WHO (May 24, 2018), <https://bit.ly/35jxsut>).

⁴²⁹ *History of WHO*, WHO, <https://bit.ly/3kSt3D9> (last visited Nov. 21, 2020).

⁴³⁰ Negri, *supra* note 382, at 270.

⁴³¹ See *supra* notes 426–428 and accompanying text.

⁴³² See generally *Milestones for Health over 70 Years*, WHO, <https://bit.ly/3ndq4qx> (last visited Mar. 25, 2022).

The WHO consists of 194 member States⁴³³ who convene annually at the World Health Assembly (“WHA”).⁴³⁴ The organization has over 8,000 personnel in more than 150 locations.⁴³⁵ And it has diverse responsibilities: to fight communicable diseases such as malaria, tuberculosis, and Ebola; alleviate noncommunicable diseases; promote nutrition, food security and healthy eating; improve health; and minimize substance abuse.⁴³⁶

However, the WHO faces criticism. Some disparage the organization for its response to the recent Ebola pandemic.⁴³⁷ Critics also decry the fact that non-WHO health organizations detract from the WHO’s importance.⁴³⁸ Despite these criticisms, the WHO is at the forefront of combatting global pandemics.⁴³⁹

2. WHO Constitution

The WHO Constitution’s objective is “the attainment by all peoples of the highest possible level of health.”⁴⁴⁰ Articles 19 through 22 allow the WHO to adopt agreements on sanitary and

⁴³³ *Countries*, WHO, <https://www.who.int/countries> (last visited Mar. 24, 2022).

⁴³⁴ Nadja Meisterhans, *The World Health Organization in Crisis – Lessons to be Learned Beyond the Ebola Outbreak*, 2 CHINESE J. GLOB. GOVERNANCE 1, 4–5 (2016).

⁴³⁵ *Who We Are*, WHO, <https://www.who.int/about/who-we-are> (last visited Apr. 18, 2022). “[D]ue to this decentralized governance structure, the WHO offers a strong voice to the differing needs of the regions” Meisterhans, *supra* note 434, at 5.

⁴³⁶ *Id.* “[T]he WHO monitors global health trends, conducts research, sets standards, and provides technical support. The agency’s work ranges from noncommunicable diseases, nutrition and obesity, to mental health, road safety, and antimicrobial resistance.” Lawrence O. Gostin, *COVID-19 Reveals Urgent Need to Strengthen the World Health Organization*, JAMA NETWORK (Apr. 30, 2020), <https://bit.ly/38Fc0SL>.

⁴³⁷ Meisterhans, *supra* note 434, at 2.

⁴³⁸ *See id.* at 8–12 (discussing how “global public private partnerships in health” like the Bill and Melinda Gates Foundation or the Joint United Nations Programme on HIV and Aids).

⁴³⁹ *See* Sarah Wetter & Eric A. Friedman, *U.S. Withdrawal from the World Health Organization: Unconstitutional and Unhealthy*, in ASSESSING LEGAL RESPONSES TO COVID-19 83, 84 (Scott Burris, Sarah de Guia, Lance Gable, Donna E. Levin, Wendy E. Parmet & Nicolas P. Terry eds., 2020) (“WHO is working worldwide to achieve its triple billion goal: to ensure that a billion more people have universal health coverage, that a billion more people are protected from health emergencies, and that a billion more people enjoy better health and well-being.”).

⁴⁴⁰ Constitution of the World Health Organization, Apr. 7, 1948, 14 U.N.T.S. 185, at 187 (art. 1) [hereinafter WHO Constitution].

quarantine requirements, outlines standards, and calls on States to accept these standards.⁴⁴¹ Each state “shall provide statistical and epidemiological reports in a manner to be determined by the Health Assembly.”⁴⁴² Within each state, the WHO enjoys “such legal capacity as may be necessary. . . .”⁴⁴³ Notably, the WHO can evolve.⁴⁴⁴

Further, the WHO relies on state reporting. States must report “action[s] taken with respect to recommendations” and “conventions, agreements, and regulations”; report national health laws, epidemiological reports; and provide “such additional information pertaining to health as may be practicable.”⁴⁴⁵ Article 75 requires that if a question or dispute cannot be negotiated or settled by the Health Assembly, then the matter “shall be referred to the International Court of Justice . . . unless the parties concerned agree on another mode of settlement.”⁴⁴⁶ The WHO can further request an advisory opinion from the ICJ on “any legal question arising within the competence of the Organization.”⁴⁴⁷

3. *International Health Regulations*

International health regulations began with the 1851 European conferences to “curb the spread of infectious diseases.”⁴⁴⁸ Specific diseases remained the focus for the next hundred

⁴⁴¹ *Id.* at 192–93 (art. 19–21).

⁴⁴² *Id.* at 200 (art. 64).

⁴⁴³ *Id.* at 200–01 (art. 66).

⁴⁴⁴ *Id.* at 202 (art. 73).

⁴⁴⁵ *Id.* at 200 (art. 62–65); see Mazzuoli, *supra* note 398, at 16 (“There is no doubt, therefore, that Member States must obey recommendations from the Organization in cases of transnational epidemics or pandemics.”).

⁴⁴⁶ WHO Constitution at 202 (art. 75).

⁴⁴⁷ *Id.* (art. 76).

⁴⁴⁸ Lawrence O. Gostin & Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Security*, 94 MILBANK Q. 264 (2016), <https://bit.ly/3lyks9W>.

years.⁴⁴⁹ By 1969, the goal shifted to “self-protection against external threats.”⁴⁵⁰ The WHA adopted the IHR as an update to the 1951 International Sanitary Regulations.⁴⁵¹

By the late twentieth-century, global health outbreaks (e.g., HIV/AIDS) made it “clear that the IHR were insufficiently flexible to respond to new infectious disease threats.”⁴⁵² For example, during the SARS outbreak, China delayed WHO notification for three months.⁴⁵³ The postponement showed an “imperative for global health governance” and “catalyz[ed] a major political shift toward a global norm of transparency and prompt reporting[.]”⁴⁵⁴ And so the WHA revised the IHR.⁴⁵⁵

IHR now has greater depth so that “the Regulations w[ould] maintain their relevancy and applicability for many years to come”⁴⁵⁶ Today, the IHR has an “all-hazards strategy”⁴⁵⁷ to “prevent, protect against, control and provide a public health response to the international spread of disease”⁴⁵⁸

For the purposes of this Note, Articles 6 and 7 are the most relevant IHR provisions.

Article 6 Notification

⁴⁴⁹ See *id.* (describing the 1892 International Sanitary Convention that “focused on quarantine for cholera,” and the emphasis on cholera, yellow fever, and plague by 1926).

⁴⁵⁰ *Id.*

⁴⁵¹ IHR, *supra* note 383, at 1. Still, the regulations focused only on certain diseases. *Id.* (listing the diseases covered by the regulations as yellow fever, plague, and cholera) (citations omitted).

⁴⁵² Gostin & Katz, *supra* note 448.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ IHR, *supra* note 383, at 2.

⁴⁵⁷ Gostin & Katz, *supra* note 448.

⁴⁵⁸ IHR, *supra* note 383, at 1, 10 (art. 2). IHR are permissive. Per Article 43, a state may enact any health measures deemed necessary to combat or prevent health risks.” *Id.* at 28 (art. 43). The only requirement is that measures “achieve the same or greater level of health protection than WHO recommendations.” *Id.*

1. Each State Party shall assess events occurring within its territory by using the decision instrument in Annex 2. Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory in accordance with the decision instrument, as well as any health measure implemented in response to those events. If the notification received by WHO involves the competency of the International Atomic Energy Agency (IAEA), WHO shall immediately notify the IAEA.⁴⁵⁹

Article 7 Information-Sharing During Unexpected or Unusual Public Health Events

If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.⁴⁶⁰

IHR Article 12 also gives the Director-General the sole power to declare a PHEIC.⁴⁶¹ The Director-General basis his decision on collected information⁴⁶² and recommendations from the Emergency Committee.⁴⁶³ The Director-General then consults with the affected state. But the Director-General makes the final decision.⁴⁶⁴

To encourage member nations to settle disputes, Article 56 discusses the IHR's dispute resolution system.⁴⁶⁵ The article provides that "[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

⁴⁵⁹ *Id.* at 12 (art. 6).

⁴⁶⁰ *Id.* (art. 7).

⁴⁶¹ *Id.* at 14 (art. 12).

⁴⁶² *Id.*

⁴⁶³ *Id.* Temporary recommendations are found in Article 15. They may "include health measures to be implemented by the State Party experiencing the public health emergency of international concern . . . regarding persons, baggage, cargo, containers, conveyances, goods and/or postal parcels to prevent or reduce the international spread of disease . . ." *Id.* at 16 (art. 15).

⁴⁶⁴ *Id.* at 14 (art. 12); *see id.* at 32 (art. 49) (setting out rights of states in whose territory the Director-General declares a PHEIC). Yet a state may only propose the termination of a PHEIC. The final decision rests with the director and Emergency Committee.

⁴⁶⁵ *Id.* at 34-35 (art. 56).

the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement.”⁴⁶⁶ Finally, to modify IHR provisions, any state or the Director-General may propose an amendment.⁴⁶⁷

C. CUSTOMARY INTERNATIONAL LAW

Article 38 of the Statute of the ICJ recognizes international law through international conventions, “general principles of law[,]” and customary international law (“CIL”).⁴⁶⁸ The next section explains why CIL includes the right to health and how China’s potential violation of this right is reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“Draft Articles”).

1. Right to Health

Two instruments affirm the right to health⁴⁶⁹: the Universal Declaration of Human Rights (“UDHR”)⁴⁷⁰ and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).⁴⁷¹ Although as Eleanor Roosevelt noted, “[the Declaration of Human Rights] . . . does not purport to be a statement of law or of legal obligation[,]”⁴⁷² today “almost all states would

⁴⁶⁶ *Id.*; see also *id.* at 35 (art. 57) (“The provisions of the IHR shall not affect the rights and obligations of any State Party deriving from other international agreements.”).

⁴⁶⁷ *Id.* at 34 (art. 55).

⁴⁶⁸ Permanent Court of International Justice, Statute of the International Court of Justice art. 38 (Oct. 24, 1945) [hereinafter ICJ Statute].

⁴⁶⁹ The right to health reflects the “intrinsic value [of] the individual and . . . society.” Tsung-Ling Lee, *Global Health in a Turbulence Time: A Commentary*, 15 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 27, 34 (2020). As the WHO Constitution declares, “[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” WHO Constitution, *supra* note 440, at 186.

⁴⁷⁰ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25, ¶ 1 (Dec. 10, 1948) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and his family.”).

⁴⁷¹ See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 at 3, 6 (art. 7) (“The States Parties present Covenant recognize the right of everyone to the enjoyment of . . . [s]afe and healthy working conditions.”) [hereinafter ICESCR]; *id.* at 3, 8 (art. 12) (“[T]he right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”).

