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Mending Dispute Resolution under the International Health Regulations

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Abstract

International dispute resolution not only aims to redress wrongdoings, but also to deter states from violating obligations. Approaching the International Health Regulations (IHR) from this viewpoint and using recent global health crises as examples, this paper argues that dispute resolution must be strengthened in the IHR in order to protect global health security. While a diverse range of dispute resolution mechanisms exist in other legal regimes, this paper proposes that a three-pronged architecture consisting of a guidance mechanism, formal adjudicative mechanism, and recourse to the ICJ and binding arbitration would provide for the most efficient and timely response to a dispute between states parties. Importantly, this architecture can be used both prior to

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and during a global health crisis, and could incentivize states parties towards solidarity in the global public health response.

Keywords

COVID-19 – international adjudication – compulsory jurisdiction – interim guidance – fast-response mechanism

1 Introduction

Since quarantine was first used in the 14th century at European ports, the world has seen a successive series of regimes governing global health security, moving from unilateral measures (1377–1851) to international conferences (1851–1892) to institutionalized coordination (1892–1946) to achieving a single global health security authority – WHO – that became the most important actor in this regime complex.[1] The *International Health Regulations* (IHR) represent only the latest mechanism through which states have agreed to coordinate their response to infectious disease outbreaks.[2] Using the force of international law, the IHR establishes a rules-based system for preventing and responding to acute health risks of international concern, empowers WHO to coordinate pandemic responses, and imposes a range of obligations on states. For example, the 196 states parties to the IHR must maintain specific surveillance and response capacities, including enforcing minimum requirements at points of entry, to report certain public health events. Countries are further legally obligated to one another in achieving the core capacities required by this agreement.[3]

The IHR was last revised in 2005 after the SARS outbreak to further elevate states' reporting obligations, expand the WHO secretariat's authority, and

1 Steven J Hoffman, 'The evolution, etiology and eventualities of the global health security regime' (2010) 25:6 *Health Policy and Planning* pp. 510–522. doi: 10.1093/heapol/czq037.

2 World Health Organization ('WHO'), World Health Assembly, *Revisions of the International Health Regulations* (Res, WHA58.3, 58th assembly, 23 May 2005).

3 Michael G Baker and Andrew M Forsyth, 'The new International Health Regulations: a revolutionary change in global health security' (2007) 120 *New Zealand Medical Journal* pp. 1–8; David P Fidler and Lawrence O Gostin, 'The New International Health Regulations: An Historic Development for International Law and Public Health' (2006) 34 *Journal of Law, Medicine & Ethics* pp. 85–94; Christopher W McDougall and Kumanan Wilson, 'Canada's Obligations to Global Public Health Security under the Revised International Health Regulations' (2007) 16 *Health Law Review* pp. 25–32.

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improve global response capacities.[4] The COVID-19 pandemic has underscored the central importance of the IHR in upholding global health security, as well as opened the IHR to fresh structural criticism. The current regulations are *inter alia* said to narrowly define health security,[5] fail to specify how national governments may effectively collaborate with one another,[6] emphasize surveillance to the exclusion of other essential elements like information sharing,[7] rely upon peer pressure and public knowledge for compliance,[8] and contain no legal enforcement mechanism.[9] Additionally, they depend upon national governments' compliance with new global health responsibilities,[10] provide opportunities for infectious disease outbreak responses to be politicized,[11] and rely on surveillance networks that may not be optimally functioning.[12]

However, one of the most stinging criticisms of the IHR is that it does not include a functioning dispute resolution mechanism. While most disapproval stems from specific issues of state party compliance or fears of non-compliance, this last critique emphasizes the fundamental absence of a formal mechanism that can be used to promote compliance. In this sense, our view of dispute resolution as a tool for fostering conformity with the IHR's obligations draws from frames of reference beyond Article 56 of the IHR. For example, the Permanent Court of Arbitration (PCA) is designated in the IHR as the appropriate judicial forum in case of disagreements, but it is the last in a series of steps in striving towards a peaceful resolution of disputes, available only after good offices and mediation have failed.[13] Even though the judicial logic of *restitution in integrum* is applicable, a key goal of international dispute resolution

4 Fidler and Gostin, *supra* note 3.
5 The Lancet, 'WHO fails to address health security' (2007) 370 *The Lancet* p. 714.
6 Dhrubajyoti Bhattacharya, 'An Exploration of Conceptual and Temporal Fallacies in International Health Law and Promotion of Global Public Health Preparedness' (2007) 35 *Journal of Law, Medicine & Ethics* pp. 588–598.
7 The Lancet, 'Public-health preparedness requires more than surveillance' (2004) 364 *The Lancet* pp. 1639–1640.
8 Jacqui Wise, 'UK steps up its global health security' (2008) 8 *The Lancet Infectious Diseases* p. 350.
9 Jessica L Sturtevant, Aranka Anema and John S Brownstein, 'The New International Health Regulations: Considerations for Global Public Health Surveillance' (2007) 1 *Disaster Medicine and Public Health Preparedness* pp. 117–121.
10 Angela Merianos and Malik Peiris, 'International Health Regulations' (2005) 366 *The Lancet* pp. 1249–1251.
11 Jonathan E Suk, 'Sound Science and the New International Health Regulations' (2007) 1:2 *Global Health Governance* pp. 1–4.
12 Kumanan Wilson, Barbara von Tigerstrom and Christopher McDougall, 'Protecting global health security through the International Health Regulations: requirements and challenges' (2008) 179:1 *Canadian Medical Association Journal* pp. 44–48.

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more broadly is not only to redress wrongdoings but actually to deter states from violating their obligations in the first place.[14] Therefore, we retake elements from a now longstanding view of dispute resolution, be it mediators or adjudicators, as a means to promote compliance, prevent non-compliance, and enforce the international rule of law – and not just to provide a service to parties in a dispute.[15]

1.1 *A Typology of Disagreements under the International Health Regulations*

It is reasonable to conceive of situations where non-compliance with the IHR – whether intended or due to varied interpretations of its provisions – might eventually progress into disagreements between state parties. A host of scenarios have elicited tensions among states in past responses to IHR-designated public health emergencies of international concern (PHEICs). One such scenario, a key issue during the COVID-19 pandemic, concerns deficiencies in the prompt reporting of outbreaks in accordance with Article 6 and Annex II of the IHR. The timely reporting of outbreaks is crucial to the international community's successful response to PHEICs. The core obligation of Article 6 of the IHR to notify the WHO within 24 hours begins only after the assessment by public health authorities of the occurrence of a disease outbreak. In the context of COVID-19, retrospective analyses suggest that the SARS-COV-2 virus was already circulating in Wuhan for several weeks prior to the first WHO notification on 31 December 2019.[16] Reports emerged soon thereafter of whistleblower

13 WHO, *supra* note 2, art. 56(2).

14 On this feature of dispute resolution in both the WTO and human rights systems, José Alvarez, 'What are International Judges for? The Main Functions of International Adjudication' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, Oxford, 2013) pp. 174–175; Mitsuo Matsushita, Thomas Schoenbaum, Petros Mavroidis and Michael Hahn, *The World Trade Organization: Law, Practice, and Policy*, 3rd edition (Oxford University Press, Oxford, 2017) p. 90.

15 Commenting critically on Hersch Lauterpacht's perspective regarding the role of international adjudicators, *see* Martti Koskenniemi, 'The Function of Law in the International Community: Introduction' in Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press: Oxford, 2011) p. xliii.

