THE CASE AGAINST CHINA
ESTABLISHING INTERNATIONAL LIABILITY FOR CHINA'S RESPONSE TO THE 2002-2003 SARS EPIDEMIC

JOSHUA D. READER*

* Editor-in-Chief, Columbia Journal of Asian Law; J.D. Candidate, Columbia Law School, 2006; A.B., Brown University, 1999. I would like to thank Professor Benjamin L. Liebman for his support in writing this note and his continued guidance through the field of Chinese Legal Studies, and Professor Douglas Kysar for his guidance during my early exploration of this topic. I would also like to thank Ms. Le Rongrong and Professor Robert S. Summers for their resolve and genius as first-rate educators. Thanks as well to my sister, Rachel, for her never-ending support in everything. Finally, special thanks to my parents, Marilyn and Bob, for always living life to the fullest and braving the perils of SARS to visit and travel with me in Asia, providing the first-hand inspiration for this note.

I. INTRODUCTION

In the spring of 2003, the world experienced "déjà vu all over again" in the field of public health and global health governance. The 20th century saw at least three pandemics—the Spanish Flu pandemic of 1918-1919,[1] [2] the Asian Flu pandemic of 1957-58, and the Hong Kong Flu pandemic of 1968-1969—all of which originated in China.[3] Once again, despite Mao Zedong's over-optimistic "farewell to the god of plagues" nearly half a century ago,[4] a new infectious disease emerged from China in the form of Severe Acute Respiratory Syndrome ("SARS"). SARS claimed lives across the globe and shook the confidence of the world's population to its roots. Although SARS did not reap nearly as many victims as previous flu pandemics or other diseases of imminent global concern like malaria, tuberculosis, or HIV/AIDS, the global community took disproportionate notice of the disease because, in part, it "spread in areas with broad international commercial links and received intense media attention as a mysterious new illness that seemed able to go anywhere and hit anyone."[5] The looming specter of globalization amplified these factors.

In today's world, the phenomenon of globalization has turned the distant threat of a localized disease outbreak into a pressing international concern.[6] Within the public health context, the effects of globalization chip away at traditional justifications for state sovereignty. As the global community grows closer, the effects of globalization, coupled with threats of easily communicable and highly deadly infectious diseases, are too dire to ignore. Recently heightened awareness of the threat of infectious disease pandemic has seen a change in public consciousness.[7] A sovereign state's response to domestic disease is no longer solely the

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[1] Jong-Wha Lee & Warwick J. McKibbin, *Estimating the Global Economic Costs of SARS*, *in* LEARNING FROM SARS: PREPARING FOR THE NEXT DISEASE OUTBREAK -- WORKSHOP SUMMARY 107 (Stacey Knobler et al. eds., 2004) [hereinafter LEARNING FROM SARS].

[2] The Spanish Flu pandemic of 1918-1919 caused "20-50 million deaths worldwide, including 500,000 in the United States." *See* Karen J. Monaghan, *SARS: Down But Still a Threat*, *in* LEARNING FROM SARS, *supra* note 1 at 268.

[3] *See id.*

[4] Yanzhong Huang, *The SARS Epidemic and its Aftermath in China: A Political Perspective*, *in* LEARNING FROM SARS, *supra* note 1, at 116.

[5] Monaghan, *supra* note 2, at 247.

[6] *See* DAVID P. FIDLER, INTERNATIONAL LAW AND INFECTIOUS DISEASES 70 (1999).

[7] John Pomfret, *China Orders End to SARS Coverup; Officials Begin Belated Campaign against Disease*, WASH POST, Apr. 19, 2003, at A08 (quoting one Chinese scientist's comments about China's response to SARS: "When I went to France, my colleagues looked at me and said, 'we might be able to understand Tiananmen Square. That was your internal affair. But here your failure has costs lives around the world.' I could only agree.") [hereinafter *China Orders End to SARS Coverup*].

concern of that state.[8] Effective and recognized principles of international law are needed to pierce the sanctified veil of state sovereignty.[9]

While governments have long-utilized international law in the realm of global health governance,[10] the current stakes of another global pandemic require an unprecedented clarification and enforcement of each state's duties to help prevent the spread of infectious disease beyond its own borders. Some of the developing factors that increase the risk of global infectious disease spread today include the approximately 180 million migrant workers in China,[11] whose often untracked movements increase the risk of carrying an infectious disease from rural areas to metropolitan centers, Asia's status as a major hub for world travelers, placing "millions of passengers within 24 hours from almost every major city in the world,"[12] and the increasing prevalence of overseas migration for employment, increasing the risk of international spread.[13] Indeed, recent concerns about the persistent reemergence and international spread of avian flu[14] underscore the urgency of strengthening measures to

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[8] *See* FIDLER, *supra* note 6, at 70; *see also* LEARNING FROM SARS, *supra* note 1, at 208 ("Nevertheless, [2003's] experiences further reinforce the lessons that HIV/AIDS, influenza, Ebola, malaria, and a host of other persistent and emerging infectious diseases have already made clear—that the health of any one nation cannot be isolated from the health of its neighbors, and that the public health challenges in any locality have the potential to reverberate swiftly around the globe.").

[9] This is not to denigrate the current trend towards recognizing the efficacy of extra-legal methods in enforcing global health governance, such as utilizing non-governmental organizations, mobilizing international political pressure, or exercising soft-power methods to promote proper state practice. *See generally* DAVID P. FIDLER, SARS, GOVERNANCE, AND THE GLOBALIZATION OF DISEASE (2004). Likewise, emphasizing non-coercive techniques and reliance on the widespread global community, as opposed to utilization of coercive techniques, in enforcing compliance by sovereign states, see generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) [hereinafter THE NEW SOVEREIGNTY], does not inherently rule out the use of focused and directed coercive measures. International law is but one aspect of larger framework, and a concerted use of both methods can symbiotically achieve the desired goal.

[10] *See generally* FIDLER, *supra* note 6, at 21-52 (providing a brief summary of the history of international law in the control of infectious diseases from 1851, when the first International Sanitary Conference was held between the European States and Turkey, to 1951, when the World Health Organization adopted the International Sanitary Regulations, the most concrete body of regulations governing international health and disease control in force today.).

[11] Monaghan, *supra* note 2, at 248.

[12] *Id.*

[13] *Id.* ("For example, a Filipino nurse working in Toronto contracted SARS and transmitted it to family members on a visit to the Philippines.").