⁴⁷² LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW CASES AND MATERIALS 903 (7th ed. 2019) (quoting 19 U.S. Dep’t of State Bull. 751 (Dec. 9, 1948)). *But see* Jessie Allen, *Theater of International*

agree that some infringements of human rights . . . are violations of . . . customary international law.”⁴⁷³

The ICESCR “provides the foundational expression of the right to health.”⁴⁷⁴ Article 12 states that “[p]arties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and “this right shall include those necessary for . . . [t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases.”⁴⁷⁵ This right is not that of perfect health, but instead “‘a right to the enjoyment of a variety’ of diagnostic, curative, and preventive ‘facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.’”⁴⁷⁶ Moreover, because China signed the ICESCR and UDHR, China has “officially accepted the universality of human rights.”⁴⁷⁷

The international community, including China, recognizes the right to health as customary international law.⁴⁷⁸ But a barrier to accountability is that each state might define a breach of the right to health differently. Thus, a certain action (i.e., permitting unsanitary wet markets) may or may not be a breach.

One can compare China’s denial of a breach to how the United Nations (“U.N.”) has avoided responsibility for a potential human rights violation. After a 2010 earthquake, Nepalese

Justice, 3 CREIGHTON INT’L & COMP. L.J. 118, 121 (2012) (“[I]nternational human rights still evoke skepticism.”).

⁴⁷³ DAMROSCH & MURPHY, *supra* note 472, at 903 (quoting 19 U.S. Dep’t of State Bull. 751 (Dec. 9, 1948)).

⁴⁷⁴ Lee, *supra* note 469, at 35.

⁴⁷⁵ ICESCR, *supra* note 8, at 8.

⁴⁷⁶ Patrick Hayden, *The Human Right to Health and the Struggle for Recognition*, 38 REV. INT’L STUD. 569, 572 (2012) (quoting Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, ¶¶ 7–13, UN Doc. E/C. 12/2000/4 (Aug. 11, 2000)).

⁴⁷⁷ SONYA SCEATS WITH SHAUN BRESLIN, CHINA AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM (Oct. 2012), <https://bit.ly/2UK5liu>.

⁴⁷⁸ See *supra* notes 475–477 and accompanying text.

troops deployed to Haiti under the U.N. flag.⁴⁷⁹ Tragically, some troops carried a strain of cholera.⁴⁸⁰ And because the U.N. base lacked adequate sanitation facilities, the cholera spread to Haiti's largest water source.⁴⁸¹ Rather than claim responsibility, however, the U.N. has "repeatedly denied their legal and moral obligations"⁴⁸²

China has taken a similar response to COVID-19. Sometimes pandemics emerge beyond a state's control.⁴⁸³ But under international law, the state must take sufficient action to report and contain the virus's spread.⁴⁸⁴ Yet China not taken responsibility for the virus's origin or its spread. China claims that their markets were not the source of patient zero.⁴⁸⁵ More importantly, Chinese officials did not provide timely notification or share complete information with the WHO during COVID-19's early stages.⁴⁸⁶

The IHR does not mandate reparations or allow a nation to impose countermeasures for a responsible States' breaches. Instead, those provisions are in the Draft Articles.

2. Draft Articles on Responsibility of States for Internationally Wrongful Acts

⁴⁷⁹ Rosalyn Chan et al., *Peacekeeping without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic*, TRANSNAT'L DEV. CLINIC 8 (2013), <https://bit.ly/36r7d4C>.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² Celso Perez & Muneer I. Ahmad, *Why the UN Should Take Responsibility for Haiti's Cholera Outbreak*, ATLANTIC (Aug. 16, 2013), <https://bit.ly/35ctK5w>; see Letter from Ban Ki-moon, UN Secretary General, to Maxine Waters, U.S. Congresswoman, (July 5, 2013), <https://bit.ly/3eM7iDI> (attempting to justify the U.N.'s decision not to take responsibility for the cholera outbreak).

⁴⁸³ A state may avoid international responsibility under the doctrine of *force majeure*, defined as "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State." Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, A/56/10, at 76 (art. 23) (2001), <https://bit.ly/3o2jF1w> [hereinafter Draft Articles with Commentaries].

⁴⁸⁴ See *supra* Sections I.B.2–3.

⁴⁸⁵ See Aylin Woodward, *Chinese CDC Now Says the Wuhan Wet Market Wasn't the Origin of the Virus*, SCI. ALERT (May 29, 2020), <https://bit.ly/2JTqaVS>.

⁴⁸⁶ See Walsh, *supra* note 422 ("[T]hough the documents provide no evidence of a deliberate attempt to obfuscate findings, they do reveal numerous inconsistencies in what authorities believed to be happening and what was revealed to the public.

In 2001, the International Law Commission submitted the Draft Articles to the U.N. General Assembly.⁴⁸⁷ Drafters sought to formulate “basic rules of international law concerning the responsibility of States for their internationally wrongful acts.”⁴⁸⁸ The General Assembly suggested in 2007 and 2010 that States should apply the Draft Articles.⁴⁸⁹ However, while international tribunals cite the Draft Articles,⁴⁹⁰ they are not accepted equally as a normative guideline nor an enforcement mechanism.⁴⁹¹

Article 1 states the document’s underlying principle: “Every internationally wrongful act of a State entails the international responsibility of that State.”⁴⁹² Article 2 defines an “internationally wrongful act of a State” as when there is an “action or omission” that “is attributable to the State under international law” and “constitutes a breach of an international obligation of the State.”⁴⁹³

Articles 12 and 13 define when there is a breach. First, “when conduct attributed to a State as a subject of international law amounts to a *failure by that State to comply* with an international obligation incumbent upon it”⁴⁹⁴ Second, “[t]here is a breach of an international obligation by a State when an act of that State is *not in conformity with what is required of it* by that obligation,

⁴⁸⁷ Sarkar, *supra* note 375.

⁴⁸⁸ Draft Articles with Commentaries, *supra* note 483, at 31.

⁴⁸⁹ Mazzuoli, *supra* note 398, at 6; James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN AUDIOVISUAL LIBR. INT’L L. 2 (2012).

⁴⁹⁰ “[T]he International Court of Justice treated certain aspects of the draft articles as reflecting the customary international law of state responsibility.” DAMROSCH & MURPHY, *supra* note 472, at 482.

⁴⁹¹ Most nations agree that much of the Draft Articles are customary international law. But in 2001, the United States published comments that asserted the articles had “deviate[d] from customary international law and state practice.” U.S. Dep’t of State, Draft Articles on State Responsibility Comments of the Government of the United States of America 1 (2001).

⁴⁹² Draft Articles with Commentaries, *supra* note 483, at 32 (art. 1).

⁴⁹³ *Id.* at 34 (art. 2).

⁴⁹⁴ *Id.* at 54 (emphasis added).

regardless of its origin or character.”⁴⁹⁵ However, there is no breach “unless the State is bound by the obligation . . . at the time the act occurs.”⁴⁹⁶

Once a breach is established, Article 31 prescribes reparations: “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”⁴⁹⁷ Reparations should “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”⁴⁹⁸ There must be a link “between the wrongful act and the injury” to merit an “obligation of reparation.”⁴⁹⁹

The Draft Articles also address countermeasures.⁵⁰⁰ Governments and international tribunals recognize that countermeasures are sometimes justified.⁵⁰¹ Article 49 identifies the object of countermeasures and enplaces limitations.⁵⁰² An injured state “may only take countermeasures against a State which is responsible for an internationally wrongful act . . . to induce that State to comply”; an injured state can only apply measures as long as the responsible state’s non-performance lasts; and they “shall . . . be taken in such a way as to permit the resumption of performance of the obligations.”⁵⁰³

⁴⁹⁵ *Id.* (emphasis added).

⁴⁹⁶ *Id.* at 57 (art. 13).

⁴⁹⁷ *Id.* at 91 (art. 31); *Factory at Chorzów (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26) (“It 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.”).

⁴⁹⁸ *See Factory at Chorzów*, 1927 P.C.I.J. (ser. A) No. 9, at 47–48.

⁴⁹⁹ Draft Articles with Commentaries, *supra* note 483, at 92. For example, reference may be made to losses “attributable to [the wrongful] act as a proximate cause”, or to damage which is “too indirect, remote, and uncertain to be appraised” *Id.* (citations omitted).

⁵⁰⁰ *See Crawford*, *supra* note 489, at 8 (“Among the most debated issues related to the responsibility of States for internationally wrongful acts, the possibility to have recourse to countermeasures as a reaction by, or on behalf of, the injured State.”).

⁵⁰¹ Draft Articles with Commentaries, *supra* note 483, at 128.

⁵⁰² *Id.* at 130.

⁵⁰³ *Id.* at 117 (art. 42).

In short, after suffering centuries of pandemics, the international community created a framework to combat global health challenges. These efforts coalesced in the WHO Constitution and 2005 IHR. As Part II now describes, China breached its international obligations under Articles 6 and 7 of the IHR and violated its citizens' right to health.

III. CHINA DID NOT FULFILL ITS INTERNATIONAL OBLIGATIONS

China has taken several steps to achieve international acceptance: hosting the Olympics,⁵⁰⁴ the Boao Forum for Asia,⁵⁰⁵ and signed the WHO Constitution⁵⁰⁶ and the IHR.⁵⁰⁷ Yet China threatened its prestige when it did not provide sufficient notification to the WHO for COVID-19⁵⁰⁸ and violated its citizens' right to health.⁵⁰⁹

A. IHR BREACH

Under the 2005 IHR, China faces a two-fold breach.⁵¹⁰ China breached its obligation under Article 6 to notify the WHO within twenty-four hours of a possible PHEIC and under Article 7 to provide all relevant health information during an emergency.

1. Article 6: Notification

China's first breach of the IHR is its failure to notify promptly the WHO. China reported "pneumonia of unknown cause" to the WHO on December 31, 2019.⁵¹¹ However, the first case

⁵⁰⁴ Pang Zhongying, *The Beijing Olympics and China's Soft Power*, BROOKINGS (Sept. 4, 2008), <https://brook.gs/2Kp6r0F> (2008 Olympics); Politics and More Podcast with Dorothy Wickenden, *What the Beijing Olympics Reveal About China*, NEW YORKER (Feb. 10, 2022), <https://bit.ly/3D0YG8g> (2022 Olympics).

⁵⁰⁵ Wang Yiming, *Boao Forum Annual Conference to Focus on Post-Pandemic Economic Recovery*, CHINA.ORG.CN (Jan. 12, 2022), <https://on.china.cn/36E8PM6>.

⁵⁰⁶ WHO Constitution, *supra* note 440, at 186 (signing July 22, 1946).

⁵⁰⁷ IHR, *supra* note 383, at 59 (showing China as one of the states party to the IHR).

⁵⁰⁸ See *infra* Section II.A.

⁵⁰⁹ See *infra* Section II.B.

⁵¹⁰ See Mazzuoli, *supra* note 398, at 21-22.

⁵¹¹ *Timeline*, *supra* note 408.

likely occurred weeks earlier.⁵¹² Article 6 requires notification within twenty-four hours of “all events that might constitute a public health emergency.”⁵¹³ Thus, notice should have occurred earlier.

Even though China did not formally notify WHO officials until January 2, 2020,⁵¹⁴ there were indications of an outbreak in early December 2019.⁵¹⁵ On December 31, 2019, WHO’s office in China noticed a Chinese media statement reporting viral pneumonia in Wuhan.⁵¹⁶ The next day, the WHO requested data on the cluster of pneumonia cases.⁵¹⁷ IHR Article 6 requires that a State “continue to communicate to WHO timely, accurate and sufficiently detailed public health information”⁵¹⁸ China did not do so. Per IHR Article 6, a state must notify the WHO within twenty-four hours “of all events which may constitute a [PHEIC].”⁵¹⁹ So when “pneumonia of unknown cause” emerged in early December 2019,⁵²⁰ China should have notified the WHO within twenty-four hours.