16 Chaolin Huang et al., 'Clinical features of patients infected with 2019 novel coronavirus in Wuhan, China' (2020) 395 *The Lancet* pp. 497–506; *see also* the retrospective findings in Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response, *Report of the Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 response*. <cdn.who.int/media/docs/default-source/documents/emergencies/a74_9add1-en.pdf?sfvrsn=d5d22fdf_1&download=true>, 19 May 2021.

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suppression at the local level at least as early as late December 2019 – preventing non-state actors from sharing frontline concerns about the novel virus.[17]

The report by the Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response (*'IHR Review Committee on COVID-19'*) sheds additional light on how events took place at the beginning of the pandemic. According to the Committee's accounts, after clinical, epidemiological and laboratory investigations by local authorities, the "unknown cause" of a cluster of atypical pneumonia cases was identified on 29 December 2019.[18] Health authorities issued public reports on 31 December 2019, informing the existence of such cases of unknown origins. The WHO requested information on 1 January 2020, which was provided two days later. Legitimate questions still remain as to what Chinese authorities knew, when they learned it, and whether they notified WHO in a "timely, accurate and sufficiently detailed" manner in accordance with the IHR[19] – or whether, as with SARS, the response was impeded by the internal politics of autocratic governance, leaving WHO with insufficient information to promptly declare a PHEIC.[20]

Much has been made collectively by the media, politicians, lawyers and international legal scholars alike of China's responsibility for the emergence and sequelae of this pandemic.[21] Yet the direct line of causation from delays in

17 Yuan Li, *China silences critics over deadly virus outbreak*, <www.nytimes.com/2020/01/22/health/virus-corona.html>, 4 April 2020; Laurie Garrett, *Grim reapers: how Trump and Xi set the stage for the coronavirus pandemic*, <newrepublic.com/article/157118/trump-xi-jinping-america-china-blame-coronavirus-pandemic>, 4 April 2020; Chris Buckley and Steven L Myers, *China's old habits delayed fight*, <www.nytimes.com/2020/02/01/world/asia/china-coronavirus.html>, 4 April 2020; Chinese Human Rights Defenders, *China: Protect Human Rights While Combatting Coronavirus Outbreak*, < www.nchrd.org/2020/01/china-protect-human-rights-while-combatting-coronavirus-outbreak/>, 5 April 2020.

18 WHO, World Health Assembly, *Strengthening preparedness for health emergencies: implementation of the International Health Regulations*, 74th assembly, (Doc No A74/A/CONF./2), 5 May 2021, paras. 42–43.

19 WHO, *supra* note 2, art. 6(2); Rebecca Ratcliffe and and Michael Standaert, 'China coronavirus: mayor of Wuhan admits mistakes', <www.theguardian.com/science/2020/jan/27/china-coronavirus-who-to-hold-special-meeting-in-beijing-as-death-toll-jumps>, 4 April 2020.

20 Matthew M Kavanagh, 'Authoritarianism, Outbreaks, and Information Politics' (2020) 5:3 *The Lancet Public Health* pp. E135-E136.

21 Russell Miller and William Starshak, 'China's Responsibility for the Global Pandemic' (2020) *Just Security,* <www.justsecurity.org/69398/chinas-responsibility-for-the-global-pandemic/>, 4 April 2020; Martins Paparinskis, 'The Once and Future Law of State Responsibility' (2020) 114 *American Journal of International Law* pp. 618–627; Donald G

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reporting the novel coronavirus to effect (ie, a pandemic that continues unabated more than two years later) cannot be drawn so simply, as many states largely floundered their opportunity to ramp up domestic public health capacities to respond to the crisis after the WHO Director-General declared a PHEIC on 30 January 2020. Disagreements arising from the rapidity of outbreak reporting are possible but unlikely to occupy the bulk of states parties' energies in any dispute resolution mechanism. As Davis, Kamradt-Scott and Rushton point out, states' interest in outbreak reporting were reconfigured well before the IHR's entry into force in 2007, and most governments have "gone to great lengths to establish the bureaucratic structures to facilitate their compliance with the IHR reporting requirements."[22]

Moreover, states must possess adequate national core public health capacities to detect possible events constituting a PHEIC to subsequently notify the WHO in a timely manner. Consequently, a further source of possible disputes under the IHR – although not one that has been raised by any party to the IHR yet – is the obligation enshrined in Article 44 for parties to "undertake to collaborate with each other, to the extent possible" in several areas, including notably "the mobilization of financial resources to facilitate implementation of…obligations" and the "provision of technical cooperation and logistical support, particularly in the development, strengthening, and maintenance of the public health capacities."[23] Without treaty language to more precisely elaborate upon the parameters of these common and shared duties under the IHR, public health capacities in many parts of the world remain critically under-developed and rendering all countries of the world vulnerable to disease.[24] A dispute resolution mechanism could serve to authoritatively interpret such provisions which remain elusive but crucial to realising the underlying purpose of the IHR.

While issues concerning the prompt reporting of the COVID-19 outbreak have affected all states, criticisms between smaller numbers of states that arise from inevitable disagreements could perhaps more likely be mitigated if there were reliable and effective dispute resolution mechanisms in place.

McNeil Jr and Andrew Jacobs, *Blaming China for Pandemic, Trump Says U.S. Will Leave the W.H.O.,* <www.nytimes.com/2020/05/29/health/virus-who.html>, 7 April 2021.

22 Sara E Davies, Adam Kamradt-Scott and Simon Rushton, *Disease Diplomacy: International Norms and Global Health Security* (Johns Hopkins University Press, Baltimore, 2015) p. 120.

23 WHO, *supra* note 2, art 44.

24 Global Preparedness Monitoring Board, 'A World in Disorder: Global Preparedness and Monitoring Board Annual Report 2020', <https://apps.who.int/gpmb/assets/annual_report/GPMB_AR_2020_EN.pdf>, 8 April 2021.

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For example, a source of disputes pertaining to the IHR are likely to emanate from the use of additional health measures by states in times of public health crisis.[25] In such circumstances, government-imposed health measures, such as travel and trade restrictions, may rest on uncertain scientific grounds, be influenced by domestic political and media pressures, and run the risk of exposing entire populations to illness and death in absence of an unapologetically decisive response.[26] While cultivating a culture of proportionality in disease outbreak response is essential to the foundational purpose of the IHR, nearly every PHEIC event since the IHR's entry into force in 2007 has elicited confusion, fear and ultimately, non-compliance by several states parties in response to crisis.[27]

Regardless, in our increasingly globalized world, the lack of a dispute resolution mechanism in the IHR is also a threat to global public health. Since one state's action or inaction may affect every other state, disagreements and non-compliance with international laws can have devastating consequences. Unresolved disagreements may prevent or delay global action during emergencies of health security, potentially resulting in unnecessary death, illness or financial collapse, in addition to the economic, psychological and social costs associated with uncertainty and fear. Relations between states could also be affected by legal disagreements over both the compliance in fact with the IHR, as well as deeper ones on what compliance in specific cases actually means, that is, on the interpretation of norms. These disagreements may even possibly lead to illegal retaliation if a state's health security interests were perceived to be sufficiently threatened.[28] States' carefully balanced relationships

25 David Fidler, *International Law and Infectious Diseases* (Oxford University Press, Oxford, 1999) p. 77.

26 Michael G Baker, Nick Wilson and Tony Blakely, 'Elimination could be the optimal response strategy for COVID-19 and other emerging pandemic diseases' (2020) 371 *BMJ*, <doi.org/10.1136/bmj.m4907>, 23 December 2020; Davies, Kamradt-Scott and Rushton, *supra* note 22, p. 120.

27 Roojin Habibi et al., 'Do not violate the International Health Regulations during the COVID-19 outbreak' (2020) 395 *The Lancet* pp. 664–666.