[14] *See, e.g.*, Keith Bradsher & Lawrence K. Altman, *A War and a Mystery: Confronting Avian Flu*, N.Y. TIMES, Oct. 12, 2004, at F1; *see also China Rings Alarm Over Possible Flue Pandemic*, CHINA DAILY, Dec. 30, 2004, *available at* http://www.chinadaily.com.cn/english/doc/2004-12/30/content_404780.htm (last visited Nov. 14, 2005); *see also* Jim Yardley, *China Says Three Cases May Be Bird Flu*, N.Y. TIMES, Nov. 7. 2005, at A4, *available at* http://www.nytimes.com/2005/11/07/international/asia/07bird.html?ex=1136610000&en=d49401373704e6c7&ei=5070 (documenting avian flu concerns in China in the late part of 2005); *see also Turkey says dead boy had bird flu*, Jan. 4, 2006, *at* http://www.cnn.com/2006/HEALTH/01/04/turkey.birdflu.ap/index.html (reporting on the spread of avian flu beyond Asia).

prevent the international spread of infectious diseases. With SARS, the world was comparatively lucky. [15] However, the global risk is persistent,[16] and international law must be called for to pursue a safer global health environment.

Publicists have noted that "globalization is creating a heightened need for new global health governance structures to promote coordinated intergovernmental action."[17] With the continually increasing need of international health law, both the body and content of international health law grow, encompassing both customary international law and treaty-based international law,[18] and directly and indirectly utilizing diverse legal concepts from international human rights law to environmental law.[19] However, although the breadth of international health law may be growing, many of its basic tenets remain either impractically narrow or unfortunately ill-defined. To that end, this note advocates the establishment of a liability regime in international health law, embodied in a tribunal empowered to adjudicate claims under international health law on an *ex post facto* basis. Not only will this regime serve the traditional deterrent, distributive, and retributive functions of tort liability, but, and perhaps more importantly, it will contribute to more definite and workable rules of international health law.

In order to illustrate, this note makes a case against China and its handling of the SARS crisis. China's response to the 2002-2003 SARS epidemic provides an optimal test case. China's attempts to cover up its domestic SARS outbreak at the early and middle stages violated its international duty to report, in good faith, infectious disease outbreaks of international significance. China's failure to comply with this duty facilitated the international spread of SARS, causing not only loss of life, but significant economic damages to specific industries and affected nations. An *ex post facto* international liability regime, under which affected nations might bring claims for economic damages against China, would serve to deter future state attempts to cover up disease outbreaks, punish state for failing to comply with their international obligations, and

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[15] *See* David L. Heymann & Guenael Rodier, *SARS: Lessons from a New Disease*, *in* LEARNING FROM SARS, *supra* note 1, at 246 (noting that "containment of SARS was aided by good fortune. The most severely affected areas in the SARS outbreak had well-developed health care systems. Had SARS established a foothold in countries where health systems are less well developed cases might still be occurring, with global containment much more difficult, if not impossible.").

[16] *See id.* ("SARS will not be the last new disease to take advantage of modern global conditions. In the last two decades of the 20th century, new diseases emerged at the rate of one per year, and this trend is certain to continue.").

[17] Allyn L. Taylor, *Governing the Globalization of Public Health*, 32 J.L. MED. & ETHICS 500, 500 (2004).

[18] *See id.*

[19] *See generally* FIDLER, *supra* note 6.

distribute wealth to make injured parties whole to the fullest extent possible. Moreover, the process of adjudication would clarify states' global health governance obligations and allow tailoring of broader legal principles to reach equitable results in specific cases, while protecting the greater interests of the global community as a whole.

Part I of this note discusses the facts of China's response to the 2002-2003 SARS epidemic, tracing a timeline of events and highlighting the spread of SARS both within China and throughout the world.

Part II summarizes the current state of global health governance, and the role of international law within the system. Due to the traditional state-centered approach to global health governance and current governments' efforts to maintain high degrees of state sovereignty, international law is underutilized in today's global health governance regime. Current attitudes towards international law in global health governance are ill-conceived and the attitudes ultimately cannot serve the interests of the global community in preventing the international spread of infectious diseases.

Part III establishes China's good faith duty to report infectious disease outbreaks of international significance within current treaty-based and customary international law. While the World Health Organization's International Health Regulations alone do not establish a reporting duty that is broad enough to encompass the duty for China to report SARS, they give substance to China's commitments to protect the right to health embodied in Article 12(2) of the International Covenant on Economic, Social, and Cultural Rights. Moreover, China's domestic pre-SARS disease control regime further illustrates China's awareness of the importance of effective information flow in combating disease spread. Given both international and domestic consciousness of the necessity of disease reporting in effectively combating infectious disease spread, China's attempted cover-up of the 2002-2003 SARS epidemic represents a failure to comply with its treaty obligations in good faith. Furthermore, general state compliance with the duty to report during the 2002-2003 SARS epidemic may have established the duty to report infectious disease outbreaks of international significance as a principle of customary international law. China could thus be held accountable under the customary state responsibility, or "abuse of rights" doctrine, which mandates that states must not knowingly allow their territory to be used in a manner contrary to the rights of other states. On these grounds, China's willful cover-up attempts constitute a wanton disregard of SARS's inherent risks, to the detriment of states that were ultimately harmed by its international spread.

Part IV explores China's breach of its good faith duty to report SARS, as well as causation issues stemming from China's compliance failure and leading to SARS's international transmission. Ultimately, both the content of China's laws—specifically, the interaction of its state secrets laws and disease control laws—and the diffuse structure of the Chinese political system led to China's cover-up attempts. Neither excuses China's actions which, given an awareness that prompt and honest disease reporting is essential to combating infectious spread, represents China's failure to comply with its treaty obligations in good faith under the Vienna Convention on the Law of Treaties. Regarding causation, while it is impossible to counterfactually prove that China's cover-up was a "but for" cause of SARS's international spread, it was at least a proximate cause. In any event, sound policy mandates that, given China's deliberate efforts to stanch information flow, China be held liable for its transgressions.

Part V outlines the economic harm caused by the international spread of SARS. While it is impossible to calculate the full economic effects of the epidemic, cursory figures demonstrate that certain nations, geographic regions, and industry sectors were hit particularly hard. Affected nations, representing their respective citizens and industry sectors, could bring claims for these economic losses under an *ex post facto* liability regime.