2. Article 7: Information-sharing

China breached IHR Article 7 by not sharing full information on the virus in January. IHR Article 7 states that “[i]f a state Party has evidence of an unexpected or unusual public health event in its territory, irrespective of origin . . . it shall provide . . . *all* relevant public health

⁵¹² Chan et al., *supra* note 407; see also James Kraska, *China is Legally Responsible for COVID-19 Damage and Claims Could be in the Trillions*, WAR ON THE ROCKS (Mar. 23, 2020), <https://bit.ly/32u44Qm>.

⁵¹³ IHR, *supra* note 383, at 12 (art. 6).

⁵¹⁴ *Timeline*, *supra* note 408.

⁵¹⁵ Chris Buckley & Steven Lee Myers, *As New Coronavirus Spread, China’s Old Habits Delayed Fight*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/01/world/asia/china-coronavirus.html> (citing Huang, *supra* note 404).

⁵¹⁶ *Timeline*, *supra* note 408.

⁵¹⁷ *Id.*

⁵¹⁸ IHR, *supra* note 383, at 12 (art. 6, ¶ 2).

⁵¹⁹ IHR, *supra* note 383, at 12 (art. 6, ¶ 1).

⁵²⁰ See Chan et al., *supra* note 407.

information.”⁵²¹ The “pneumonia of unknown cause” was an unusual public health event. Given China’s history with outbreaks, China should have given the WHO all possible information on the virus during January and February 2020.

The state breached IHR Article 7 when it “initially withheld basic information about the coronavirus from the public, underreported cases of infection, downplayed the severity of the infection, and dismissed the likelihood of transmission between humans.”⁵²² More, the world received a large amount of misinformation about COVID-19 between January and March 2020.⁵²³ As the South China Post reported, China withheld data that showed the prevalence of “‘silent carriers’—people who are infected by the new coronavirus but show delayed or no symptoms.”⁵²⁴ Whistleblowers resorted to coded messages to avoid government censors.⁵²⁵ And China did not appear truthful when officials silenced a physician.⁵²⁶ Even Dr. Anthony Fauci, Director National

⁵²¹ *Id.* at 12 (art. 7) (emphasis added). As one scholar commented, “[t]his provision’s wording—in the best *hard law* style—is direct and imperative.” Mazzuoli, *supra* note 398, at 12.

⁵²² *Human Rights Dimensions of COVID-19 Response*, HUM. RTS. WATCH (Mar. 19, 2020, 12:01 AM), <https://bit.ly/3lh6cSP>; see also Devashish Giri, *Responsibility of China for the Spread of COVID-19: Can China be Asked to Make Reparations?*, JURIST (Tim Zubizarreta ed.) (Apr. 10, 2020, 4:24 PM), <https://bit.ly/2IqvYVS>.

⁵²³ See Ana Santos Rutschman, *Mapping Misinformation in the Coronavirus Outbreak*, HEALTH AFFS. (Mar. 10, 2020), <https://bit.ly/2JPZSng>. Also, the WHO tweeted on January 14, “[p]reliminary investigations conducted by the Chinese authorities have found no clear evidence of human-to-human transmission of the novel #coronavirus (2019-nCoV) identified in #Wuhan, #China.” Nick Givas, *WHO Haunted by January Tweet Saying China Found No Human Transmission of Coronavirus*, FOX NEWS (Mar. 18, 2020), <https://fxn.ws/36r7PHs>.

⁵²⁴ Josephine Ma et al., *Exclusive: A Third of Coronavirus Cases may be “Silent Carriers”, Classified Chinese Data Suggests*, S. CHINA MORNING POST (Mar. 22, 2020, 6:00 PM), <https://bit.ly/35f4Fak>.

⁵²⁵ Ryan Broderick, *Chinese WeChat Users are Sharing a Censored Post About COVID-19 by Filling it with Emojis and Writing it in Other Languages*, BUZZFEED NEWS (Mar. 11, 2020, 1:54 PM), <https://bit.ly/3pdzXpR>.

⁵²⁶ See Julian Gewirtz, *One Doctor’s Place in China’s Battle for the COVID-19 Narrative*, JUST SEC. (Mar. 23, 2020), <https://bit.ly/2JJWtq2> (“An ophthalmologist in Wuhan, Dr. Li noticed that patients were appearing with strange cases of a severe respiratory illness. He sent out a widely circulated message on December 30 to other doctors in the area, warning them to take precautions, which caused the local police to call him in. They accused him of “making false comments” that had “severely disturbed the social order.”).

Institute of Allergy and Infectious Diseases, said that “misinformation from China delayed and affected U.S. response efforts.”⁵²⁷

Because pandemics like COVID-19 spread quickly,⁵²⁸ a state must thoroughly report all health emergencies. Because that did not occur here, China breached Articles 6 and 7.

B. VIOLATION OF THE RIGHT TO HEALTH

China violated the right to health by allowing their wet markets to flourish after the 2002 SARS outbreak without imposing sufficient health measures. Article 12 of the ICESCR explains the right to health as peoples’ right to “lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”⁵²⁹ As such, there is no question that wet markets are unsanitary compared to accepted international norms.⁵³⁰

After SARS, China should have known that its wet markets, and the exotic animals sold there, were a health risk.⁵³¹ Even the WHO recognizes that the wet markets lack sufficient health and safety standards.⁵³² China banned civets from Chinese wet markets after SARS’s emergence

⁵²⁷ Vincent J. Vitkowsky & Rachida Mecheri, *Responding to China at the United Nations*, NAT’L SEC. INST. at 9 (Nov. 2020) (citing Tim Haines, *Fauci: Chinese “Misinformation” Delayed US Response to Coronavirus*, REAL CLEAR POL. (Apr. 13, 2020), <https://bit.ly/38EbwfA>).

⁵²⁸ See *Clinical Care Guidance*, CDC (last updated Feb. 16, 2020), <https://bit.ly/2iPd3Y> (“The incubation period for COVID-19 is thought to extend to 14 days, with a median time of 4-5 days from exposure to symptoms onset.”).

⁵²⁹ Economic and Social Council Res. E.C. 12/2000/4 (Apr. 25, 2000), <https://bit.ly/38sFlzq>.

⁵³⁰ See, e.g., Woo et al., *supra* note 405, at 403 (“Here, the animals are closely packed in cages and hygienic conditions are inevitably poor, with the shedding of large amounts of animal excreta. These animal excreta may contain high concentrations of zoonotic microbes of potential hazard to human health. High-risk behaviors of customers, such as blowing the cloacae of chickens commonly practised to examine their healthiness, further increase the risk of transmission of these potential microbes.”).

⁵³¹ SARS (*Severe Acute Respiratory Syndrome*), WHO, <https://bit.ly/35T6LNg> (last visited Nov. 8, 2020).

⁵³² See Helen Briggs, *Coronavirus: WHO Developing Guidance on Wet Markets*, BBC (Apr. 21, 2020), <https://bbc.in/3kyk6OZ>.

in late 2003.⁵³³ But civets were available in wet markets as early as 2004.⁵³⁴ A similar chain of events happened with COVID-19. China closed its Wuhan wet markets in January 2020 due to the virus.⁵³⁵ However, China allowed the wet markets to reopen in April, 2020.⁵³⁶ In short, China should follow the WHO's guidelines in its high-risk wet markets, especially those that have contributed to prior epidemics.⁵³⁷ Overall, China denies its citizens the right to health because China continues to operate wet markets despite evidence that outbreaks continue to start in these very markets.⁵³⁸

C. CHINA'S RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS

China can be held responsible for its breaches under the Draft Articles. A state must act "in conformity with what is required . . . regardless of its origin or character."⁵³⁹ A breach could come from any "international obligation[] of States,"⁵⁴⁰ such as bilateral obligations, duties to the international community at large, or treaties.⁵⁴¹ Further, China is bound by the IHR articles on top of the ICESCR's right to health provision.⁵⁴²

⁵³³ Robert G. Webster, *Wet Markets – a Continuing Source of Severe Acute Respiratory Syndrome and Influenza*, 363 *RAPID REV.* 234, 235 (2004); see also *Civet*, *BRITANNICA*, <https://bit.ly/3a0Bz11> (last visited Dec. 9, 2020).

⁵³⁴ *Id.* And are still available. See Jason Gale, *China's Wildlife Is a Pandemic 'Waiting to Happen,' Study Finds*, *Bloomberg Quint* (Nov. 15, 2021), <https://bit.ly/3DaLgqd> (selling civets).

⁵³⁵ Cate Cadell, *A Year on, Markets Bustling in Chinese City Where COVID-19 Emerged*, *REUTERS* (Dec. 7, 2020, 11:06 PM), <https://reut.rs/357Pjac>.

⁵³⁶ Sigal Samuel, *The Coronavirus Likely Came from China's Wet Markets. They're Reopening Anyway*, *VOX* (Apr. 15, 2020, 11:40 AM), <https://bit.ly/35cztbG>.

⁵³⁷ *E.g.*, Robert G. Webster, *Wet Markets – A Continuing Source of Severe Acute Respiratory Syndrome and Influenza?*, 363 *LANCET* 234 (2004), <https://bit.ly/36XMRBu> (describing outbreak of avian flu in Shenzhen); Marion Koopmans & Menno D. de Jong, *Avian Influenza A H7N9 in Zhejiang, China*, 381 *Lancet* 1882 (2013), <https://bit.ly/3qE2Z2x>.

⁵³⁸ See *supra* notes 401–412 and accompanying text.

⁵³⁹ Draft Articles with Commentaries, *supra* note 483, at 54 (art. 12).

⁵⁴⁰ *Id.* at 55.

⁵⁴¹ *Id.* at 55–56.

⁵⁴² See *id.* at 57 (art. 13) ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

China’s wrongful acts would allow reparations for “any damage, whether material or moral.”⁵⁴³ This right is self-evident—“the general obligation of reparation is formulated in article 31 as the immediate corollary of a State’s responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States.”⁵⁴⁴ Article 31 allows an injured state to claim reparations for any damage.⁵⁴⁵

An injured state can then invoke Article 42. This article outlines the right of the “State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act.”⁵⁴⁶ A “State is entitled . . . to invoke the responsibility of another State if the obligation breached is owed to . . . (a) that State individually; or (b) a group of States . . . or the international community.”⁵⁴⁷

Under the IHR and ICESCR, China owes obligations to member States: to notify the WHO within twenty-four hours of any potential PHEIC, to give complete information on emergent health events, and to support the right to health.⁵⁴⁸ Because China breached these obligations, states have a path under Article 42 to hold China responsible.⁵⁴⁹

The next section describes mechanisms an injured state could leverage, including IHR settlement, seeking an ICJ decision, and imposing countermeasures. Each option will be assessed and weighed against the goals of accountability and prevention.

⁵⁴³ *Id.* at 91 (art. 31, ¶ 2).

⁵⁴⁴ Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, A/56/10, at 76 (art. 31) (2001), <https://bit.ly/3o2jF1w> [hereinafter Draft Articles with Commentaries].

⁵⁴⁵ *Id.* at 91 (art. 31).

⁵⁴⁶ *Id.* at 116.