28 Eugene V Bonventre, Kathleen H Hicks and Stacy M Okutani, 'U.S. National Security and Global Health: An Analysis of Global Health Engagement by the U.S. Department of Defense: A Report of the CSIS Global Health Policy Center – Working Draft' (2009) *Center for Strategic and International Studies* pp. 1–28; Harley Feldbaum, 'U.S. Global Health and National Security Policy: A Report of the CSIS Global Health Policy Center' (2009) *Center for Strategic and International Studies*, <www.csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/090420_feldbaum_usglobalhealth.pdf>; Susan Peterson, 'Epidemic Disease and National Security' (2002) 12 *Security Studies* pp. 43–81.

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are perhaps the most vulnerable during a pandemic where disagreements on issues such as disease origin, travel advisories, trade restrictions, border closings, vaccine provision and proper treatment of foreign nationals provoke more immediate consequences.

1.2 *In Search of an Effective Dispute Resolution Mechanism*

Disagreements are a largely unavoidable consequence of international legal accords between multiple states parties.[29] For international law regimes like the IHR to have real impact in advance of and during crises like COVID-19, they must provide parties with confidence that their obligations will be fulfilled universally, and that if they are not, mechanisms promoting compliance are available.[30] Such insights build upon the role of dispute resolution as a means to uphold the international rule of law.[31] Thus, international law must be equipped with a rapid, transparent, and fair method of articulating party concerns, protecting party interests and also more generally of deterring non-compliance.[32] Essential to this confidence is an effective dispute resolution process, as it presents a method through which parties may clarify and interpret legal obligations, report non-compliance, and resolve other disagreements as needed. Since disputes are customary to law and politics, the strength of international legal and political regimes may be at least partially evaluated by the way they manage disputes.

This article proceeds by outlining currently existing mechanisms for resolving disputes under the IHR and assessing limited instances of their application. From there, it explores broader trends in dispute resolution under international law, before turning to prospects for reforming or further developing international legal mechanisms for resolving disputes arising under the global governance of infectious diseases. The article ends by providing a suggested formulation for a new dispute resolution mechanism under the IHR.

29 Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge University Press, Cambridge, 2017).

30 Steven J Hoffman and John-Arne Røttingen, 'Assessing implementation mechanisms for an international agreement on research and development for health products' (2012) 90 *Bulletin of the World Health Organization* pp. 854–863.

31 Koskenniemi on Lauterpacht, *supra* note 15.

32 Álvarez, *supra* note 14.

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2 Dispute Resolution under the International Health Regulations (2005)

Under Article 56 of the current IHR, two types of disputes are envisaged with corresponding processes for resolution. Disagreements between a state and WHO are referred to the World Health Assembly for resolution.[33] Where disagreements emerge between states, the IHR stipulates that the parties "shall seek in the first instance to settle the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation."[34] If a resolution is not attained, the parties "may agree to refer the dispute to the [WHO] Director-General, who shall make every effort to settle it." As a "last resort" option, binding arbitration at the PCA, seated in The Hague, is then possible. A sine qua non component for the PCA's jurisdiction under Article 56(3) of the IHR, however, is the explicit consent by states, who can provide it either for all disputes in general, or specific ones at any given moment.[35] To date, no such declaration has been made, or at least none visible in the IHR's appendices reflecting official statements by individual states.[36]

The IHR's approach to dispute resolution may appear rather progressive, since it recognizes the limitations, costs, and consequences of judicial settlement and instead promotes alternative processes such as negotiation, mediation, conciliation, and arbitration. By referencing WHO's highest governing body, the World Health Assembly, the IHR enables all states parties affected by the dispute to have an essential role in solving it. Mediation and good offices initiated by the WHO have been successful in the past for settling a dispute between states. For example, in 1970, the Turkish government notified the WHO of a complaint against Bulgaria and Romania due to their adoption of "excessive measures" regarding cholera control.[37] While the dispute was settled without further recourse to judicial adjudication, this was

33 World Health Organization, *Constitution of the World Health Organization* (2006), < www.who.int/governance/eb/who_constitution_en.pdf>, 8 April 2021.

34 WHO, *supra* note 2, art. 56(1).

35 Note that the consent of all the parties to the judicial settlement of a dispute is a non-derogable element of judicial/arbitration proceedings and corresponds to a general principle of international procedural law. Yuval Shany, 'Jurisdiction and Admissibility' in Romano, Alter and Shany (eds), *supra* note 14, pp. 783–784.

36 WHO, *supra* note 2.

37 WHO, World Health Assembly, *Sixteenth report of the Committee on International Surveillance of Communicable Diseases*, 24th assembly (Doc No A24/B/10, 2 April 1971) pp. 1–38.

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mostly because all measures had been lifted by the time the parties attended a hearing at the WHO.

Negotiation, conciliation, and mediation with the Director-General are all strictly voluntary. In the absence of an obligatory mechanism that forces the disputing parties to participate, the resolution process and outcome is determined by power and political influence, rather than by legal norms. Moreover, there is little incentive for rapid resolution and uncertainty is unnecessarily extended by the lack of a guaranteed final settlement. The IHR's provisions for binding arbitration would address many of these concerns, but this process can only be used in disputes between parties that have voluntarily accepted this additional obligation. Despite global heightened awareness of the IHR's importance following their 2005 update, and currently during the COVID-19 pandemic, not one state has voluntarily accepted the additional obligation to binding arbitration. In consequence, these arbitration provisions are mostly dead letter. Above all, international realities and structural barriers to equal participation dictate that, in disputes between the WHO and a state, some states will be more influential before the World Health Assembly than others, since it is essentially a majority rule system that prioritizes politics and national self-interest over legal and scientific considerations.[38]

As observed in the COVID-19 pandemic, the world is in danger when disputes concerning quickly evolving communicable diseases are unresolved or addressed too slowly. Politics are permitted to reign supreme, which has been historically damaging to public health,[39] as weaker states experience further disadvantage, and all states are left vulnerable. Yet there are few incentives for states to resolve their disputes through peaceful means and no mechanism to ensure a timely settlement. In the first instance, IHR parties may not be incentivized to criticize another party's actions where the impact of such actions on individuals is concerned. As states are the only subjects with direct standing under Article 56 IHR, the espousal by home states is necessary for challenging potential breaches by other states of IHR obligations to the detriment of their citizens.[40] Avoiding judicial dispute resolution in such cases may make

38 Steven J Hoffman, 'Mitigating Inequalities of Influence among States in Global Decision Making: Mitigating Inequalities in Global Decision Making' (2012) 3 *Global Policy* pp. 421–432.

39 Norman Howard-Jones and World Health Organization, *The scientific background of the International Sanitary Conferences, 1851–1938*, <apps.who.int/iris/handle/10665/62873>, 3 April 2021; 'The Venice Sanitary Conference' (1892) 139:3590 *The Lancet* pp. 1345–1398; Suk, *supra* note 11.

40 Ronald J Bettauer, 'Espousal of Claims' in Hélène Ruiz Fabri et al. (eds), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, Oxford, 2019).