Part VI discusses the feasibility and wisdom of creating an *ex post facto* liability regime. Trends in international law indicate that the world community may be moving towards a greater role for adjudicative measures in settling international legal disputes. Moreover, *ex post facto* adjudication provides many benefits, from both a legal and practical perspective. *Ex post facto* adjudication, in addition to its deterrent, retributive, and distributive functions, promotes clarity in international law principles and allows specific application of broad concepts, in order to serve the needs of both parties to the dispute and the wider global community.

Ultimately, international law cannot and does not sanction China's failure to comply with its good faith duty to report infectious disease outbreaks of international significance. Whether through an existing institution or the creation of a new body like an International Civil Court, international law must take nations like China, which fail to comply with their global health governance obligations, to task, in order to set a clear precedent and safeguard the global population from pandemic threats.

II. THE FACTS: THE PROGRESSION OF THE SARS EPIDEMIC AND CHINA'S RESPONSE

SARS first emerged in November 2002 in Guangdong, a province in southern China.[20] Experts believe that the first case of SARS, reported on November 16, 2002, was in Foshan, a city in Guangdong Province.[21] Medical experts believe that the SARS virus, epidemiologically classified as a coronavirus,[22] is zoonotic,[23] meaning that it is a "disease of animals . . . which can be transmitted to humans."[24] Indeed, SARS transmission to humans "has been linked with the handling and preparing of exotic mammals for human consumption"[25] common to Chinese cuisine.

Professor David P. Fidler divides China's response to SARS into three stages.[26] During the first stage, which lasted from the emergence of SARS until February 2003, the Chinese government attempted to suppress information about SARS, at the time merely a strange respiratory disease spreading through Guangdong.[27] In the second stage, lasting from mid-February 2003 to April 17, 2003, China "acknowledged an outbreak but attempted to deny and cover up the extent of the epidemic."[28] The third stage of China's response did not begin until April 18, 2003, when the Chinese government finally admitted the existence and severity of SARS, began to cooperate with the World Health Organization ("WHO"), and made a concerted and ultimately successful drive to stop the spread of SARS within and beyond its borders.[29] For the purposes of this analysis, I am primarily concerned with China's actions and omissions during the first two stages of Fidler's framework.

During the first stage of China's response, despite the government's desire and efforts to prevent news of SARS from becoming

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[20] *SARS: Emergence, Detection, and Response - Overview*, *in* LEARNING FROM SARS, *supra* note 1, at 41.

[21] *See* Heymann & Rodier, *supra* note 15, at 236; *see also* David P. Fidler, *SARS: Political Pathology of the First Post-Westphalian Pathogen*, 31 J.L. MED. & ETHICS 485, 491 (2003) [hereinafter *SARS: Political Pathology*].

[22] Robert F. Breiman et al., *Role of China in the Quest to Define and Control SARS*, *in* LEARNING FROM SARS, *supra* note 1, at 57.

[23] *Id.* at 58.

[24] www.dictionary.com, *at* http://dictionary.reference.com/search?q=zoonotic (last visited Apr. 3, 2006).

[25] LEARNING FROM SARS, *supra* note 1, at 41; *see also Where the SARS Virus Hides*, N.Y. TIMES, Oct. 5, 2005, at A28 (reporting that Chinese horseshoe bats, sold in live food markets in China, are the "likely reservoir" of the SARS virus).

[26] *SARS: Political Pathology*, *supra* note 21, at 491.

[27] *Id.*

[28] *Id.*

[29] *Id.*

public, some information, bypassing the Chinese government's control, spread through sources like "the Internet, email, and cell phone text messaging."[30] As Fidler reports:

> On February 10, 2003, Pro-MED mail, a non-governmental global electronic reporting system for outbreaks of infectious disease, posted [an]
> email asking about an epidemic in Guangzhou being linked in Internet chat rooms to hospital closings and fatalities. Also on February 10, WHO staff in Beijing and Geneva received an email from the son of former [*sic*] WHO employee in China asking about a "strange contagious disease" causing death and panic in southern China.[31]

While the Chinese Ministry of Health learned of SARS in January 2003,[32] the Guangdong provincial government took no action to inform the public or prevent its spread.[33] In fact, reports indicate that the "top secret" document to the provincial health department "sat unopened" because no government official in the office had the requisite security clearance to read it—the higher level officials were vacationing for the Chinese New Year.[34] At the end of January, the Guangdong Province medical department finally informed Guangdong hospitals of the outbreak.[35]

Evidence suggests that news of the SARS outbreak did not reach the highest levels of the Chinese government until February of 2003.[36] This was due, in part, to the efforts of provincial party cadres, like Guangdong Party Secretary Zhang Dejiang, to suppress news of the epidemic.[37] Reports indicate that "authorities did not want concerns about the virus to cut into people's spending during the Chinese New Year holiday."[38] At this stage, the sole government response to SARS

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[30] *Id.*
[31] *Id.*
[32] *See* Huang, *supra* note 4, at 120.
[33] *See* John Pomfret, *China's Slow Reaction to Fast-Moving Illness; Fearing Loss of Control, Beijing Stonewalled*, WASH POST, Apr. 3, 2003, at A18.
[34] *See* Huang, *supra* note 4, at 120.
[35] Lynn T. White III, *SARS, Anti-Populism, and Elite Lies: Temporary Disorders in China*, *in* THE NEW GLOBAL THREAT: SEVERE ACUTE RESPIRATORY SYNDROME AND ITS IMPACTS 44 (Tommy Koh et al. eds., 2003).
[36] *Id.* at 42.
[37] *Id.*
[38] John Pomfret, *Outbreak Gave China's Hu an Opening: President's Move on SARS Followed Immense Pressure at Home, Abroad*, WASH. POST FOREIGN SERV. REP., May 13, 2003, at A01, *quoted in* White, *supra* note 35, at 44.

was official cover-up. As of February 7, 2003, the government had taken no further action to combat the disease.[39]

In early February, the Canadian Global Public Health Intelligence network ("GPHIN") and the WHO Influenza Network[40] identified reports of an outbreak in southern China.[41] On February 10, 2003, WHO's Beijing office received an email message "describing a 'strange contagious disease'" in Guangdong Province that had already killed 100 people.[42] Faced with mounting pressures and information leaks in the global community, the Chinese government finally officially reported the outbreak to WHO on February 11, 2003, one day after the WHO Global Outbreak Alert and Response Network ("GOARN") picked up on the disease.[43] In its report, China admitted 300 infections and five deaths in Guangdong Province, resulting from "an acute respiratory syndrome."[44] China further reported that "a team from the Ministry of Health [was] working with health officials in the province to investigate the outbreak and collect samples for laboratory analysis."[45]