⁵⁴⁷ *Id.* at 117 (art. 42).

⁵⁴⁸ See *supra* notes 519–521, 529 and accompanying text.

⁵⁴⁹ Draft Articles with Commentaries, *supra* note 483, at 117 (An injured state is “entitled to resort to all means of redress contemplated in the articles, including countermeasures.”).

IV. MECHANISMS TO HOLD CHINA ACCOUNTABLE

Assuming China does not provide reparations to injured States, there are three avenues to obtain recourse: (A) settlement, (B) ICJ decisions, or (C) countermeasures.

A. SETTLEMENT

Settlement is the first step to resolving a dispute under the IHR. The regulations direct States to seek negotiation “or any other peaceful means” to settle disputes.⁵⁵⁰ States can choose from several methods: mediation, good offices, conciliation, or any other “dispute settlement mechanisms”⁵⁵¹ But States do not have to accept settlement results or even conduct the settlement in good faith.⁵⁵²

If the affected States cannot resolve the matter independently, they may agree to submit the dispute to the Director-General for arbitration.⁵⁵³ But if China was unlikely to accept a settlement, it is even more unlikely China would consent to arbitration.⁵⁵⁴ Before engaging in

⁵⁵⁰ IHR, *supra* note 383, at 34–35 (art. 56, ¶1).

⁵⁵¹ *Id.* at 35 (art. 56, ¶ 4).

⁵⁵² *See id.* (art. 56, ¶ 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.”).

⁵⁵³ *Id.*

⁵⁵⁴ For example, in 2012, after China “squeezed out the Philippines from Scarborough Shoal,” the two nations engaged in negotiations. Leszek Buszynski, *Law and Realpolitik: The Arbitral Tribunal’s Ruling and the South China Sea*, 21 ASIAN Y.B. INT’L L. 121, 125 (2015). When negotiations failed, China and the Philippines appealed to arbitration at the Permanent Court of Arbitration. *Id.* The Tribunal found that China “violated the Philippines’ sovereign rights in its exclusive economic zone” and had “inflicted irreparable harm.” *Id.* at 126 (quoting Press Release, Permanent Ct. Arb., S. China Sea Arb. (July 12, 2016) (on file with author). China “claimed the ruling had no legal significance,” “contested the legitimacy of the ruling,” and then “declared that the ruling is ‘null and void and has no binding force and China neither accepts nor recognizes it.’” *Id.* at 128 (quoting Press Release, China For. Ministry, Award S. China Sea Arb. Initiated by Phil. (July 12, 2016) (on file with author)).

arbitration, each state would have to “accept [it] as a means of resolving disputes . . . [and] must declare this acceptance ‘in writing’ to the Director General.”⁵⁵⁵

In a similar vein, China has an obligation to pursue settlement.⁵⁵⁶ Article 33 of the U.N. Charter directs that States “shall . . . seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements”⁵⁵⁷ The Charter further provides that the Security Council may ask States to settle the dispute,⁵⁵⁸ and if the parties fail to do so, the council may “recommend such terms of settlement as it may consider appropriate” if the dispute implicates “international peace and security.”⁵⁵⁹ Given the rhetoric to hold China responsible,⁵⁶⁰ the Security Council should consider its involvement if China rejects settlement.

While no state has ever invoked IHR Article 56,⁵⁶¹ there are advantages to settlement. For one, China could control its fate, as compared to binding arbitration or an ICJ decision.⁵⁶² But as Professor Steven Hoffman identifies, seeking settlement may not be feasible. While the IHR requires parties to “attempt settling the dispute, there is no guarantee or requirement that they

⁵⁵⁵ Mazzuoli, *supra* note 398, at 19. The WHO cannot force a state to accept settlement. IHR, *supra* note 383, at 35 (art. 56, ¶4).

⁵⁵⁶ See U.N. Charter art. 33–38.

⁵⁵⁷ U.N. Charter, art. 33, ¶ 1.

⁵⁵⁸ *Id.* art. 33, ¶ 2.

⁵⁵⁹ *Id.* art. 37, ¶ 2.

⁵⁶⁰ See Patrick Wintour & Tobi Thomas, *China Loses Trust Internationally over Coronavirus Handling*, GUARDIAN (Oct. 27, 2020, 10:30 AM), <https://bit.ly/2Ll3EWD> (“Overall, the poll suggests there is a receptive global audience for the next US president, if he chooses, to construct an international alliance to challenge China’s growing political dominance, and to question the moral values of its leadership.”).

⁵⁶¹ Armin von Bogdandy & Pedro A. Villarreal, *Critical Features of International Authority in Pandemic Response: The WHO in the COVID-19 Crisis, Human Rights and the Changing World Order*, MAX PLANCK INST. COMPAR. PUB. L. & INT’L L. 23, 24 (2020); 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, 279 (2020).

⁵⁶² See *infra* Section III.B.2.

actually resolve it.”⁵⁶³ The “lack of any obligatory mechanism compelling the parties to participate . . . means that it will be power and political influence” instead of “law and legal norms” that drives state behavior.⁵⁶⁴ Indeed, there are “few incentives for states to ever resolve their disputes and no mechanism to ensure a timely settlement.”⁵⁶⁵ Because settlement is unlikely to occur, however, the ICJ can also play a role in holding China accountable.

B. ICJ DECISIONS

The WHO could seek an advisory opinion or States could bring a contentious claim.

1. Advisory Opinion

Though an advisory opinion is not binding,⁵⁶⁶ an advisory judgment would be valuable for its “contribution[] to important substantive issues.”⁵⁶⁷ The ICJ could examine the IHR’s reporting requirements, how COVID-19 began, and measure China’s response. The question presented would be, “Was there a failure by a member state to properly notify and inform the WHO under Articles 6 and 7?” An answer to this question would “lay down a path for the subsequent course of action.”⁵⁶⁸

An advisory opinion could also have an impact beyond China because the “court gets to decide [the opinion’s scope] on the basis of all the available evidence.”⁵⁶⁹ The issue should not be limited to China’s alleged failure to notify the WHO. Instead, a broader holding, using the facts of

⁵⁶³ Seven J. Hoffman, *Making the International Health Regulations Matter*, in ROUTLEDGE HANDBOOK OF GLOB. HEALTH SEC. 239, 242 (Simon Rushton & Jeremy Youde eds., 2014).

⁵⁶⁴ *Id.*

⁵⁶⁵ Hoffman, *supra* note 563, at 4.

⁵⁶⁶ See DAMROSCH & MURPHY, *supra* note 472, at 593.

⁵⁶⁷ *Id.*

⁵⁶⁸ Atul Alexander, *Gauging the Advisory Jurisdiction of the International Court of Justice in the Face of COVID-19*, JURIST (BRITTNEY ZELLER ED.) (Apr. 6, 2020, 3:46 PM), <https://bit.ly/2GJbQxR>.

⁵⁶⁹ *Id.*

China and COVID-19, would help illuminate member States' notification obligations. An ICJ decision could also lead to higher expectations for state notification requirements and strengthen the WHO's notification procedures. Finally, an advisory opinion could help answer whether States pursuing domestic actions against China could overcome legal issues like proving causation.⁵⁷⁰

One potential obstacle is that an organization (other than the U.N. General Assembly or Security Council) may only request an advisory opinion on "any legal question . . . within the scope of the activities of the requesting organ."⁵⁷¹ For example, the ICJ rejected the WHO's request for an advisory opinion on whether State use of nuclear weapons would breach international law and the WHO Constitution.⁵⁷²

China's alleged failure to adhere to Articles 6 and 7 is a public health matter within the WHO's scope.⁵⁷³ COVID-19 falls within the WHO mandate.⁵⁷⁴ So even though the WHO has a poor record in advisory opinions,⁵⁷⁵ and the ICJ seldom provides them,⁵⁷⁶ the request to clarify two key IHR articles, Art. 6 and 7, would likely succeed.⁵⁷⁷

⁵⁷⁰ See Sebastián Guidi & Nahuel Maisley, *Who Should Pay for COVID-19?: The Inescapable Normativity of International Law*, 96 N.Y.U. L. REV. 375, 401-05 (2021) (discussing the problem of causation).

⁵⁷¹ DAMROSCH & MURPHY, *supra* note 472, at 593.

⁵⁷² INTERNATIONAL COURT OF JUSTICE [ICJ], *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, <https://bit.ly/35Tmtlh> (last visited Apr. 18, 2022). Interestingly, although the WHO could not ask for an advisory opinion, the ICJ stated that "[t]here was no doubt that questions . . . were within the competence of the United Nations." *Id.*

⁵⁷³ Alexander, *supra* note 568.

⁵⁷⁴ The first guiding principle in the WHO Constitution is for the "enjoyment of the highest attainable standard of health." WHO Constitution, *supra* note 440, at 186.

⁵⁷⁵ See *supra* note 572 (declining jurisdiction); ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, <https://www.icj-cij.org/en/case/65> (last visited Mar. 24, 2022) (accepting jurisdiction).

⁵⁷⁶ The ICJ has ruled on only twenty-eight advisory opinions in its history. *Judgments, Advisory Opinions and Orders*, ICJ, <https://bit.ly/3eKRukh> (last visited Mar. 24, 2022).

⁵⁷⁷ See Sandrine De Herdt, *A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic*, EJIL: TALK! (May 20, 2020), <https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic/>.

2. Contentious Decision

Since its inception, the ICJ has issued 139 contentious decisions.⁵⁷⁸ A contentious decision would provide a binding (on the parties), neutral, and generally internationally accepted decision that would allocate state or organizational responsibility and calculate damages. Here, the two matters in dispute are whether China's IHR breaches led to injuries and whether China had sufficient health measures in its wet markets.

Before the ICJ exercises its power, it must establish jurisdiction over the dispute. The ICJ statute first explains that “[t]he Court shall be open to the states parties to the present Statute.”⁵⁷⁹ In other words, States must recognize the court's jurisdiction.⁵⁸⁰ Article 75 of the WHO Constitution provides for jurisdiction: “Any question or 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 International Court of Justice.”⁵⁸¹ Thus, if dispute resolution fails, a state might be able to obtain jurisdiction.

Thus, China's breaches of IHR Articles 6 and 7 provide apt legal questions for the ICJ.⁵⁸² Unlike an advisory opinion, injured States would benefit from the court directly answering the question, “Did China's breach of Articles 6 and 7 contribute to the pandemic and lead to damages?” On the other hand, the violation of the right to health is a more difficult analysis. As section II.B discusses, there are problems with defining the right to health and proving that China

⁵⁷⁸ *Contentious Cases*, ICJ, <https://bit.ly/36V3bl7> (last visited Mar. 24, 2022).

⁵⁷⁹ ICJ Statute, *supra* note 468, art. 35(1) Jurisdiction is also open to other states through the UN Security Council. *Id.* art. 35(2).

⁵⁸⁰ *See id.* art. 36(6).

⁵⁸¹ WHO Constitution, *supra* note 440, at 202 (art. 75).

⁵⁸² *See* Mazzuoli, *supra* note 398, at 21–22 (“A plausible solution would be to hold China accountable for the failure to comply with the duty to report, which is a rule contained in the IHR grounded on the provisions of the WHO Constitution . . .”) (citations omitted); *see also* Alexander, *supra* note 568.

violated this right.⁵⁸³ While an ICJ advisory or contentious decision is a viable route, countermeasures could also play a role.