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sense from a cost-benefit analysis. Considering the expenses related to litigation in the PCA, usually ranging in the hundreds of thousands or even millions of euros,[41] states might be willing to invest such quantities only if there is an expectation of receiving equivalent reparations. 'Minimal' economic damages caused by bilateral additional health measures are highly unlikely to be worth those expenses. The trade-off is that individuals' rights under the IHR are left without redress at the international level, if and when their home state refuses to resort to dispute resolution. The situation is aggravated further when travelers affected by restrictions lack access to effective judicial remedies through national courts of allegedly responsible states, either due to lack of awareness of the complexities involved in such transnational disputes, or to insufficient economic means to deploy costly legal services in the host country.[42]

On other occasions, however, the impact of additional health measures has led to massive economic damages. For instance, during the plague outbreak of 1994 in India, it is estimated that the country suffered losses for up to USD 1.7 billion.[43] Travel restrictions were one reason for the downturn. Similarly, the governments of Guinea, Liberia and Sierra Leone were subjected to numerous travel restrictions during the West African Ebola crisis of 2014–2016, severely hampering their economic activities as well as humanitarian interventions that were crucial to the public health response.[44] Although unlikely, such damages could be requested through and compensated by judicial dispute resolution. Yet even if the prospect of prevailing in such complex proceedings may be worth the risk, uncertainty regarding the outcome is always a factor worth weighing. Claimant states can never be fully confident that they will prevail after long and costly proceedings. In addition, international judicial adjudication is slow relative to dynamic public health measures. By the time a formal dispute is underway, excessive measures taken by other states in response to a

41 Permanent Court of Arbitration, Schedule of Fees and Costs, <www.pca-cpa.org/fees-and-costs/>; for an example of the tribunal's costs per case, *see* Arctic Sunrise Arbitration (*The Kingdom of the Netherlands* v. *The Russian Federation*), Award on Compensation, 10 July 2017, Permanent Court of Arbitration, paras. 1111–1113.

42 Though referring to the risk of criminal procedures, see a similar reasoning in David Stewart, 'The Emergent Human Right to Consular Notification, Access and Assistance' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric* (Cambridge University Press, Cambridge, 2020) pp. 439–440.

43 Obijiofor Aginam, 'International law and communicable diseases' (2002) 80 *Bulletin of the World Health Organization* pp. 946–951.

44 WHO, World Health Assembly, *Implementation of the International Health Regulations (2005): Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response*, 69th assembly, (Doc No A69/21, 13 May 2016).

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PHEIC may have been lifted. Moreover, the myriad measures taken to restrict travel during the COVID-19 pandemic defy any possibility of resorting to litigation against specific states parties.[45]

Furthermore, not all potential disputes would follow the same rationale. The COVID-19 pandemic is the first occasion ever where a judicial dispute has been openly debated, within the confines of domestic legislative proceedings, for a state's alleged non-compliance with the IHR's obligation to notify events in its territory.[46] Similar potential breaches had been reported by the IHR Review Committee on the Ebola crisis in West Africa in 2014.[47] But, despite the documented delays by the government of Guinea in furnishing relevant information to the WHO, no state invoked its responsibility. A possible explanation of such unwillingness by states to bring a dispute forward is their reluctance to enforce obligations which they may not always be able to uphold themselves.

Unfortunately, the insufficiency of dispute resolution mechanisms is not unique to global health law. While there are a few exceptions in trade (eg, the World Trade Organization), maritime law (eg, the International Tribunal for the Law of the Sea), and human rights (eg, UN human rights treaty bodies), and more generally, the International Court of Justice (ICJ), states parties are too often left without effective mechanisms to authoritatively interpret public international laws, define their rights and obligations under them, or adjudicate allegations of transgression. In seeking to confront parties that are potentially unwittingly in violation of a certain provision or purposely refusing to fulfill an obligation for leverage or coercion, states have few legal options. Political solutions may be too lengthy or unfeasible in complex disputes, and technical disputes or emergencies in which decisions necessitate scientific and research evidence may require shielding of such decisions from political influence.[48] Furthermore, without a reliable and effective dispute resolution process, disagreements may remain unresolved or otherwise managed through arbitrary processes, including political clout, dominance by economic strength, or even the use of force.[49]

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45 Thomas Hale et al., 'A global panel database of pandemic policies (Oxford COVID-19 Government Response Tracker)' (2021) 5 *Nature Human Behaviour* pp. 529–538.

46 Stephen P Mulligan, 'Can the United States Sue China over COVID-19 in an International Court?' (2020) *Congressional Research Service* pp. 1–5.

47 WHO, *supra* note 44.

48 Suk, *supra* note 11.

49 Hoffman, *supra* note 1; D. Paul Emond, *Commercial Dispute Resolution* (Canada Law Book, Aurora, 1989).

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Both the aforementioned historical disputes and the COVID-19 pandemic have revealed the extent to which the IHR's dispute resolution process has been challenged by ambiguity, voluntariness, and political considerations. The persistent divisions among developed, emerging, and developing countries have never been more blatant than at present, undoubtedly serving as a destabilizing force and source for disputes. The IHR's existing dispute resolution process has not been successful, warranting the need for strategies to strengthen it for a healthy future.

3 Dispute Resolution under International Law: Broader Trends, Prospects and Pitfalls

In recent years, international judicial bodies have faced increasing challenges to their authority. Whether it is the withdrawal of legal instruments providing them jurisdiction (ICJ), the non-participation of parties in proceedings (PCA), or the downright blockage of the appointment of members of dispute resolution bodies (WTO Appellate Body),[50] existing mechanisms of international adjudication have suffered significant setbacks in state confidence even as international venues for adjudication of disputes has continued to proliferate.[51] Taking note of what drives these setbacks should inform any future discussions on how to improve the IHR's current system of judicial dispute resolution.

3.1 *The IHR's Current Judicial Forum: Permanent Court of Arbitration*

In a hypothetical setting where two IHR states parties accept to submit their differences to binding arbitration, the 'default' applicable procedural rules would be the *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States*, now consolidated under the *PCA Arbitration Rules 2012*. The procedure would be as follows: the claimant state must file a notice of arbitration, notifying both the PCA (ie, its International Bureau) and the respondent state. In turn, the respondent must send its reply within thirty days. Unlike in the ICJ, states parties are free to appoint arbitrators – either one, three or five, with arbitrators and not states parties choosing the 'odd numbered' one who

50 Bradly Condon, 'Captain America and the tarnishing of the crown' (2018) 52 *Journal of World Trade* p. 535.

51 Andreas L Paulus, 'Dispute resolution' in G Ulfstein (ed), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, Cambridge, 2007) p. 355.

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may issue the decisive vote in case of a potential tie. Parties to the dispute may choose the location of the arbitration. If there is no agreement on any of these issues, there are safeguards in the *PCA Arbitration Rules 2012* to prevent the proceedings from being blocked.

The functioning of the PCA can be ascertained through other international law instruments. This is notably the case in the *United Nations Convention on Law of the Sea* (UNCLOS). Its Article 286 foresees the possibility for any state party to submit, as a claimant, a dispute regarding the interpretation of an obligation in the Convention to a court or tribunal. In turn, Article 287 UNCLOS allows parties, any time after signature, to choose from four courts and tribunals, among which an arbitral tribunal such as the PCA is included. In case the parties do not choose the same forum, or if one of them does not choose any whatsoever from the list, an arbitral tribunal may be constituted under Annex VII UNCLOS.[52] The fact that any state party may submit a matter to judicial dispute resolution without first securing the consent of the eventual respondent was deemed to be a major turning point in fostering compulsory jurisdiction.[53]

The incorporation of compulsory jurisdiction in UNCLOS, however, has not amounted to a bulletproof option. In the much-publicized South China Sea Arbitration, China refused to participate in the proceedings instituted by the Philippines. At stake were contested maritime boundaries between both countries. China did not recognize the tribunal's jurisdiction nor, by extension, its final Award. The PCA's ruling has not been implemented. Thus, not only was the underlying dispute not settled, but rather ulterior developments hint at a possible escalation.[54] The South China Sea debacle shows how even the clearest jurisdictional clauses in binding instruments cannot guarantee ironclad proceedings. If and when a state party decides to withdraw from them, there is no available recourse to compel it to rejoin. Assuming there is an initial willingness to accept an international tribunal's jurisdiction, the relevance of states' active participation throughout proceedings should not be overlooked.