Thus began the second stage of China's response. During this period, from mid-February until April 17, 2003, the Chinese government claimed that the outbreak was under control and falsely insisted that the disease had not spread beyond Guangdong Province.[46] In order to maintain its façade, the Chinese government prohibited the domestic media from reporting on the disease.[47]

From an international perspective, this was a crucial point. On February 21, 2003, a sixty-four year-old physician who had treated patients in Guangzhou, the largest city in Guangdong Province, traveled to Hong Kong, where he checked into a room on the ninth floor of the Metropole Hotel.[48] The doctor was suffering from the respiratory symptoms associated with SARS.[49] The doctor then "transmitted the

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[39] *See id.* at 43; *see also* John Pomfret, *China's Slow Reaction to Fast-Moving Illness; Fearing Loss of Control, Beijing Stonewalled*, WASH POST, Apr. 3, 2003, at A18.

[40] Consisting of 110 laboratories in eighty-four countries. *See* Heymann & Rodier, *supra* note 15, at 237.

[41] *See id.* at 237-40.

[42] World Health Organization, *Update 95 - SARS: Chronology of a Serial Killer* (Jul. 7, 2003), *at* http://www.who.int/csr/don/2003_07_04/en/ [*hereinafter Chronology of a Serial Killer*].

[43] *SARS: Political Pathology*, *supra* note 21, at 491.

[44] World Health Organization, *Acute Respiratory Syndrome in China* (Feb. 11, 2003), *at* http://www.who.int/csr/don/2003_02_11/en/ (last visited Nov. 14, 2005).

[45] *Id.*

[46] *SARS: Political Pathology*, *supra* note 21, at 491.

[47] *Id.*

[48] J.S. MacKenzie et al., *The WHO Response to SARS and Preparations for the Future*, *in* LEARNING FROM SARS, *supra* note 1, at 43.

[49] *Id.*

SARS virus to at least sixteen other guests, all linked to the ninth floor."[50] As of March 28, 2003, this one series of infections resulted in 195 cases in Hong Kong, seventy-one cases in Singapore, fifty-eight cases in Vietnam, twenty-nine cases in Canada, one case in the United States, and one case in Ireland.[51] In short, one doctor from Guangzhou begat a global outbreak.[52]

In early March, Dr. Jiang Yanyong, a physician, Communist Party member, People's Liberation Army veteran, and famed government whistle-blower during the SARS crisis,[53] reported that the "medical staff in Beijing's military hospitals were briefed about the dangers of SARS . . . but were told not to publicize what they had learned lest it interfere with the [National People's Congress] meeting."[54] Although the Chinese government was briefing the staff of its military hospitals, it still had not disclosed the true severity of the epidemic to WHO, the international community, or its own citizens. As a result, the world community was still not on adequate notice of the full magnitude of the SARS crisis.

March of 2003 was a watershed month for international awareness of the SARS crisis. On March 10, 2003 China's Ministry of Health finally asked WHO to provide "technical and laboratory support to clarify the Guangdong outbreak of atypical pneumonia."[55] On March 12, notwithstanding China's lack of cooperation, WHO issued a "global alert about cases of atypical pneumonia," due to reports of rapid spread among hospital staffs in Hong Kong and Hanoi, Vietnam.[56] This was the first international warning on SARS from an official source. On March 15, as evidence mounted that the disease was traveling along major airline routes, WHO issued a "rare"[57] emergency travel advisory, alerting travelers and airline crew to the nature and symptoms of the disease.[58] In this advisory, WHO noted that reports of SARS had been received from "Canada, China, Hong Kong Special Administrative Region of China,

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[50] *Id.*

[51] *See* Monaghan, *supra* note 2, at 249.

[52] *See* MacKenzie et al., *supra* note 48, at 43.

[53] *See generally* Susan Jakes, *Asian Newsmakers: Jiang Yan Yong vs. China's Culture of Silence*, TIME, Dec. 29, 2003, at 84.

[54] *See* Huang, *supra* note 4, at 120. The National People's Congress meeting, scheduled to take place in March, 2003, marked the initiation, at the highest levels, of a new Chinese government, with Jiang Zemin and Zhu Rongji handing the reins to Hu Jintao and Wen Jiabao. *See id.*

[55] World Health Organization, *supra* note 42.

[56] *WHO Issues a Global Alert about Cases of Atypical Pneumonia* (Mar. 12, 2003), *at* http://www.wpro.who.int/sars/docs/pressreleases/pr_12032003.asp.

[57] *See* World Health Organization, *supra* note 42.

[58] *See World Health Organization Issues Emergency Travel Advisory* (Mar. 15, 2003), *at* http://www.wpro.who.int/sars/docs/pressreleases/pr_15032003.asp [hereinafter *Travel Advisory*]. It is at this point that the disease is named "SARS." *Id.*; *see also* Mackenzie et al., *supra* note 48, at 43.

Indonesia, Philippines, Singapore, Thailand, and Viet Nam."[59] On March 17, China gave a "brief report" on the Guangdong outbreak to WHO, stating that the epidemic had "tapered off."[60] On March 26, 2003, "China report[ed] a cumulative total of 792 cases and 31 deaths in Guangdong Province from 16 November 2002 to 28 February 2003. Officials had previously reported 305 cases and 5 deaths from mid-November to 9 February."[61] On March 27, the Chinese government, for the first time, reported cases in China outside of Guangdong Province.[62]

It was not until April 2, 2003 that the Chinese government finally allowed a WHO team to travel to Guangdong Province to investigate the Guangdong outbreak of SARS.[63] As reported, "Chinese officials waited more than three months to acknowledge the extent of the illness" which had, at that point, "affected at least 2,223 people worldwide and killed 78."[64] As the Chinese government obfuscated the SARS situation, the disease spread to "Hong Kong and 16 other countries."[65]