C. COUNTERMEASURES

Countermeasures could be available to bring China into health compliance. The Draft Articles recognize countermeasures in “certain circumstances . . . as necessary to ensure cessation of the wrongful act and reparation for its consequences.”⁵⁸⁴ They function as “a feature of a decentralized system by which injured States may seek to vindicate their rights” and affirm that they are “recognized by Governments and the decisions of international tribunals.”⁵⁸⁵ An injured state may have a valid basis for imposing countermeasures against China for its violations.⁵⁸⁶

A state must ensure that countermeasures satisfy five criteria. First, the injured state must notify the offending state of its breach and give time to correct the situation.⁵⁸⁷ Second, the measures must be proportional.⁵⁸⁸ Third, the measures must be narrowly focused to ensure their “function . . . to induce a wrongdoing State to comply with obligations of cessation and reparation”⁵⁸⁹ Fourth, measures must be corrective.⁵⁹⁰ Finally, the measures “must be as far as possible reversible in their effects in terms of future legal relations between the two States”⁵⁹¹

⁵⁸³ See *supra* notes 532–538 and accompanying text.

⁵⁸⁴ Draft Articles with Commentaries, *supra* note 483, at 32.

⁵⁸⁵ Draft Articles with Commentaries, at 128.

⁵⁸⁶ See *supra* Part II.

⁵⁸⁷ Draft Articles with Commentaries, *supra* note 483, at 135 (art. 52, ¶ 2).

⁵⁸⁸ *Id.* at 134 (art. 51) (“Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”).

⁵⁸⁹ *Id.* at 70.

⁵⁹⁰ *Id.* at 135 (art. 52, ¶ 3) (“Countermeasures may not be taken, and if already taken must be suspended without undue delay if: (a) the internationally wrongful act has ceased.”); *id.* at 137 (art. 53) (“Countermeasures shall be terminated as soon as the responsible State has complied with its obligations”).

⁵⁹¹ Draft Articles at 129, (art. 49, ¶¶ 2, 3); see *id.* at 137 (art. 53).

For example, in 1978, an airline carried a route between the United States and Paris, with a transfer in London.⁵⁹² Yet France objected and did not allow the passengers to disembark in Paris.⁵⁹³ In response, the United States prohibited all flights by French-designated carriers to the West Coast.⁵⁹⁴ Trying to resolve the impasse, the United States and France signed a *compromis* and submitted the dispute to an Arbitral Tribunal.⁵⁹⁵

The tribunal supported the United States’s right to impose countermeasures.⁵⁹⁶ First, the tribunal stated that if “a situation arises which, in one State’s view, results in the violation of an international obligation by another State, the first State is entitled . . . to affirm its rights through ‘counter-measures.’”⁵⁹⁷ Next, the tribunal weighed the direct and indirect injuries to both sides and found the measures proportional.⁵⁹⁸ The measures were valid because the United States did “everything . . . expedite the arbitration[.]”⁵⁹⁹

Injured States could seek countermeasures in this case. WHO member States could limit China’s leadership roles at WHA and WHO. This would meet countermeasures’ requirements (assuming notice and cessation of measures upon China’s compliance). The measure is proportional and narrow. China could not fully participate in the WHA or WHO until it met the standard and the proposed action focuses on international health.

Because countermeasures cannot correct China’s failure to notify, an injured state can only point to China’s violation of the right to health. But there is one immediate barrier: defining a

⁵⁹² Air Services Agreement Case (France v. U.S.), Decision, 18 R.I.A.A. 416 (1978), <https://bit.ly/3kfDqR9>.

⁵⁹³ *Id.*

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ France v. U.S., ¶ 98.

⁵⁹⁷ *Id.* ¶ 81.

⁵⁹⁸ *Id.* ¶ 90.

⁵⁹⁹ *Id.* ¶ 98.

breach of the “right to health.” No evidence conclusively shows the virus started in the wet markets.⁶⁰⁰ Nor are there any firm international health standards for these markets.⁶⁰¹ Even if international standards existed, China would likely argue that they are making reasonable efforts to promote safe, healthy markets.⁶⁰² For example, Hong Kong has banned live ducks and geese from markets since 1998.⁶⁰³ And China has targeted regulations for wet markets, market sanitation, and food safety.⁶⁰⁴

There may be undesirable consequences. China might claim the countermeasures themselves were internationally wrongful acts and lead to reciprocal countermeasures. Alternatively, if a state imposes countermeasures against China, China might then target other States that might also have violated the “right to health.”

The goal of countermeasures is to bring a state in line with its obligations, not harm third parties.⁶⁰⁵ States should thus consider the targeted state’s reaction and ripple effects on the global health picture before using this tool. China’s likely response would be more harmful overall to global health. Because States may have difficulties justifying and imposing countermeasures, they

⁶⁰⁰ See, e.g., Kenji Mizumoto, Katsushi Kagaya & Gerardo Chowell, *Effect of a Wet Market on Coronavirus Disease (COVID-19) Transmission Dynamics in China, 2019–2020*, 97 INT’L J. INFECTIOUS DISEASES 96 (2020) (“[S]ignificant evidence strongly links the Huanan Seafood Wholesale Market in Wuhan with the early spread of the novel coronavirus (COVID-19) among humans.”); Qun Li et al., *Early Transmission Dynamics in Wuhan, China, of Novel Coronavirus-Infected Pneumonia*, 382 NEW ENG. J. MED. 1199 (2020) (“[T]he first 4 cases reported, all linked to the Huanan (Southern China) Seafood Wholesale Market . . .”).

⁶⁰¹ See WHO, A GUIDE TO HEALTHY FOOD MARKETS 1 (2006), <https://bit.ly/2IzOPi2>. The report offers several recommendations to “reduce transmission of avian influenza,” including education and awareness, monitoring, visual inspection, personal protective equipment, market zoning, and potable water and hand washing. *Id.* at 31–34.

⁶⁰² E.g., Woo et al., *supra* note 405, at 405 (discussing Hong Kong’s health measures in its livestock markets); *Regulation of Wild Animal Wet Markets in Selected Jurisdictions*, L. LIBR. CONG. 1, 3 (Aug. 2020), <https://bit.ly/3nyvCmb> (“China . . . ha[s] specific regulations that apply to wet markets.”).

⁶⁰³ Woo et al., *supra* note 405, at 405.

⁶⁰⁴ *Regulation of Wild Animal Wet Markets in Selected Jurisdictions*, *supra* note 602, at 3.

⁶⁰⁵ Draft Articles with Commentaries, *supra* note 483, at 129 (art. 49, ¶¶ 1, 2).

might turn to unilateral options.⁶⁰⁶ These other options, like domestic legal action and reprisals, may irreparably harm global health.

States have several options to seek recourse for China's breaches. First, States can engage in settlement or arbitration.⁶⁰⁷ However, no state has ever engaged in settlement under the IHR.⁶⁰⁸ Second, the WHO can seek an advisory opinion from the ICJ, or States could pursue a contentious decision.⁶⁰⁹ Yet, this would be a time-consuming process and an injured state would have difficulty proving the breach of the right to health.⁶¹⁰ Third, States could impose countermeasures for China's violation of the right to health.⁶¹¹ Nevertheless, countermeasures would be hard to justify and likely to incur reciprocal action. Punishing China is not the best way to prevent the next pandemic. States and the WHO should instead improve the international health framework.

IMPROVEMENTS TO THE INTERNATIONAL FRAMEWORK

Existing international law mechanisms are not ideal for prevention. States must therefore (A) improve the WHO, (B) build upon the IHR, and (C) strengthen global health.

A. CHANGE THE WHO

Because a strong WHO is crucial to prevent outbreaks, the WHO must seek informational, financial, and structural improvements. This section will discuss WHO's weaknesses and suggest a Compliance and Accountability Committee as a cure.

⁶⁰⁶ Unilateral measures might include "reprisals," which are "otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach" or domestic legal action. *Id.* at 128; *see also* Isabel Vincent, *New Yorkers Seek Justice with Class-Action Coronavirus Lawsuits Against China*, N.Y. POST (May 16, 2020, 11:17AM), <https://bit.ly/3pzIgfM> (lawsuits).

⁶⁰⁷ *See supra* Section III.A.

⁶⁰⁸ *See supra* note 561 and accompanying text.

⁶⁰⁹ *See supra* Section III.B.

⁶¹⁰ *See supra* notes 582–583 and accompanying text.

⁶¹¹ *See supra* Section III.C.

1. Address WHO Weaknesses

The WHO must overcome multilateralism and a lack of independence. The first shortfall is Trojan multilateralism.⁶¹² Professors Devi Sridhar and Ngaire Woods explain how “concerns about . . . pandemics” led to new health initiatives that “created a model that is tempting States to import new and greater control into traditional international organizations.”⁶¹³ In essence, “governments might be using their ‘gifts’ to multilateral organizations to further . . . bilateral initiatives” instead of global ones.⁶¹⁴ Second, the WHO is over-reliant on States for information and financial support.

a. Informational Improvements.

The WHO must strengthen information collection. IHR Article 12 gives the Director-General unilateral power to declare a PHEIC.⁶¹⁵ Yet to “determin[e] whether an event constitutes a public health emergency of international concern,” the director considers, among other factors, information given by states.⁶¹⁶ While the director has the final say on declaring a PHEIC,⁶¹⁷ there is too much deference given to the state where the incident occurred.⁶¹⁸

One option is to modify Article 12 to decrease reliance on information given by States. Instead of saying that the Director-General “shall consider . . . information provided by the State party,” the article should replace “shall” with “may.”⁶¹⁹ Further, IHR Article 9 allows the WHO

⁶¹² Meisterhans, *supra* note 434, at 9.

⁶¹³ Devi Sridhar & Ngaire Woods, *Trojan Multilateralism: Global Cooperation in Health*, 4 GLOB. POL’Y 325, 325 (2013)).

⁶¹⁴ *Id.* at 326.

⁶¹⁵ See *supra* notes 555–558 and accompanying text.

⁶¹⁶ IHR, *supra* note 383, at 14 (art. 12, ¶ 4).

⁶¹⁷ See *supra* note 558 and accompanying text.

⁶¹⁸ IHR, *supra* note 383, at 14–15 (art. 12, ¶ 3).

⁶¹⁹ *Id.* at 14 (art. 12, ¶ 4).

to “take into account reports from sources other than notifications or consultations.”⁶²⁰ For States that have shown a hesitance to share complete or timely information,⁶²¹ the WHO should put more weight to other information sources.⁶²²

Naturally, the WHO should not send health inspectors uninvited to States. But gathering timely and accurate information is vital. As a result, the WHO must adjust its leadership style to promote greater state cooperation given COVID 19.

The Director-General should act more independently, particularly during an emergent health crisis.⁶²³ The director should not have to wait on a state’s approval to convene the emergency committee or declare a PHEIC.⁶²⁴ Instead, the WHO’s executive should be “standing up to even the most powerful member States.”⁶²⁵ Also, the Director-General should avoid the appearance of partiality.⁶²⁶ But this does not mean the Director-General should be aggressive; he should offer unifying remarks as he gave at the G20 Leader’s Summit.⁶²⁷ By acting more

⁶²⁰ *Id.* at 12 (art. 9, ¶ 1).