52 Robin Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use' (2017) 48:3–4 *Ocean Development & International Law* p. 219.

53 Tullio Treves, 'The Expansion of International Law' (2018) 398 *Recueil des Cours* p. 313.

54 Reuters, *Philippines protests China's "illegal" South China Sea presence*, <www.reuters.com/world/asia-pacific/philippines-protests-chinas-illegal-south-china-sea-presence-2021-05-29/>, 3 June 2021.

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3.2 *The IHR and the International Court of Justice: Is the Past the Future?*

Being the main judicial forum of the United Nations, and with its general jurisdiction on matters international law, the ICJ would be a natural choice for dealing with interstate disputes due to non-compliance by a state party to the IHR. In fact, both of the IHR 2005's direct predecessors, the *International Sanitary Regulations of 1951*[55] (Art. 112(3)) and the IHR 1969[56] (Art. 93(3)) designated the ICJ as the chosen judicial forum. There was, moreover, no need to provide a subsequent written acceptance of its jurisdiction. This stands in contrast with other legal instruments, where a subsequent express manifestation of state consent to a judicial dispute is required.

The ICJ has never dealt with interstate disputes on matters of international health. The ICJ's jurisdiction is nevertheless provided for in Article 75 of the Constitution of the WHO, which provides a basis for jurisdiction in case of a breach of its provisions. Here, Article 64 of the Constitution of the WHO has been touted as a potential source of a primary legal obligation to "provide statistical and epidemiological reports in a manner to be determined by the Health Assembly".[57] Under this extensive interpretation, failure to report new diseases like COVID-19 would fall within its purview. However, two obstacles, one procedural and one substantive, emerge against this interpretation.

Procedurally, before resorting to international adjudication, there is still a requirement to undertake previous steps aimed at settling a dispute. In *Armed Activities on the Territory of the Congo* (*New Application: 2002*), for instance, the claimant (the Democratic Republic of Congo) sought to institute proceedings against Rwanda for flagrant violations of human rights and on its territory, invoking Article 75 of the Constitution of the WHO as a basis for the ICJ's jurisdiction.[58] While the court recognized it would, in principle, have jurisdiction to know of the dispute, it concluded that the DRC had failed to meet the

55 WHO, World Health Assembly, *Adoption of the International Sanitary Regulations* (*WHO Regulations No. 2*, WHA4.75), 4th assembly, 25 May 1951 in *Handbook of Resolutions and Decisions of the World Health Assembly and the Executive Board – Volume I,* <https://apps.who.int/iris/handle/10665/79012> ('International Sanitary Regulations').

56 WHO, World Health Assembly, *International Health Regulations*, (WHA22.46), 22nd assembly, 25 July 1969 in *Handbook of Resolutions and Decisions of the World Health Assembly and the Executive Board – Volume I* <https://apps.who.int/iris/handle/10665/79012>, 3 June 2021.

57 Peter Tzeng, 'Taking China to the International Court of Justice over COVID-19' (2020) *EJIL:Talk!* <www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/>, 3 June 2021.

58 *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo* v. *Rwanda*), 3 February 2006, Judgment on Jurisdiction and Admissibility, International Court of Justice, para. 15.

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requirements of prior negotiation or appeal to the World Health Assembly.[59] Even though the reasoning applies to the Constitution of the WHO, the steps envisaged in Article 56 IHR could be interpreted as having a similar mandatory sequence. Furthermore, from a substantive point of view, the primary obligations in the Constitution of the WHO do not say much themselves about the manner in which statistical and epidemiological reports ought to be furnished. These details are only found in Article 6 of the IHR (discussed above). Being the *lex specialis*, the IHR's provisions would supersede those of the Constitution of the WHO. It would be difficult to argue that the breach of the IHR represents simultaneously a breach of Article 64 of the Constitution of the WHO, thus altogether sidelining the jurisdictional basis of Article 56 of the IHR.

When the IHR 2005 supplanted the IHR 1969, there was a shift away from the ICJ and towards the PCA. The choice radically altered the dynamics of international adjudication in terms of both procedure and, importantly, costs. No publicly available documents explain why this happened. It is possible that the expansion of state party obligations in the IHR 2005, in comparison to the IHR 1969, was coupled with a reluctance by the parties to accept the increased possibility of being sued in an international court. The higher number of states parties participating in the IHR 2005's negotiations may have also been a relevant factor, given the presence of countries who are consistently reluctant to accept compulsory jurisdiction clauses.[60]

3.3 *The WTO as an Alternative and Polar Opposite*

The IHR is applicable in the case of measures taken by states that restrict international trade (Art. 2, IHR). It is a remnant of the 19th century sanitary conventions, where the main concern was not the travel of persons, but rather the impact of quarantines on merchant ships.[61] By the time the *International Sanitary Regulations* were approved in 1951, the field of international trade law had witnessed a paramount breakthrough with the approval of the *General Agreement on Tariffs and Trade* ('*GATT*') in 1947. As the number of states parties to the GATT steadily increased, international trade law developed its own, specialized forum for the resolution of disputes. This culminated in the approval of the *Marrakesh Agreement* establishing the World Trade Organization (WTO) in 1994, entering into force in 1995.

59 Leila Sadat, 'Pandemic Nationalism, COVID-19, and International Law' (2021) 20/3 Washington University *Washington University Global Studies Law Review*.

60 Treves, *supra* note 53, pp. 332–334.

61 Hélène de Pooter, *Le droit international face aux pandémies: vers un système de sécurité sanitaire collective?* (Pedone, Paris, 2015) p. 32.

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A core instrument was its *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), which created the Dispute Settlement Body (DSB) composed of representatives from WTO Member States. The proceedings and decisions in disputes and their actual decisions (called 'reports') are drafted by Panels, composed of persons selected from a roster. These reports may be reviewed by standing Appellate Body Members. If a Panel report is circulated amongst parties and is not appealed within 60 days (Article 16.4 DSU), or after the Appellate Body has issued its own report, the DSB will adopt them unless there is a consensus among states not to do so ('reverse consensus'). Under Article 17.14 DSU, states parties to a dispute must 'unconditionally accept' the reports.

The WTO's DSB represents both a direct alternative, as well as a reverse-mirror to the current dispute resolution mechanism under the IHR. It is an alternative, in so far as trade restrictions of goods due to the spread of communicable diseases fall within the purview of both the IHR and of GATT/WTO law, particularly the *SPS Agreement*.[62] If states adopt measures restricting trade in response to disease outbreaks, it leads to an overlap between both legal regimes.

Since all WTO states parties accept the compulsory jurisdiction of the DSB when they accede to the organization, the possibility to challenge measures is not dependent on the ulterior acceptance by states. Furthermore, the DSB has the support of standing, specialized personnel from the WTO Secretariat. It has developed a robust body of jurisprudence. For these reasons, it is little wonder why states are more likely to select the WTO as a forum over the ad hoc PCA arbitral tribunals under the IHR. This was manifest in the 2009 H1N1 influenza pandemic, where trade restrictions were imposed against imports of pork meat from Mexico, Canada and the United States of America. None of these countries resorted to the WHO to settle the matter. Instead, they expressed their disagreement at the WTO's Committee on Sanitary and Phytosanitary Measures.[63] The problem did not lead to a dispute at the DSB, since the measures were lifted relatively quickly.