On April 16, WHO's Beijing office estimated 100 to 200 cases in that city alone, sharply contrasting with the Chinese government report of thirty seven cases.[66] In noting the disparity in the number of estimated cases, WHO accused China of underreporting SARS and maintaining "secret military health files that [made] it impossible to control and monitor the spread of the disease in the Chinese capital."[67] On April 17, 2003, at a Politburo meeting, Chinese President Hu Jintao reportedly "acknowledged that the government had lied about the disease."[68] At this meeting, the Politburo finally mandated, from that point forward, to hold "party and government leaders" accountable for the "overall SARS situation in their jurisdictions."[69] Following this meeting, on April 18, 2003, the Chinese Communist Party ultimately declared a "nationwide

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[59] *Travel Advisory*, *supra* note 58.
[60] World Health Organization, *supra* note 42.
[61] *Id.*
[62] *Id.*
[63] *See* Pomfret, *supra* note 33.
[64] *Id.*
[65] *Id.*
[66] *See* World Health Organization, *supra* note 42.
[67] *See* John Pomfret, *Underreporting, Secrecy Fuel SARS in Beijing, WHO Says*, WASH. POST, Apr. 17, 2003, at A16.
[68] John Pomfret, *Outbreak Gave China's Hu an Opening; President Responded to Pressure Inside and Outside Country on SARS*, WASH. POST, May 13, 2003, at A01, *quoted in* White, *supra* note 35, at 46.
[69] *See* Huang, *supra* note 4, at 124.

war on SARS" and ordered officials to "stop covering up the extent of the epidemic."[70]

Professor Fidler's third phase begins after the April 17 Politburo meeting. At this stage, China began to cooperate with WHO and the world community, provided more accurate information to WHO, and ultimately launched an impressively effective campaign to prevent the further spread of SARS.[71] The government also began to hold some officials accountable for their pre-April 17 actions.[72]

In the end, from the original outbreak in Guangdong Province, SARS spread to thirty countries and administrative regions within six months.[73] SARS infected 8422 people worldwide, and caused 916 deaths.[74] In addition, the disease caused tremendous economic damage to both the Asian and world economy, as discussed in further detail below.

WHO declared the worldwide outbreak of SARS officially contained on July 5, 2003.[75] Despite the end of the worldwide outbreak, WHO called for "continued vigilance" in efforts to fight and prevent the spread of the disease.[76] Note, however, that the Chinese government lifted a ban on the sale and consumption of exotic animals, from which SARS is thought to have originated, in mid-August of 2003.[77] Notwithstanding concerns of avian flu and other respiratory syndrome outbreaks, SARS itself remains a pressing global health concern.

III. INTERNATIONAL LAW IN GLOBAL HEALTH GOVERNANCE DURING THE 2002-2003 SARS EPIDEMIC AND TODAY

The intersection of international law and global health governance is too archaic to serve the world's current interests. When the European nations met in Paris in 1851 to negotiate the first multilateral convention

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[70] *China Orders End to SARS Coverup*, *supra* note 7. Health care workers in Beijing revealed that the government had ordered them to underreport SARS cases in Beijing, for fear that WHO would issue a travel advisory for the city, as it had for Hong Kong and Guangdong on April 2, 2003. *Id.*

[71] *SARS: Political Pathology*, *supra* note 21, at 491.

[72] John Pomfret, *SARS Coverup Spurs a Shake-Up in Beijing*, WASH POST, Apr. 21, 2003 at A01. In late April, the mayor of Beijing, Meng Xuenong, and the Minister of Health, Zhang Wenkang, were ousted from their party posts for disloyalty. Zhang was accused of lying about the extent of SARS during an April 4, 2003 news conference, and Meng was, presumably, a sacrificial lamb, because Beijing Communist Party Secretary Liu Qi was a member of the Politburo and, thus, too powerful to fall. *See id.*

[73] *SARS: Emergence, Detection, and Response - Overview*, *supra* note 20, at 41.

[74] Heymann & Rodier, *supra* note 15, at 237.

[75] *Chronology of a Serial Killer*, *supra* note 42.

[76] *Id.*

[77] *See* Monaghan, *supra* note 2, at 248.

on infectious disease control,[78] they were operating from what Professor Fidler calls "Westphalian" principles.[79] Global health governance was left to interstate diplomacy, and focused on the effects of disease spread between nations rather than disease spread within state borders.[80] International response to the outbreak of SARS demonstrates the inadequacy, from a legal perspective, of this approach. In the tight-knit era of globalization, a domestic epidemic can quickly become a global pandemic. In reality, a government's decisions regarding a local outbreak nevertheless have global consequences. Yet, while diseases can move undetected across sovereign borders, international health law holds fast to the boundaries of state sovereignty.[81]

Interestingly, the state-centered focus of current global health governance structure lags behind the law's modern conceptions of sovereignty in other distinct yet related fields. While the concept of sovereignty in fields like human rights and international trade has evolved, global health governance remained static. Indeed, "for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently . . . . To be a player, the state must submit to the pressures that international regulations impose."[82] Accordingly, states generally comply with regulatory agreements because the costs of non-compliance and isolation outweigh the benefits of doctrinal adherence to absolute sovereignty.[83]

Within this context, what role does international law play? In a system with weak threats of sanction for non-compliance, the law still works to shape the international norms by which the world judges a rogue state. In this respect, international law is "a mass of commonplace

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[78] *See* FIDLER, *supra* note 6, at 22.

[79] *See SARS: Political Pathology*, *supra* note 22, at 486. "Westphalian" principles refer to an international system, legal or otherwise, that is structured on a state-to-state framework. This, of course, refers to the Peace of Westphalia in 1648, which ended the Thirty Years' War and established today's international framework, by which "[p]olitical authority is fragmented among states . . . ." In a "Westphalian" world, state borders are absolute sovereign boundaries, within which the affairs of the state are exclusive to that state's sovereign, and outside of which a state's sovereign was forbidden to interfere. As Fidler observes, this created a horizontal structure of international relations, as "(1) only states were involved in governance; (2) governance primarily addressed the mechanics of state interaction . . .; and (3) governance did not penetrate sovereignty to address how a government treated its people or ruled over its territory." Moreover, under a Westphalian structure, the "Great Powers" determined how the system functioned. *Id.* at 486-88. SARS, according to Fidler, is the first post-Westphalian disease, because the disease itself, as viruses do, failed to respect international borders, and the disease outbreak was ultimately subdued by non-state forces like international and non-governmental organizations, at the expense of China's veil of sovereignty. *See generally id.*

[80] *See id.* at 485-87.