⁶²¹ See, e.g., Justine Coleman, *Leaked Documents Show China Mishandled Early COVID-19 Pandemic: Report*, Hill (Nov. 30, 2020, 7:04 AM), <https://bit.ly/3osfhJE> (describing how Chinese officials withheld information like the actual number of COVID-19 cases in early February, the time required for a positive diagnosis (23.3 days), and a severe influenza outbreak in late 2019).

⁶²² See, e.g., *supra* notes 408–412 and accompanying text (describing how WHO received notice of an unusual health event and activated its IMST).

⁶²³ Lawrence O. Gostin & Sarah A. Wetter, *Using COVID-19 to Strengthen the WHO: Promoting Health and Science Above Politics*, MILBANK Q. (May 6, 2020), <https://bit.ly/3nTQMob>.

⁶²⁴ As political consultant Lee Atwater once opined, “perception is reality.” Victoria Times-Colonist Staff, *In Politics, Perception Is Reality*, TIMES COLONIST (Aug. 3, 2017, 8:04 AM), <https://www.timescolonist.com/opinion/letters/in-politics-perception-is-reality-4652492>. Thus, the WHO’s delay in declaring a PHEIC “suggested something troubling: that the WHO was letting Beijing influence what was supposed to be an independent, science-driven process.” Jennifer Nuzzo, *To Stop a Pandemic: A Better Approach to Global Health Security*, FOREIGN AFFS., Jan./Feb. 2021, at 39.

⁶²⁵ Gostin & Wetter, *supra* note 623.

⁶²⁶ Instead, he “should always speak truth to power.” *Id.*

⁶²⁷ Press Release, WHO, WHO Director-General Calls on G20 to Fight, Unite, and Ignite Against COVID-19 (Mar. 26, 2020), <https://bit.ly/2U84Q0N>. Dr. Tedros Adhanom Ghebreyesus observed that “[t]his is a global crisis that requires a global response,” and he called on leaders to “fight, unite, and ignite.” *Id.*

independently and forcefully, the director will be able convince States to cooperate more with the WHO.

b. Financial Improvements.

The WHO lacks funds to pursue the kind of transformative programs necessary to fight global pandemics effectively.⁶²⁸ In 2018, the WHO called for \$14.1 billion for 2019–23 to “deliver on the Triple Billion strategy.”⁶²⁹ Yet, the WHO projected an annual income of less than \$4 billion.⁶³⁰ The shortfall thus limits the “WHO to single issue-oriented health goals and isolated programs”⁶³¹

As of 4Q 2021, the WHO receives 83.6% of its funding from specified and thematic voluntary contributions (“earmarks”), and only 12.6% from assessed contributions.⁶³² Unlike earmarks, assessments are dues for WHO membership.⁶³³ These assessments provide a dependable and flexible income. And assessments can act as penalties for delinquent States such as “loss of voting rights[,] . . . significant criticism[,] . . . [and] reputational costs.”⁶³⁴ With fewer assessments, the WHO loses a key compliance lever.

⁶²⁸ Greater financial independence will help the WHO. *See* Bogdandy & Villarreal, *supra* note 561, at 26.

⁶²⁹ WHO, A HEALTHIER HUMANITY: THE WHO INVESTMENT CASE FOR 2019–2023, at 9 (2018), <https://bit.ly/38tBdzq>.

⁶³⁰ WHO, 72d World Health Assembly, Prov. Agenda Item 11.1 at 20, A72/4 (May 10, 2019).

⁶³¹ Meisterhans, *supra* note 434, at 12.

⁶³² *Contributors*, WHO, <https://bit.ly/35Bqwc1> (last visited Mar. 24, 2022).

⁶³³ *How WHO Is Funded*, WHO, <https://bit.ly/2UDfTzf> (last visited Nov. 17, 2020).

⁶³⁴ *Id.*

Decades ago, most of the WHO budget came from state assessments.⁶³⁵ The model changed however, as States began giving more funds to intergovernmental organizations (“IGO”).⁶³⁶ The WHO followed suit,⁶³⁷ which led to the WHO facing “strategic distortions” due to reliance on earmarks.⁶³⁸

Because only 16% of WHO’s funding is flexible, the WHO has severe restrictions on how it may spend its funding.⁶³⁹ Granted, States have increased voluntary contributions to fight COVID-19.⁶⁴⁰ However, because the WHO does not have discretionary spending over these funds, the WHO will not be able to accomplish its other goals. For that reason, the WHO should increase state assessments.⁶⁴¹

In a similar vein, the WHO can use its power of the purse to influence compliance.⁶⁴² The 2020–21 WHO budget describes how the Secretariat “measures WHO’s impact at the country level”⁶⁴³ and prioritizes resources.⁶⁴⁴ The Secretariat could therefore scrutinize developed nations

⁶³⁵ See Tedros Adhanom Gebreyesus, WHO Director-General, *WHO’s Director-General Outlines Funding Challenges and Strategies*, YOUTUBE (May 25, 2020), <https://bit.ly/2IGX3V8> (describing “the shift of assessed contributions” from 80% in the 1970s to 20% today).

⁶³⁶ “[B]etween 1995 and 2010 earmarked contributions for operational activities for development in the UN system grew by 252 per cent.” Erin R. Graham, *Follow the Money: How Trends in Financing are Changing Governance at International Organizations*, 8 GLOB. POL’Y 15, 15 (2017), <https://bit.ly/3nw70Uw>.

⁶³⁷ See *supra* note 274 and accompanying text.

⁶³⁸ Graham, *supra* note 636, at 18 (citation omitted).

⁶³⁹ *Contributors*, *supra* note 632. Flexible funds are those that are not tied to specific projects. *Flexible Funding*, WHO, <https://bit.ly/3NnhWkU> (last visited Mar. 24, 2022).

⁶⁴⁰ See Elaine Ruth Fletcher, *China Announces US\$ 2 Billion COVID-19 Initiative; US Assails China’s Pandemic Response; WHO Decries Global “Amnesia” About Epidemic Lessons*, HEALTH POL’Y WATCH (May 18, 2020), <https://bit.ly/3pgHLHg>; *Contributors*, *supra* note 632 (showing Pandemic Influenza Preparedness (PIP) funds at \$51,828,000 for 4Q 2021).

⁶⁴¹ See Gostin & Wetter, *supra* note 623 (discussing how at least half of the WHO’s budget should come from mandatory assessments).

⁶⁴² Dr. Nuzzo supports this reasoning. She proposes that “countries that honor their obligations to report outbreaks should be rewarded with help and priority access to resources – not penalized.” Nuzzo, *supra* note 624, at 39.

⁶⁴³ WHO, *Programme Budget 2020–2021*, 72nd WHA, at 13, A72/4 (May 2019), <https://bit.ly/3pBVXLI>.

⁶⁴⁴ *Id.* at 50 (based on “the severity of the crisis [and] to the Member State’s capacity to respond and to the risk of international spread”).

more closely that have fallen short of primary obligations.⁶⁴⁵ As such, the WHO could prioritize funding for countries that better support the WHO's mission.

If the WHO presses too hard on States for funding, there might be consequences. As Professor Lawrence Gostin and Sarah Wetter explain, the "WHO is often placed in an impossible position: if it acts too harshly . . . countries may . . . pull their funding, ultimately putting global health at greater risk."⁶⁴⁶ States may be therefore "reticent to invest in the core budget of the WHO" because they think they are "relinquishing their state sovereignty."⁶⁴⁷ Indeed, a state frustrated with the WHO could simply walk away.⁶⁴⁸

Still, the WHO should take a firm stance against States that do not fund the WHO or are partly responsible for pandemics.⁶⁴⁹ If the international community trusts the WHO's judgments, States like China might bow to social pressure. But for now, the WHO relies on providing budget transparency⁶⁵⁰ and pleading with States for donations.⁶⁵¹

⁶⁴⁵ *Id.* at 14. Specifically, the Secretariat could investigate "the extent to which the [state] interventions . . . have integrated . . . equity and human rights[.]" *Id.*

⁶⁴⁶ Gostin & Wetter, *supra* note 623.

⁶⁴⁷ Srikanth K. Reddy et al., *The Financial Sustainability of the World Health Organization and the Political Economy of Global Health Governance: a Review of Funding Proposals, Globalization & Health* (2018) at 9, <https://bit.ly/2ItTv8V>.

⁶⁴⁸ For example, in 2020, the United States announced its withdraw from the WHO after then-President Trump "criticized WHO for being slow to respond to the pandemic and for being too 'China-centric.'" Pien Huang, *Trump Sets Date to End WHO Membership over its Handling of Virus*, NPR (July 7, 2020, 6:14 PM), <https://n.pr/3fbsPWC>. Yet, the current Biden administration declared in early 2021 that the United States will rejoin the WHO. Christina Morales, *Biden Restores Ties with the World Health Organization that were Cut by Trump*, N.Y. TIMES (Jan. 20, 2021), <https://nyti.ms/36N6kqQ>.

⁶⁴⁹ As of 4Q 2021, China contributed 2.3% of the WHO's budget (\$177,659,000). *Contributors*, *supra* note 632. Yet SARS and COVID-19 originated in China. See Sarkar, *supra* note 375; Davidson, *supra* note 398.

⁶⁵⁰ See generally *Contributors*, *supra* note 632.

⁶⁵¹ See Gebreyesus, *supra* note 635 (highlighting "the two objectives of the Organization's transformation agenda in this context are to increase overall funding for the Organization and to increase flexible funding to expand and strengthen WHO's programmes.").

Other than achieving greater financial independence, increased surveillance and reporting can be met through a compliance and accountability committee.

2. *Form a Compliance and Accountability Committee*

A Compliance and Accountability Committee (“CAC”), as offered by Professor Ching-Fu Lin,⁶⁵² could ensure that States maintain a core capacity for surveillance and reporting.⁶⁵³ Because there are no obligatory compliance mechanisms, the WHO is often at the mercy of state reporting.⁶⁵⁴ China in particular is reticent to “collaborate with surveillance systems or engage in other information-sharing activities.”⁶⁵⁵

For that reason, the CAC should act against a state that does not meet its surveillance responsibilities. Of course, the CAC’s initial actions should be restrained. The committee could launch an “‘assess and comment’ procedure to review specific cases” and “issue a ‘*Specific Comment*’ on such a case.”⁶⁵⁶ A comment is not legally binding, however; its purpose is to “help[] other State Parties urge[] the State Party concerned to bring its measure into compliance.”⁶⁵⁷ Under Professor Lin’s model, the CAC could identify a wrong and suggest remediation, but it would have to rely on other States to enforce compliance. Granted, the targeted state might not like being

⁶⁵² Lin, *supra* note 561, at 282–83; cf. Ahmed Al-Baidhani, *The Role of Audit Committee in Corporate Governance: Descriptive Study*, 2 INT’L J. RSCH. & METHODOLOGY IN SOC. SCI. 45, 55 (2016) (discussing how “[t]he audit committee plays a major role in corporate governance”).

⁶⁵³ As Dr. Nuzzo reports, less than twenty-five percent of WHO member states reported complete compliance as of 2012 and only a third had met the standard by 2014. Nuzzo, *supra* note 624, at 38.

⁶⁵⁴ See Vitkowsky & Mecheri, *supra* note 527, at 9 (“The World Health Organization’s (WHO) response in light of the recent COVID-19 pandemic has demonstrated its reliance on China’s assessments in its own reporting and the effect of the WHO’s failure to exercise independent critical judgment independent of the Chinese government.”).