Besides being an alternative, the WTO's DSB is a polar opposite of dispute resolution under the IHR. In terms of docket, the DSB has settled more than

62 *See* Intergovernmental Working Group on the Revision of the International Health Regulations, *Review and approval of proposed amendments to the International Health Regulations: relations with other international instruments* (A/IHR/IGWG/INF.DOC./1), paras. 7–9.

63 WTO Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting of 23–24 June 2009* (*Restricted*) (G/SPS/R/55) paras. 5–10.

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260 disputes in its less than three decades of existence.[64] Its activity in recent years has been unrivaled by any other permanent international adjudicative body.[65] Moreover, with its scope of review and the possibility to create a growing jurisprudence, the Appellate Body was deemed to be the "crown jewel" of the WTO.[66] By contrast, the complete absence of international case law under the IHR raises the question of whether it makes sense to follow a model from an adjudicative body facing the opposite scenario. One potential explanation is the unsuitability of existing judicial mechanisms for settling disputes under the IHR. However, even with the compulsory jurisdiction of the ICJ, no case was ever filed in the fifty-four years of pre-IHR 2005 binding law under Article 21 of the Constitution of the WHO. It may be the case that judicial dispute resolution as such was not considered to be an appropriate mechanism for solving IHR-related problems. Consequently, any future amendments to Article 56 IHR would be wise not to hold any expectations for a busy docket of judicial cases.

Other lessons from the WTO's DSB may be useful for the IHR, but for different reasons. Until recently, the DSB was hailed as an exemplary model of a successful international adjudicative body. But since 2016, its 'crown jewel' has been subjected to a heist. Due to strong disagreements with what it perceives as judicial overreach, the United States of America began blocking the appointment of new members of the Appellate Body since 2017. Like the PCA's debacle in the South China Sea arbitration, the authority of the WTO's DSB could not escape the challenges posed by influential states.

Lastly, the WTO's DSB offers a useful point of comparison in a different regard. There, interstate disputes do not only consist of challenging the conformity of national measures with GATT/WTO law. There are alternative arbitration procedures dealing with 'smaller' procedural matters, such as the determination of the appropriate timeframe for implementing a Panel or Appellate Body Report (Art. 21.3(c) DSU). An ongoing initiative to overcome the paralysis of the Appellate Body is precisely to develop a 'multi-party interim appeal arbitration arrangement'[67] on the basis of Art. 25 DSU, which provides for 'expeditious

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64 WTO, *Dispute Settlement activity – some figures,* <www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm>, 10 July 2021.

65 Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press, Oxford, 2016) p. 88.

66 Joseph Weiler, 'The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 *Journal of World Trade* pp. 191–207.

67 European Commission, 'Trade: EU and 16 WTO members agree to work together on an interim appeal arbitration arrangement', <ec.europa.eu/commission/presscorner/detail/en/IP20113>, 10 July 2021.

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arbitration' as an alternative means of dispute resolution – if and when parties explicitly agree to do so. These disputes-within-disputes are solved in a shorter time frame and may be decided upon by one person instead of the minimum three required for Panels. A similar alternative procedure could be foreseen in the IHR; rapid response assessments could be issued on very specific matters, such as certain additional health measures under Art. 43 IHR. They would not have legally binding effects for states involved. Whether there should be public disclosure of the dispute's details remains open for debate.

4 Charting a Course to the Effective Settlement of Disputes under the IHR

The preceding sections have sought to delineate possibilities for strengthening the role of dispute settlement under the IHR by drawing on past and present of mechanisms envisaged by it, as well other instructive examples of fora for dispute settlement across international legal regimes and venues. Short of amending the IHR or advocating in the World Health Assembly for a commitment by states to accept the PCA's jurisdiction in all potential disputes, however, it is unclear how the current configuration of IHR judicial dispute settlement can be streamlined. Whether political momentum will ever converge on IHR reform remains an open question as this article goes into press. We propose a stepwise, nuanced perspective complemented by a series of options, taking into account the different grounds upon which disputes may arise, as well the need for intermediate solutions.

In line with earlier scholarship examining the role of dispute resolution in the IHR, we posit that a well-functioning dispute settlement mechanism should advance six key goals for states parties (see Table 1): (1) secure a guaranteed resolution and by extension, eliminate uncertainty in the dispute settlement process; (2) allow for an expeditious conclusion to the dispute or legal uncertainty, particularly in the context of fast-moving outbreaks; (3) promote trust, credibility and legitimacy to the process through transparency, impartiality and fairness; (4) encourage state party participation through authoritativeness; (5) maintain friendly relations among all stakeholders; and (6) allow for realistic implementation.[68] As a corollary, an effective dispute settlement mechanism may also serve as the springboard for future possible reforms,

68 Steven J Hoffman, 'Making the International Health Regulations Matter: Promoting compliance through effective dispute resolution' in S Rushton and J Youde (eds), *Routledge Handbook of Global Health Security* (Routledge, Abinger, 2014) p. 246.

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illustrating where possible compromises can be found between competing interests. Ultimately, the institutional design of an IHR dispute settlement mechanism should make "extra-treaty dispute settlement activity useful for and not disruptive of treaty implementation."[69]

TABLE 1 Framework for assessing potential IHR dispute resolution mechanisms[70]

	Goal	**Significance**
1.	Guaranteed resolution	– Ensures the dispute will eventually be resolved – Eliminates uncertainty and reduces fear
2.	Quick process (or fast-track option via non-binding interim guidance)	– Prevents delay in responding to a PHEIC – Considers potentially rapid evolution of pandemic situations
3.	Transparent and independent	– Enhances credibility in and legitimacy of the process – Encourages parties to meaningfully and fully participate – Promotes buy-in, trust and compliance
4.	Authoritative	– Ensures decisions are accepted by all parties – Encourages participation and compliance – Diminishes impact, relevance and persuasiveness of post-hoc complaints concerning legitimacy of the process
5.	Maintains friendly relations	– Ensures parties can continue working together on global communicable disease control as is necessary

69 *Adapted from* Hoffman, *supra* note 68.
70 Paulus, *supra* note 51, p. 372.

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TABLE 1 Framework for assessing potential IHR dispute resolution mechanisms (*cont.*)

	Goal	Significance
		– Prevents the eruption of secondary, more serious conflicts in other arenas – Promotes the underlying values and principles of WHO, UN and the entire multilateral international system
6.	Realistic implementation	– Encourages adoption of the revised dispute resolution process – Increases traction and lessens barriers for reform – Removes roadblocks to success

To meet the above criteria, and to provide IHR states parties with the means for a process adapted to their diverse needs, we propose a flexible, three-pronged dispute settlement architecture consisting of (1) a guidance mechanism offering authoritative, rapid, responsive and non-binding interim guidance and general comments on matters of IHR interpretation from a mandated IHR Special Rapporteur at arms-length from the WHO; (2) a formal adjudicative mechanism overseen by a specialized independent panel constituted by the terms of the IHR to consider disputes between states parties and issue binding decisions pertaining to them; and (3) recourse to the ICJ or binding arbitration if dispute settlement remains unsatisfactory for one or more parties (as in the existing Article 56). In light of their relatively novel characteristics, the features of the first two mechanisms (the advisory and adjudicative mechanisms) are outlined and justified in the following paragraphs. The features of each mechanism are summarized and compared in Table 2.