[81] *See* FIDLER, *supra* note 6, at 293.

[82] THE NEW SOVEREIGNTY, *supra* note 9, at 27.

[83] *See generally id.*

assumptions about what is right, appropriate, or natural to do."[84] To that end, most states voluntarily comply with principles of international law because they value their international reputations as law-abiding actors and they wish to avoid countermeasures, coercive or otherwise, imposed by the world community.[85] Law, thus, has the "potential to help shape the meaning of . . . behavior for good or ill."[86] This works both proactively, with codified rules creating world perceptions of behavior, or retroactively, with codified rules reflecting already existing notions of proper behavior.

Assuming that most states genuinely believe that it is proper behavior, if not legal obligation, for a state to reasonably act to prevent the spread of a disease outbreak beyond its borders—a notion explored in greater detail below—it is curious that the legal principles of modern global health governance do not reflect this value. A realist might judge this as an indication that it is not yet in states' interests to abandon the legal protections of sovereignty or, alternatively, to adopt limited sovereignty in the realm of global health governance.[87] Perhaps states, as a whole, do not yet feel that the need to protect their populations from the economic and social effects of "other nations' diseases" outweighs the accompanying sacrifice of sovereignty needed to strengthen the international effort to combat pandemics.[88]

However, the SARS epidemic and global response indicates a different, more likely reason that sovereignty in global health governance has failed to keep pace with the evolution of sovereignty in other fields of international law and politics. Put simply, the world community has reflected an "out of sight, out of mind" mentality in global health governance and corresponding international law. Global health governance has been a victim of the success of scientific achievements. Great advances in anti-microbial medicine, like the smallpox vaccine, led governments to believe that they had conquered disease.[89] With scientific solutions, state governments saw no need to subordinate their sovereignty

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[84] *See* Scott Burris, *Law as a Structural Factor in the Spread of Communicable Disease*, 36 HOUS. L. REV. 1755, 1779 (1999).

[85] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979).

[86] Burris, *supra* note 84, at 1779.

[87] *See* FIDLER, *supra* note 6, at 281.

[88] *Id. Cf.* David P. Fidler, *Constitutional Outlines of Public Health's "New World Order"*, 77 TEMP. L. REV. 247 (2004) [hereinafter *Constitutional Outlines*] (analyzing post-SARS state behavior as evidencing the beginnings of a realignment towards a "Constitutional" global health governance framework, as opposed to rigid maintenance to previous conceptions of state sovereignty in global health governance).

[89] *See* FIDLER, *supra* note 6, at 16.

to the international community as a whole by strengthening international law in global health governance.[90]

Moreover, the strength of international law in global health governance is self-defeating. States do not use international law to serve global health governance unless they perceived it in their national interests; but states generally do not perceive international law as useful to global health governance because it does not feature strongly within the global health framework.[91] With the advent of highly transmissible and lethal diseases like HIV/AIDS, world consciousness may have begun a shift towards international law as an effective means of disease control.[92] The global SARS epidemic illustrates the world community's vulnerability to diseases from across the globe. If nothing else, perhaps SARS has further emphasized the need to strengthen international law in global health governance.

Indicating an effort to fill the gap left by the inadequate international legal health regime, some scholars now focus on related disciplines like human rights law and international environmental law to serve the ends ignored by the current health structure.[93] This congruence, called "issue linkage," has enriched the bodies of law in subjects like international labor law, human rights law, environmental law, trade law, and arms control.[94] Likewise, as other disciplines touch on international health law, they strengthen global health governance. For instance, multilateral organizations with relatively strong enforcement powers see to the areas of international health law related to their respective concerns.[95] Yet, the consequences of international infectious disease spread are too dire to leave global health governance and the related *corpus juris* of international law to ad hoc rulemaking on the periphery of concerned but distinct legal disciplines.[96]

One explanation for the apparent vacuum in the field is the lack of a multilateral organization effectively pressing its interests. Effective global health governance, with its multidisciplinary nature, needs an international multilateral organization to coordinate appropriate

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[90] *See id.* at 220.
[91] *See id.* at 281.
[92] *See id.* at 220.
[93] *See* Taylor, *supra* note 17, at 500.
[94] *Id.* at 501.
[95] *See* FIDLER, *supra* note 6, at 282 (noting the role played by GATT and the World Trade Organization in international trade, the United Nations in human rights, and "institutions established by international environmental treaties.").
[96] *See* Taylor, *supra* note 17, at 500 ("With multiple international organizations sharing lawmaking authority for global health and with other actors engaged in the international legislative process, international lawmaking shows potential for fragmented, uncoordinated, and inefficient sprawl.").

responses.[97] Ostensibly, this role should go to the WHO. WHO's specific role in promulgating international law in the realm of infectious disease control is discussed more fully below. Yet for now, suffice it to say, WHO has proven reluctant to enlist the full weight of international law in serving its ends. A variety of factors, many of which are out of WHO's control, make WHO either unwilling or unable to utilize international law in furthering its goals.[98]

However, with SARS came a rude awakening for the world community. As a report to the United States National Intelligence Council notes, "[t]his intense focus on SARS has opened a window of opportunity to pursue bilateral and international cooperation against infectious diseases."[99] Many States are now moving to strengthen their domestic health systems, most notably by seeking external support from WHO or the United States Centers for Disease Control ("CDC").[100] Even China, traditionally reluctant to open its doors to international assistance, has discussed "exploring ways to improve [its] health system" with the United States.[101] Likewise, recent state behavior in response to subsequent SARS scares and, most recently, avian flu, has evidenced greater state willingness to subordinate supreme sovereignty in the interests of a more effective global health governance regime.[102] These are promising developments. Yet, bolstering international law can provide more comprehensive, coordinated, and continuing benefits to complement individual and unilateral state actions, and ensure that states initiate and follow through with such commitments. It is time to open the window of opportunity a bit further to invite international health law into the room.

There is a general perception, especially in the field of global health governance, that international law is weak and generally not enforced.[103] Often, international treaty regimes like WHO are left

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[97] *See id.* at 503 ("The vast majority of international legislative projects are conducted under the auspices of international organizations. Public international organizations are institutional mechanisms for multilateral cooperation and collective action. Their organizational structures and formal administrative arrangements provide stable negotiating forums for member states in realms within their relevant legal authority, thereby anchoring and facilitating intergovernmental cooperation.").