⁶⁵⁵ JEREMY YOUDE, GLOBAL HEALTH GOVERNANCE IN INTERNATIONAL SOCIETY 133 (2018).

⁶⁵⁶ Lin, *supra* note 561, at 283.

⁶⁵⁷ *Id.*

censored or “urged” by other States. If the CAC had authority as an independent body, it could take more forceful measures without needing other States to expend their political capital.

Measures should be narrowly tailored to influence States. In essence, actions against a noncompliant state should mirror those of countermeasures.⁶⁵⁸ Of course, allowing the committee to censure States would require an IHR amendment.⁶⁵⁹ Given the WHO’s inability to reprimand China, however, at least two-thirds of member States would likely support a proposal to allow the CAC the power to rebuke a recalcitrant state.⁶⁶⁰

Further, the committee would be a “standing body” that “function[s] independently from the Director-General” and would “answer directly to the WHA.”⁶⁶¹ An independent, standing body would help inoculate the WHO against political influence. The committee, however, should not be independent. The director should retain veto power over decisions by the committee to provide a political check. Of course, the committee could override the veto with a two-thirds vote, as is the case in several multi-branch governments and organizations.⁶⁶² The diagram below depicts where the CAC would fall within the WHO’s existing structure.

⁶⁵⁸ See *supra* Section III.C.

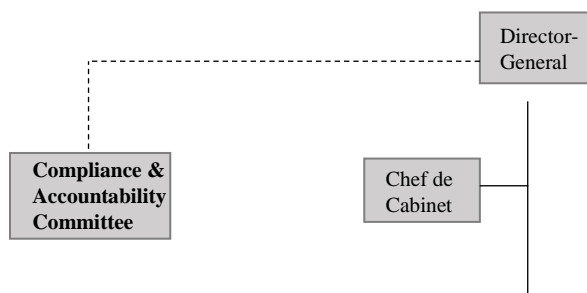
⁶⁵⁹ See IHR, *supra* note 383, at 34 (art. 55).

⁶⁶⁰ WHO Constitution, *supra* note 440, at 192 (art. 19) (“A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements . . .”).

⁶⁶¹ Lin, *supra* note 561, at 282.

⁶⁶² See Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 N.W. J. INT’L L. & BUS. 398, 431 (1997) (“Horizontal and vertical institutional ‘checks and balances’ are one of the major objectives of international organizations . . .”).

Proposed WHO Organizational Structure⁶⁶³



The CAC’s mission would be to “monitor, assess, and comment upon compliance information of State Parties’ measures, or the lack thereof,” and review disputes upon the request of a state or the Director-General.⁶⁶⁴ Rather than rely on States to start settlement, the independent committee could objectively examine a dispute and offer recommendations.⁶⁶⁵ For example, the CAC could, “on its own initiative, or at the request of a State Party, examine the process of how the Director-General reached the conclusion of a PHEIC determination, point out procedural flaws, and even suggest corrective actions and best practices in its specific comment.”⁶⁶⁶

More importantly, the committee’s composition must reflect expertise and independence. Professor Lin offers a thorough description of what the CAC should look like,⁶⁶⁷ which shares similarities to the ICJ’s composition.⁶⁶⁸ First, members should be impartial experts. The Director-General could canvas the existing IHR Expert Roster and select “international health law experts

⁶⁶³ For the full organizational chart, see *World Health Organization Headquarters*, WHO (May 10, 2021), <https://bit.ly/2GO1MDW>.

⁶⁶⁴ Lin, *supra* note 561, at 283.

⁶⁶⁵ At least in theory. This may just create yet another bureaucratic arm of the WHO that runs the risk of becoming politicized. Ching-Fu Lin is optimistic, however, that the improvements will work. *See id.* at 284 (“Backed by careful scrutiny, thorough assessment, and legal reasoning from independent international health law experts, Specific Comments may serve as strong legal anchors in dispute settlements between State Parties and the WHO before the WHA, which is prone to purely political self-interest considerations, international realities, and structural barriers to equal participation . . .”).

⁶⁶⁶ *Id.*

⁶⁶⁷ *See* Lin, *supra* note 561, at 282–85.

⁶⁶⁸ *See generally* ICJ Statute, *supra* note 468.

on the basis of their expertise and experience” to serve on the committee.⁶⁶⁹ Like the ICJ, the committee should have fifteen members and there could not be more than two experts from the same state.⁶⁷⁰ Finally, barring objections (which would be adjudicated by an ad hoc committee appointed by the WHA), the Director-General would appoint experts to serve a defined term.⁶⁷¹ To allow for greater diversity, the term’s initial length would vary much like the ICJ Statute.⁶⁷² Then, the process would repeat as vacancies arise.⁶⁷³

Decision-making should be straightforward. For recommendations and sanctions, the committee would need only a majority vote, and there need not be an appeals process for recommendations. But if the committee issues a sanction, the target state could appeal the decision to the Director-General, who could then veto the committee’s actions. Of course, if the committee still desired the measure, it could override the veto.

The WHO lacks a robust mechanism to confirm compliance. As COVID-19 has shown, the system does not work if a state prioritizes politics over health. With the CAC, the WHO will have an impartial tool to provide recommendations and impose limited sanctions. Along with strengthening the WHO by empowering the Director-General, seeking financial independence, and forming the CAC, the IHR could use an improved dispute resolution system that includes triggering the ICJ if arbitration fails.

⁶⁶⁹ Lin, *supra* note 561, at 283; *IHR Expert Roster*, WHO, <https://bit.ly/35RU2ug> (last visited Mar. 24, 2022).

⁶⁷⁰ See ICJ Statute, *supra* note 86, art. 3(1).

⁶⁷¹ *Cf. id.* art. 13(1).

⁶⁷² *Id.* (describing how the term length of the court’s initial class are staggered).

⁶⁷³ *Id.* art. 14.

B. AMEND THE IHR

COVID-19 was an “acid test” for the IHR,⁶⁷⁴ and the test has illuminated several flaws.⁶⁷⁵ However, IHR drafters included Article 55 so that the regulations could be amended.⁶⁷⁶ To better promote global health, the IHR should be amended by including a provision that triggers the ICJ if settlement and arbitration fail.

1. *Settlement Provision*

Settlement reform is desperately needed.⁶⁷⁷ An amendment could replace the current settlement article with a more effective mechanism for dispute settlement.⁶⁷⁸ And while the CAC will help encourage States to engage in the settlement process, formalizing the process will also encourage dispute resolution.

Several scholars have called for reform.⁶⁷⁹ Professor Hoffman suggests replacing the current system with a three-tier construct consisting of an “*initial legal opinion*, which, if unsatisfactory . . . could be appealed to an . . . *advisory body*,” which could also be appealed to an “*adjudicative body* for final resolution.”⁶⁸⁰ This system has several advantages. One strength is that the “pressure of a mandatory and structured adjudication process . . . facilitate[s] a voluntary

⁶⁷⁴ Jennifer Nuzzo, *supra* note 624, at 39 (citing WHO Director-General Ghebreyesus).

⁶⁷⁵ *See supra* Section I.A., Part II.

⁶⁷⁶ IHR, *supra* note 383, at 34 (art. 55).

⁶⁷⁷ *See supra* Section III.A.

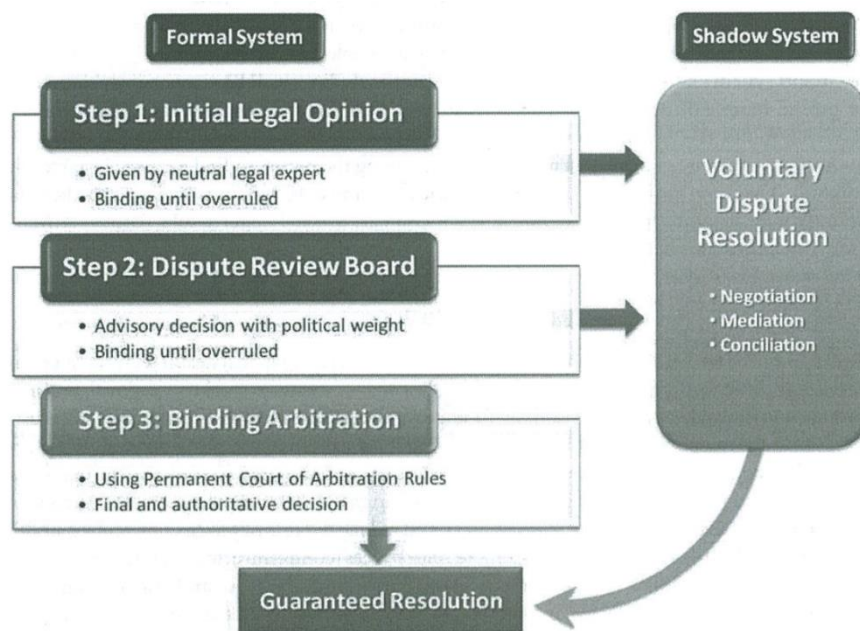
⁶⁷⁸ Lin, *supra* note 561, at 281–82. Additionally, “Thomas Bollyky and Yanzhong Huang argue that ‘[t]o fix those problems, we may need a new mechanism to respond to dangerous disease events, a mechanism that has greater independence from affected member states.’” *Id.* at 282.

⁶⁷⁹ *See, e.g., id.* at 282–83 (providing a set of specific improvements that can be implemented at the procedural level, such as the incorporation of a compulsory, procedurally structured arbitration system.)

⁶⁸⁰ Hoffman, *supra* note 563, at 247 (emphasis in original).

and collaborative ‘shadow system’ of (diplomatic) dispute resolution”⁶⁸¹ Hoffman’s proposal is reproduced below.

Hoffman’s Proposed Multitiered IHR Dispute Resolution Process/Shadow System⁶⁸²



The three-tier construct is a step forward from the IHR’s settlement process. However, one improvement to the model would be to combine steps one and two. The CAC would offer the initial recommendation and function as the dispute review board. If one of the States refused to accept the CAC’s recommendation, the committee would begin arbitration. The present settlement article is too weak concerning arbitration: “States Parties concerned may agree to refer the dispute to the Director-General.”⁶⁸³ If States cannot agree to settle, their dispute should automatically go to the CAC for arbitration. However, Article 56(3)’s reference to the Permanent Court of

⁶⁸¹ Lin, *supra* note 561, at 282–83.

⁶⁸² Hoffman, *supra* note 563, at 247.

⁶⁸³ IHR, *supra* note 383, at 35 (art. 56, ¶ 2).

Arbitration (“PCA”) should remain in force. Further, having a shadow system as an alternative to the mandatory, binding system might prompt states to use the informal methods.⁶⁸⁴

Professor Lin identifies weaknesses in Hoffman’s model. He points out that states may balk at a “long and costly adjudication process[,]” and these proposals do not adequately address a “dispute between State Parties and the WHO.”⁶⁸⁵ States may not want to engage in a laborious process. But if the alternative is no resolution, states would likely choose to settle. It would be to their advantage to leverage an informal system instead of the mandatory process. A binding settlement system with alternative informal methods will provide tangible options for states to achieve satisfaction under the IHR. Offering a direct path to the ICJ is another option.