4.1 *Guidance Mechanism*

Since not all potential disagreements have the same complexity or may amount to disputes that are intractable to the parties involved, one option is to envisage abridged procedures aimed at solving minor disagreements in a shorter period of time. Specialized bodies existed in the past, both in the *International Sanitary Regulations* and in the IHR 1969: committees composed of non-remunerated experts from outside of the WHO were tasked (in

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TABLE 2 Comparison of guidance and adjudicative mechanisms in a revised IHR dispute settlement architecture

Characteristics	Guidance Mechanism	Adjudicative Mechanism
Legally binding?	N	Y
Decisions made public?	Y	Y
Modality	Non-adversarial	Adversarial
Can be triggered by non-state actors?	Y	N
Timing	2 to 5 days	3 to 6 months after conclusion of proceedings
Structure	Independent Special Rapporteur	Independent Panel

theory) with settling the disputes before submitting the matter to binding arbitration.[71] Their decisions were not meant to be legally binding for participating states, but rather were consultative in nature. This allowed for avoiding increased procedural hurdles like those required for binding court rulings.

A variety of regional and international treaties provide pathways for the issuance of interim guidance, including the *UN Convention on the Law of the Sea* and the Rules of the *International Tribunal for the Law of the Sea*,[72] the *American Convention on Human Rights*,[73] the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[74] and the *Protocol of the African Charter on Human and Peoples' Rights on the Establishment of the African Court*

71 International Sanitary Regulations, *supra* note 55, art 112; WHO, *supra* note 56, art 93.

72 *United Nations Convention on the Law of the Sea* (10 December 1982, 1833 UNTS 397), art. 188(2) and 191; *International Tribunal for the Law of the Sea: Rules of the Tribunal* (17 March 2009, ITLOS/8).

73 Organization of American States, *American Convention on Human Rights* (22 November 1969), art. 64.

74 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (4 November 1950, ETS 5), art. 47.

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on Human and Peoples' Rights.[75] Different procedural standards prevail among this mosaic of legal regimes, including standards related to the entities that are authorized to seek interim guidance, the entities that issue them, and the matters on which interim guidance may be pronounced. Generally speaking, however, interim guidance is understood to stem from questions of a legal (as opposed to a political) nature.[76]

The guidance mechanism envisioned by our proposal would cautiously draw on the above examples, while adapting to match the dexterity, responsiveness and non-legally binding but authoritative nature of the mandate accorded to independent experts (such as special rapporteurs) of the UN Human Rights Council's special procedures. The first special rapporteur position in the UN human rights regime was established in 1982 to determine the occurrence and extent of summary or arbitrary executions.[77] The number of special rapporteur positions has since grown to address a wide range of themes, including health, minority issues and freedom of religion, as well as situations in specific countries. Special rapporteurs help promote the development and awareness of international human rights standards by conducting thematic studies and convene expert consultations, monitoring human rights and reporting on violations, and recommending broader means of promoting technical cooperation and protecting human rights.[78] As an "archipelago" of the UN human rights system,[79] their value and success in furthering their mandates is suggested to stem from their ability to influence key actors and motivate both governmental and non-governmental officials during country visits.[80]

A growing body of scholarship in global health law has sought to delineate obligations embedded in key provisions of the IHR, guided by the rules of treaty interpretation enshrined in customary international law.[81]

75 Organization of African Unity, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights* (10 June 1998), art. 4.

76 Rüdiger Wolfrum, 'Panel II: Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?' in R Wolfrum and I Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer, Berlin, 2013) p. 42.

77 Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* pp. 201–228.

78 Jo Becker, *Campaigning for Justice: Human Rights Advocacy in Practice* (Stanford University Press, Palo Alto, 2020) pp. 77–79.

79 Paul Hunt, 'Configuring the UN Human Rights System in the Era of Implementation: Mainland and Archipelago' (2017) 39 *Human Rights Quarterly* pp. 489–538.

80 Ted Piccone, *Catalysts for Change* (Brookings Institution Press, Washington, 2012) pp. 18–27.

81 Roojin Habibi et al., 'The Stellenbosch Consensus on Legal National Responses to Public Health Risks Clarifying Article 43 of the International Health Regulations' (2020)

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Recognizing that ambiguity and indeterminacy may be an unavoidable fixture in the language of a treaty, particularly on matters where consensus is difficult to achieve,[82] this mechanism would offer potential users the option of seeking an interim guidance from an appointed, independent and competent special rapporteur that advances authoritative legal interpretations of the provisions of the IHR, referencing other regimes of international law as appropriate (for example, the specialised SPS Committee at the WTO if matters of trade are at stake).[83] Clarificatory advice on the IHR is necessary given that many of its key provisions – including those pertaining to additional health measures and state obligations to collaborate and assist – remain poorly understood and inadequately implemented.[84] Moreover, the special rapporteur may occasionally deem it necessary – or may be seized by the World Health Assembly – to issue ad hoc reports or pre-emptive guidance on legal obligations within the IHR.

Like the special procedures of the UN Human Rights Council,[85] the special rapporteur would be appointed for a three-year term by the World Health Assembly and enjoy a degree of discretion in determining whether a given question falls within its area of competence, and whether it bears further study. It should be emphasized that this envisaged guidance mechanism is not a judicial process and need not be triggered by the existence of an emerging or ongoing interstate, though such a mechanism may prove effective in

International Organizations Law Review; Margherita Cinà et al., 'The Stellenbosch Consensus on the International Legal Obligation to Collaborate and Assist in Addressing Pandemics: Clarifying Article 44 of the International Health Regulations' (2020) *International Organizations Law Review*; Pedro Villarreal, 'COVID-19 Symposium: "Can They Really Do That?" States' Obligations Under the International Health Regulations in Light of COVID-19 (Part I)' (2020) *Opinio Juris*.

82 Abram Chayes and Antonia Handler Chayes. *The New Sovereignty* (Harvard University Press, Cambridge, 1998).

83 The UN Human Rights Council has elaborated upon a list of technical and objective requirements sought from candidates who seek a special procedures mandate, which include having recognized competence and experience in the field of human rights (as identified for instance through relevant educational qualifications, or equivalent professional experience), independence, impartiality, personal integrity, objectivity, and flexibility/readiness to perform effectively the functions of the mandate. These requirements may be analogously relied upon to identify candidates who are qualified to hold the mandate of an IHR Special Rapporteur. *See* Human Rights Council, *Follow-up to Human Rights Council Resolution 5/1* (Decision 6/102).

84 Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response, *supra* note 16.

85 Deriving from a broader mandate provided by the United Nations Economic and Social Council, *Resolution 1235 (XLII)* (UN Doc. E/4393).

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preventing the progression of a disagreement into a formal and costly adversarial dispute. A formal state party request lodged with the appointed IHR special rapporteur whose work is housed with – but remains independent of – the WHO's IHR Secretariat would trigger a process of review to determine whether the query is a question of law that falls within the area of competence of the special rapporteur. States parties may unilaterally seek guidance on a matter of legal interpretation or on a point of disagreement with one or more other states parties.

Borrowing further from widespread practice of engagement with non-state actors in the international human rights regime, a guidance pathway could help enhance accountability for state obligations towards individuals implicated by the IHR (ie, travellers and, more broadly, persons). Thus, non-state actors, including private individuals, civil society groups and local communities could have standing to seek clarifications and interpretations of state obligations arising from the scope of the IHR. Such avenues may attract greater oversight to IHR-violative circumstances that affect individuals, but for which states are not always incentivized to intervene (as described in Section 2). While the special rapporteur would maintain discretion to engage with requests from non-state actors, such an innovation would be in line with a broader shift to incorporate the individual as a participant to the clarification and development of international law.[86]

In general, the strength of the guidance pathway lies in its potential to provide a reasonably precise, responsive and reproducible elucidation of obligations under the IHR in a non-adversarial setting, and particularly in the face of rapidly changing circumstances arising over the course of responses to outbreaks. Such a mechanism should aim to assimilate relevant information and produce rapid legal opinions within a week's time, unencumbered by the need to establish the facts for each side of a case, as is typically required in contentious legal proceedings. Because advisory legal opinions would be non-binding and non-adversarial in nature, the special rapporteur would be under no constraint to withhold this information from the general public. Such an advisory mechanism would also function as a complement to the "mandatory universal peer review" process recommended by the IHR Review Committee on COVID-19 in their final report of 30 April 2021.[87] Importantly, while universal

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86 Duncan French and Richard Kirkham, 'Complaint and Grievance Mechanisms in International Dispute Settlement' in D French, M Saul and N D White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing, Oxford, 2010) pp. 57–83.