[98] *See generally* David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079 (1998).

[99] Monaghan, *supra* note 2, at 269.

[100] *Id.*

[101] *Id.* Beijing has reportedly publicly committed $1.3 billion in new funds to this goal. *Id.* However, given a frequent disparity between the Chinese government's public statements and its ultimate actions, it remains to be seen what amounts actually go to strengthening China's health system.

[102] *See generally Constitutional Outlines*, *supra* note 88.

[103] *See* FIDLER, *supra* note 6, at 94.

without adequate enforcement measures, thus diminishing the efficacy of international law in the eyes of both harmed states and interested bystanders alike.[104] Yet, the broader field of customary international law provides various enforcement measures that are either overlooked or underutilized. Perhaps the heightened awareness of the threat of global epidemic in the post-SARS era will lead the world community to exploit this valuable tool.

In order to serve the greater health interests of the world community, international law should, at least, require states to make good faith efforts to honestly and promptly report any disease information of international relevance. Professor Fidler's call for an "open public health society" encompasses these principles.[105] Approaching the problem from the angle of individual rights, Professor Fidler advocates a system in which "citizens have a right to receive and disseminate information important to the protection and promotion of their health" and "non-state actors can hold governments accountable for their management of the public's health."[106] Ultimately, Professor Fidler calls on the world community to abandon its Westphalian approach to global health governance and allow individuals to hold world government's accountable for public health failures.[107]

A conception of rights, whether of sovereign states or of the individuals that comprise those states, is essential in the battle against infectious diseases.[108] Rights are grounded in the law. Strengthening international law is the appropriate method to enforce these rights. From a practical and realistic perspective on international relations and global health,[109] a clear and enforceable good faith state duty to report relevant disease outbreaks should adequately serve the interests of the international community. A clear duty to report strikes a comfortable balance between a sovereign state's right to conduct its own affairs within its own territory while putting other sovereign states on proper notice. It gives state governments around the world the opportunity to protect their own interests and prevent diseases from spreading to their own citizens, while permitting sovereigns to deal with their domestic health as they see fit. Under such a regime, each country can fulfill its responsibilities to other sovereign nations without sacrificing its own sovereignty.

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[104] *Id.*
[105] *See SARS: Political Pathology*, *supra* note 21, at 493.
[106] *Id.*
[107] *Id.*
[108] *See* Burris, *supra* note 84, at 1778.
[109] For what Professor Fidler calls "microbialpolitik," see generally David P. Fidler, *Microbialpolitik: Infectious Diseases and International Relations*, 14 AM. U. INT'L L. REV. 1 (1998).

IV. DUTY: INTERNATIONAL LAW AND THE DUTY TO REPORT

As a matter of global health policy, holding nations to a good faith duty to report domestic disease outbreaks that may credibly threaten other nations is eminently sensible. At the very least, sound global policy would dictate that a state and its respective government must not conceal infectious disease cases, risking potentially catastrophic economic and human losses across the world, in favor of local economic development or international reputation.[110] During the first two stages of China's response to SARS, the Chinese government, at various levels, chose its own state interests over combating the international consequences of SARS.[111] Such a choice casts doubt on the Chinese government's abilities to properly prioritize national interests and the Chinese Communist Party's interests in relation to world interests in future situations.[112]

Good policy aside, however, it is another question altogether as to whether international law, as it stands today, actually does support a state's good faith duty to report internationally relevant infectious disease outbreaks. Moreover, even if international law supports this duty, does it provide a legal mechanism by which aggrieved states can exercise their rights against a breaching state?

The sources of international law, as generally accepted, are laid out in Article 38(1) of the Statute of the International Court of Justice.[113] Article 38(1) directs the International Court of Justice ("ICJ"), in deciding disputes under international law, to apply the following sources of law: "international conventions," or treaties, "establishing rules expressly recognized by the contesting states"; "international custom, as evidence of a general practice accepted as law," or customary international law; "the general principles of law recognized by civilized nations"; and; "judicial decisions" and writings of "publicists" of "various nations, as a subsidiary means for determination of rules of law."[114]

For the purposes of evaluating China's duty to report SARS, the most relevant treaties are WHO's International Health Regulations ("IHR") and the International Covenant on Economic, Social and Cultural

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[110] Heymann & Rodier, *supra* note 15, at 242.

[111] *See SARS: Political Pathology*, *supra* note 21, at 493 ("These stages of China's response exhibited the government's myopic focus on 'social stability' in China, continued flows of trade and investment into China, and the image of the Communist party.").

[112] *Id.*

[113] Statute of the International Court of Justice art. 38, para. 1, June 26, 1945, 59 Stat. 1055, T.S. No. 993 [hereinafter ICJ Statute].

[114] *Id.*

Rights ("ICESCR"). While the current IHR do not support a tacit duty to report and the ICESCR does not explicitly impose such a duty, an exploration of the principles behind the ICESCR, as colored by recognized duties under the IHR, indicates that good faith compliance must require a state duty to report infectious diseases of international significance. Moreover, the same principles embodied by these agreements, coupled with general state practice during the SARS epidemic of 2003, give rise to a credible claim that a good faith duty to report both exists today and, more importantly for this analysis, existed during the 2002-2003 SARS epidemic, in customary international law. In conjunction with the customary international law doctrine of state responsibility, or "abuse of rights," China must be held legally accountable for its failure to comply in good faith with its international legal obligations during the SARS epidemic of 2003.

A. WHO and the International Health Regulations

The paramount source for international health law is the World Health Organization. WHO was created under the auspices of the United Nations ("UN"), in order to, among other things, unify global efforts to control infectious diseases.[115] Under Article 21 of the WHO Constitution, WHO, through its "supreme decision-making body,"[116] the World Health Assembly ("WHA"), adopted the International Health Regulations.[117] With the authority to issue such regulations, WHO is able to maintain a global health governance system in the face of rapid scientific and medical progress "without having to proceed through the cumbersome treaty process."[118] Thus, presumably, the UN delegated this authority to WHO, in part, to avoid not only the technical and procedural obstacles of the international treaty-making process, but also to avoid Member States' narrow-interest sovereignty objections from hindering implementation of an effective disease control regimen.

The IHR's purpose "is to ensure the maximum security against the international spread of diseases with a minimum interference with world traffic."[119] To this end, the IHR were "first introduced to help

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[115] *See* FIDLER, *supra* note 6, at 59.