2. *ICJ provision*

States should amend the 2005 IHR so that failed arbitration would automatically trigger the ICJ. First, the CAC, serving as the dispute review board, would provide a recommendation. If states still refuse to settle, arbitration would be triggered. Finally, if arbitration fails, the dispute would go to the ICJ. Though the WHO Constitution offers a path to the court,⁶⁸⁶ putting an ICJ provision in the IHR would crystalize this right.

This Note so far has discussed WHO and IHR changes. However, states and the WHO should also focus on policy improvements to prevent future pandemics.

⁶⁸⁴ Hoffman, *supra* note 563, at 248 (arguing that “if mandatory processes exist, it will be within parties’ own self-interest to actively seek out acceptable settlements rather than leave the resolution to others who will impose one on them”).

⁶⁸⁵ Lin, *supra* note 561, at 282.

⁶⁸⁶ See WHO Constitution, *supra* note 440, at 202 (art. 75).

C. STRENGTHEN GLOBAL HEALTH JURISPRUDENCE

Recent global pandemics⁶⁸⁷ should not discourage states from relying on the WHO and IHR framework. On the contrary, the need for international health is paramount.⁶⁸⁸ Nations must strengthen their domestic health laws and work together.⁶⁸⁹

1. *Domestic Improvements*

Professor David Fidler cautions that “[l]egal knowledge and skill alone are insufficient for preventing, protecting against, and responding to disease challenges.”⁶⁹⁰ He points to the dearth of government guidance, which has led to the “traged[y] of the global health commons, where we find overexploitation and under exploitation in terms of public health activity.”⁶⁹¹ States can improve in two specific ways: develop expertise in international health law and use their domestic law to contribute to global health law.

First, the global health community needs more professionals with “expertise across a daunting range of legal fields (for example, public health, law enforcement, emergency

⁶⁸⁷ See *supra* notes 375–384 and accompanying text.

⁶⁸⁸ See David P. Fidler, *Global Health Jurisprudence: A Time of Reckoning*, 96 GEO. L.J. 393, 395 (2008). Though written in 2008, these words still hold true today. In fact, “[t]he need for law reflects the emergence of public health threats that the existing public health capacities and skill sets proved ill-equipped to handle. The inadequacies run deeper than the decay in the public health infrastructure in developed and developing countries that occurred in previous decades. The threats public health increasingly confronts forced a radical rethinking of public health strategies and, consequently, the policy and governance actions required to implement them.” *Id.* at 397.

⁶⁸⁹ As Dr. Nuzzo explains, this “requires a fundamental change in the way that countries think about global health security.” Nuzzo, *supra* 624, at 36. In this vein, countries must provide the WHO adequate resources and pledge share scientific data. *Id.*

⁶⁹⁰ See Fidler, *supra* note 688, at 398.

⁶⁹¹ *Id.* at 406.

management, national security, trade and commerce) in both domestic and international settings.”⁶⁹² To achieve this goal, States should encourage professional growth.⁶⁹³

Second, states should use domestic law to drive how they respond to future pandemics. Governments are quick to enact laws in response to health challenges.⁶⁹⁴ Yet, they should be equally quick to “develop legal preparedness strategies for public health emergencies.”⁶⁹⁵ The focus should be on “surveillance and intervention to protect population health.”⁶⁹⁶ Of course, that will present a challenge for nations that have constitutional limitations to surveillance.⁶⁹⁷

To address this challenge, states must look beyond their borders. Nations should consider refining their domestic laws to better guard against the spread of disease and infections.⁶⁹⁸ Ideally, domestic health law should embrace the IHR’s goals: “connect[ing] public health to national and international security, economic interests, development concerns, and the protection of human rights.”⁶⁹⁹

China has an enormous opportunity. Specifically, China could enact legislation to clean up wet markets and improve surveillance and reporting. Of course, China is not the only nation that can improve its domestic laws. Because of China’s past behavior related to COVID-19, however,

⁶⁹² David P. Fidler, *Global Health Jurisprudence: A Time of Reckoning*, 96 GEO. L.J. 393, 398 (2008).

⁶⁹³ See, e.g., Laura W. Perna et al., *Promoting Human Capital Development: A Typology of International Scholarship Programs in Higher Education*, 43 EDUC. RESEARCHER 63 (2014).

⁶⁹⁴ See Giovanni Salvo et al., *Legal Responses to Health Emergencies*, L. LIBR. CONG. (Feb. 2015), <https://bit.ly/3kbtrMx> (discussing how “[m]easures taken by national governments in response to recent outbreaks of infectious diseases); We The People Podcast, *The Constitution and the Coronavirus*, NAT’L CONST. CTR. (Mar. 19, 2020), <https://bit.ly/32wH17j> (discussing history of government “combatting diseases” and what restrictions the government can impose during COVID-19).

⁶⁹⁵ Fidler, *supra* note 688, at 398.

⁶⁹⁶ *Id.* at 401.

⁶⁹⁷ See Rita F. Aronov, *Privacy in a Public Setting: The Constitutionality of Street Surveillance*, 22 QUINNIPIAC L. REV. 769 (2004) (analyzing the constitutionality of street surveillance); see also U.S. CONST. amend. IV.

⁶⁹⁸ See Jennifer Prah Ruger, *Normative Foundations of Global Health Law*, 96 GEO. L.J. 423, 442 (2008).

⁶⁹⁹ Fidler, *supra* note 688, at 403–04.

China is well placed to lead the way in advancing domestic legislation to support a revamped global framework for the right to health.

2. *Intergovernmental Improvements*

Global health can also improve if states overcome state self-interest, particularly in internal health surveillance.⁷⁰⁰ No state wants to self-report that it started a pandemic.⁷⁰¹ As a result, many states make decisions in terms of politics, not health.⁷⁰² Fidler describes the current structure as “open-source anarchy.”⁷⁰³ However, he does not suggest that states return to a “closed, state-centric condition.”⁷⁰⁴ Instead, Fidler argues that states should develop more substantive treaties⁷⁰⁵ and “solidif[y] . . . public health law.”⁷⁰⁶

For these reasons, the WHO can be a transformative leader.⁷⁰⁷ The WHO “will require the Organization to [continue] develop[ing] and utiliz[ing] public health law capabilities.”⁷⁰⁸ Politics, however, is a significant barrier. The WHO has the difficult task of repairing the relationship

⁷⁰⁰ Before the 2005 IHR, “[o]ne analysis of the IHR’s effectiveness over their fifty-six-year history concluded that they had been relatively ineffective in achieving their main objective, due primarily to a failure in their surveillance system and the ineffectiveness of protection measures.” Jennifer Prah Ruger, *Normative Foundations of Global Health Law*, 96 GEO. L.J. 423, 437 (2008).

⁷⁰¹ Dr. Nuzzo describes a system that “[r]el[ies] on individual governments to report data in a timely, complete fashion” as “not work[ing] out well[.]” Nuzzo, *supra* note 624, at 41.

⁷⁰² See Richard A. Cash & Vasant Narasimhan, *Impediments to Global Surveillance of Infectious Diseases: Consequences of Open Reporting in a Global Economy*, 78 BULL. OF THE WHO 1358, 1364 (2000), [https://www.who.int/bulletin/archives/78\(11\)1358.pdf](https://www.who.int/bulletin/archives/78(11)1358.pdf) (“[W]hen a country reports an outbreak, the international community may benefit relatively little, whereas the reporting country . . . may suffer . . .”).

⁷⁰³ Fidler, *supra* note 688, at 410.

⁷⁰⁴ *Id.*

⁷⁰⁵ *Id.* at 401.

⁷⁰⁶ *Id.* at 405.

⁷⁰⁷ And a necessity. See David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT’L L. 1079, 1081–82 (1998) (“[P]ursuit of global health jurisprudence constitutes a strategy that WHO needs to include as an essential element of its future global health policy.”).

⁷⁰⁸ Fidler, at 1082.

between China and the rest of the world. But the WHO should not bear the burden alone—other states must support the organization.

Critics, however, have called for a NATO-like organization “with prepositioned supplies, a deployment blueprint, and an agreement . . . that an epidemic outbreak in one country will be met with” collective action.⁷⁰⁹ In other words, these critics want to create a super-WHO that has a NATO Article 5-like provision triggering collective action.⁷¹⁰ While the WHO can be strengthened, it should not become a mini-NATO.⁷¹¹

The proposals in this Note will help the WHO address fundamental shortfalls in managing emerging pandemics. A CAC can help keep recalcitrant states in check.⁷¹² Then, as disputes arise, a revised dispute resolution system can provide formal and informal opportunities for states to resolve their differences.⁷¹³ Indeed, COVID-19 has wreaked enormous damage.⁷¹⁴ Rather than focus on how to punish China,⁷¹⁵ however, states and the WHO should work to solidify global health infrastructure.

⁷⁰⁹ See, e.g., Michael T. Osterholm & Mark Olshaker, *Chronicle of a Pandemic Foretold: Learning from the COVID-19 Failure—Before the Next Outbreak Arrives*, FOREIGN AFFS., July/Aug. 2020, at 24 (“Instead, something along the lines of NATO will be necessary—a public-health-oriented treaty organization with prepositioned supplies, a deployment blueprint, and an agreement among signatories that an epidemic outbreak in one country will be met with a coordinated and equally vigorous response by all.”).

⁷¹⁰ Cf. *Collective Defence—Article 5*, NATO (Nov. 25, 2019, 11:12 AM), <https://bit.ly/2IDUkvQ>. NATO’s Article 5 states that an “armed attack” against one nation is “an attack against them all[,]” thus requiring all NATO member states to automatically defend a state that has been attacked.

⁷¹¹ See Carolina I. Andrada & Paul E. Cormarie, *Questioning NATO for Health*, THINK GLOBAL HEALTH (Jan. 12, 2022), <https://www.thinkglobalhealth.org/article/questioning-nato-health> (“[T]he WHO needs all governments to participate willingly, actively, and cooperatively.”).

⁷¹² See *supra* Section IV.A.2.

⁷¹³ See *supra* Section IV.B.1.

⁷¹⁴ See *supra* Section I.A.

⁷¹⁵ Press Release, Chairman Graham Applauds Committee Passage of Bill to Allow Americans to Sue China over Coronavirus Pandemic, Comm. on the Judiciary (July 30, 2020), <https://bit.ly/35cQO46>.

VI. CONCLUSION

The world faces the daunting task of improving international structures to help prevent the next outbreak. When the first cases of COVID-19 appeared,⁷¹⁶ China had the duty to report immediately to the WHO and they should have given the WHO full and accurate information. They did not. Thus, injured states may have a way to hold China accountable for its breaches of IHR Articles 6 and 7 and the right to health.⁷¹⁷

However, blame is not conducive to preventing another global pandemic. Instead, member states must push to modify the WHO and IHR in order to strengthen global health jurisprudence. As U.S. Surgeon General Jerome Adams noted, “we can’t just pull up the drawbridges; we’ve got to have international cooperation.”⁷¹⁸ If the international community comes together and takes these steps, perhaps the world will avoid another devastating pandemic the next time Fortune spins her wheel.

⁷¹⁶ See *supra* Section I.A.

⁷¹⁷ See *supra* Part III.

⁷¹⁸ Meridian International Center, *The Case For Global Health Diplomacy: U.S. Surgeon General Jerome Adams*, YOUTUBE (Oct. 27, 2020), <https://bit.ly/3pYx9NY>.