87 Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response, *supra* note 16, para. 123.

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peer review would seek to "foster whole-of-government and whole-of-society accountability for implementing the IHR", a facultative advisory mechanism for legal interpretation would address distinct clarificatory questions attached to specific obligations under the IHR.

4.2 *Adjudicative Mechanism*

Where the advisory pathway would operate in a non-adversarial context, the adjudicative pathway would have a mandate to settle legal disputes arising between states parties to the IHR or between one or more states parties and the WHO, gathering facts, synthesizing complex technical and scientific evidence (a crucial determinant of key legal obligations enshrined in the IHR) and applying the sources of international law to the dispute, in the overall objective of rendering decisions that are binding on states parties and the WHO. Although housed at the WHO, an IHR 'Adjudicative Panel' would remain independent of the Organization, reporting instead to the World Health Assembly and to the Executive Board. Members of the Adjudicative Panel would be appointed by the World Health Assembly for one five-year term, led by a chairperson, and unlike the advisory pathway, committed to hearing and issuing decisions on allegations of non-compliance, complaints and/or grievances between states parties to the IHR, and between states parties to the IHR and the WHO.

Since disputes arising out of the implementation of obligations under the IHR are likely to require the appraisal of complex technical and scientific evidence, due authority as well as financial buttress must also be granted to the Adjudicative Panel to consult experts and commission expert inquiries, as is afforded for instance to WTO panels.[88] The authority to decide on cases where the facts hinge significantly on the state of public health evidence need not always aim to resolve the underlying scientific uncertainty – indeed such an expectation is not reasonable with the first years of an emerging pathogen outbreak, as evidenced by COVID-19.[89] It can, however, empower the Panel to determine whether states parties undertook the appropriate steps to ensure their alignment with scientific and methodological exigencies of the IHR.[90] In relation to determining whether an additional health measure falls within

88 Dispute Settlement Understanding, Article 13(1); *see also* Makane Moïse Mbengue, 'International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication Symposium Issue' (2011) 34:1 *Loyola of Los Angeles International and Comparative Law Review* p. 53; Jose E Alvarez, 'Are International Judges Afraid of Science: A Comment on Mbengue Symposium Issue' (2011) 34:1 *Loyola of Los Angeles International and Comparative Law Review* pp. 81–98.

89 Julian W Tang, 'COVID-19: interpreting scientific evidence – uncertainty, confusion and delays' (2020) 20:1 *BMC Infectious Diseases* p. 653.

90 Habibi, *supra* note 81.

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the ambit of actions permitted under Article 43, for instance, the Adjudicative Panel might ascertain whether state claims that health measures were in fact grounded in information that was "based on the established and accepted methods of science", as required under the IHR.[91] The drawbacks of this pathway, however, lie in the fact that decisions would be made available only *ex post facto*, with a turn-around time on the order of months (three at minimum), and therefore not agile enough to respond to emerging developments in a rapidly unfolding outbreak.

In cases where damages are sought, the pathway might also require one or more states to hold a reasonable claim of injury as a result of breaches of one or more states' obligations under the IHR, necessitating the establishment of an ostensible causal link. Proving such a relationship may present difficulties for disputes arising out of multiple and concurring instances of non-compliance with IHR obligations.[92] Consider for instance, a situation in which one party launches a dispute against another party for their failure to notify the WHO of an event which may constitute a PHEIC within the requisite 24–hour notification period[93] – but the implicated party was unable to effectively detect such an event due to a lack of public health resources and infrastructure, reflecting at least partially a disregard among all IHR parties of the collective obligation to collaborate in the strengthening and maintenance of core national health capacities.[94] It must be understood, especially in the wake of the COVID-19 pandemic's "universal, immediate, grave and broadly shared character",[95] that at least some of the norms articulated by the IHR can in fact be characterized as norms of "community interest".[96] Disputes submitted to the Adjudicative Panel would therefore not only provide an opportunity to clarify the IHR, but also the potential to further define how notions of solidarity and shared responsibility are to be understood and operationalized in the realm of global health law.

91 WHO, *supra* note 2, art 1.
92 Geir Ulfstein, 'Dispute resolution, compliance control and enforcement in international environmental law' in G Ulfstein (ed), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, Cambridge, 2007) p. 115.
93 WHO, *supra* note 2, art. 6.
94 *Ibid*, art. 44.
95 Martins Paparinskis, 'The Once and Future Law of State Responsibility' (2020) 114:4 *American Journal of International Law* p. 618.
96 Bruno Simma, *From Bilateralism to Community Interest in International Law* (*Volume 250*)*: Collected Courses of the Hague Academy of International Law*, <referenceworks-brillonline-com.ezproxy.library.yorku.ca/entries/the-hague-academy-collected-courses/*A9789041104199_02>, 13 July 2021.

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5 Conclusion

The absence of an effective dispute settlement mechanism in the IHR is fundamentally a threat to global public health. The rapidly evolving COVID-19 pandemic, which saw politics rather than international legal obligations control the global public health response, evinced the need for nuanced pathways to resolve the diverse array of disagreements which may arise between IHR states parties. For the IHR to have influence on global health security, it must provide states parties with a quick, transparent, and fair method of dispute resolution, thus enabling states parties to clarify and interpret legal obligations, report non-compliance, and resolve other disagreements as needed before and during a global health crisis.

This article began in Section 2 by elaborating upon the existing mechanisms of dispute resolution under the current IHR, as well as their deficiencies in resolving the variety of disagreements that may arise between states parties in the course of discharge of their international legal obligations. Section 3 surveyed a subset of dispute resolution mechanisms under different international legal regimes, as well as past iterations of the IHR, to identify lessons learned as well as promising approaches that may be adapted to global health law under the IHR. Regrettably, the IHR's past judicial forum (ICJ), current judicial forum (PCA), and alternative dispute settlement mechanisms used in other regimes (eg, WTO's DSB) do not provide for a means to efficiently and expediently address timely disputes under the IHR. Nevertheless, these two sections informed the proposal advanced in Section 4, for a stepwise and nuanced mechanism of dispute resolution, beginning firstly with a guidance mechanism consisting of an appointed IHR Special Rapporteur issuing non-binding clarifications of IHR provisions with a quick turnaround time for the states parties involved. Especially in a time of crisis, the interim guidance mechanism provided by the Special Rapporteur could improve state adherence to obligations under the IHR, as well as generally provide for a more uniform global public health response. The mechanism would also reserve states parties recourse to more elaborate albeit slower-moving methods of dispute settlement. Our proposed three-pronged dispute settlement architecture consisting of a guidance mechanism, formal adjudicative mechanism, and failing these two mechanisms, recourse to the ICJ and binding arbitration (the existing IHR Article 56) advances six key goals for states parties. It provides for a guaranteed resolution, a quick decision process, transparency, authoritativeness, maintenance of friendly relations, and realistic implementation. Taking inspiration from the international human rights regime and the WTO, this proposed dispute resolution architecture would be well positioned to incentivize states parties to resolve their disputes.

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