[116] *See* World Health Organization, *Governance*, *at* http://www.who.int/governance/en/ (last visited Apr. 9, 2006).

[117] *See* WHO CONST., 14 U.N.T.S. 185, art. 21.; *see also* FIDLER, *supra* note 6, at 49 ("Article 21 of the WHO Constitution gave WHO the authority to adopt regulations concerning, *inter alia*, 'sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease.'").

[118] *See* FIDLER, *supra* note 6, at 59.

[119] *See* World Health Organization, *Foreword to the Current International Health Regulations*, *at* http://www.who.int/csr/ihr/current/en/ (last visited Apr. 9, 2006) [hereinafter IHR].

monitor and control four serious diseases which had significant potential to spread between countries . . . ."[120] WHO generally divides the IHR's functions into four categories: notification of cases, health regulated rules for international trade and travel, health organization, and health documents required.[121] While all four categories are interrelated in serving the IHR's purpose, this analysis focuses on the disease notification requirements.

"WHO Member States are obliged to notify WHO for a single case of cholera, plague or yellow fever, occurring in humans in their territories, and give further notification when an area is free from infection."[122] On their face, current IHR notification requirements only apply to three diseases: cholera, plague, and yellow fever.[123] Specifically, Article 3(1) requires a Member State to notify WHO "within twenty-four hours of its being informed that the first case of a disease subject to the [IHR], that is neither an imported cases nor a transferred case, has occurred in its territory, and, within the subsequent twenty-four hours, notify the infected area."[124] Thus, if the 2002-2003 SARS outbreak in Guangdong had instead been an outbreak of cholera, plague, or yellow fever, Article 3(1) would apply and the Chinese government would have been bound to notify according to the IHR. Article 3(2) imposes similar obligations on Member States where one of the covered diseases is imported from another area.[125] Thus, to continue the above analogy, Article 3(2) applies to nations like Singapore, Vietnam, or Canada, if the 2002-2003 SARS epidemic facts had involved one of the three diseases covered by the IHR. When a Member State notifies WHO, WHO publishes the information in its *Weekly Epidemiological Record.*[126] Under Article 22 of the WHO Constitution, the IHR are binding on WHO Member States. In order to enter reservations to IHR provisions, a WHO Member State must actively "contract out" of provisions by notifying the WHO Director-General of its reservations according to mandated procedures.[127]

From both epidemiologic and legal perspectives, the IHR have not served their purpose.[128] The IHR's failings can be traced to a variety of

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[120] *See id.*
[121] *Id.*
[122] *Id.*
[123] IHR, *supra* note 119, at arts. 1, 3. Note that, while the IHR were originally introduced to assist in monitoring and preventing the spread of four diseases, smallpox was removed from the list in 1981. *See* FIDLER, *supra* note 6, at 62 n. 31.
[124] IHR, *supra* note 119, at art. 3(1).
[125] *See id.* at art. 3(2).
[126] *See* IHR, *supra* note 119.
[127] *See* FIDLER, *supra* note 6, at 59.
[128] *See id.* at 65.

factors endemic to the Regulations themselves, as well as the overarching legal structure within which they attempt to function. First of all, although the IHR apply only to plague, yellow fever, and cholera, the global community is tacitly aware of risks from diseases not within the IHR's ambit, such as HIV/AIDS, and other newly emerging infectious diseases.[129] Second, although the IHR prescribes certain state duties, like the duty to report, Member States often fail to comply even during outbreaks of the three explicitly covered diseases.[130] Third, WHO's enforcement measures are wholly inadequate.[131] From a prospective and preventative standpoint, "[n]o organ of WHO is empowered to investigate whether States have fulfilled their IHR obligations."[132] Moreover, even if WHO discovers after the fact that a state has not complied with its IHR obligations, neither the WHO Constitution nor the IHR give WHO authority to impose sanctions for the breach.[133] As an organization, WHO is generally powerless to enforce the very legal provisions necessary to serve its stated purpose.

This is not to say, however, that the WHO structure is without any enforcement provisions at all. While WHO, as an organization, may not penetrate state borders to enforce its mandate,[134] Article 93 of the IHR does provide for a dispute settlement mechanism between State parties.[135] Article 93 thus gives WHO Member States the right to submit disputes of "interpretation or application" of the IHR to WHO's Director-General.[136] If the Director-General does not resolve the dispute, he or she may direct the dispute to the "appropriate committee" within WHO for further consideration.[137] If the committee fails to resolve the dispute, final recourse may be had to the ICJ.[138] However, referral to the ICJ is only viable if the ICJ has pre-existing jurisdiction over both parties.[139]

Despite this elaborate dispute resolution scheme, practice suggests that either Member States do not take it seriously, that it is ineffective, or both. Although states frequently breach IHR duties, the IHR's formal

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[129] *Id.* at 66.
[130] *Id.* at 65.
[131] *Id.* at 96.
[132] *Id.*
[133] *See id.* at 68.
[134] Note, however, that while the IHR severely limit WHO's ability to penetrate the sanctified veil of state sovereignty, the principles encompassed in the preamble to the WHO Constitution evidence a broader role for WHO in effecting a global health governance mandate. *See Constitutional Outlines*, *supra* note 88, at 260-62.
[135] *See* IHR, *supra* note 119, at art. 93(1).
[136] *Id.*
[137] *Id.*
[138] *See* IHR, *supra* note 119, at art. 93(3).
[139] *See* FIDLER, *supra* note 6, at 68-69.

dispute resolution mechanism has only been utilized once,[140] and not at all in the past thirty years.[141] Further, no dispute under the IHR has ever been referred to the ICJ.[142] Professor Fidler suggests that this evidences that states prefer informal dispute resolution, which drives global health governance from the legal to the diplomatic realm.[143] In essence, inadequate dispute resolution and enforcement techniques frustrate WHO's very purpose, by driving states to pursue ad hoc political solutions at the expense of coordinated efforts.

Moreover, WHO, as an institution, "walks a fine line" in even monitoring, much less enforcing, violations of the IHR.[144] WHO has, to this point, relied on the cooperation of Member States to pursue its goals. However, if WHO is overzealous in its monitoring, Member States might refuse to cooperate in the future.[145] Without either the authority or the willingness to impose coercive measures on an *ex post facto* basis, thus giving WHO Member States incentive to voluntarily comply with their monitoring duties, it is unlikely that WHO will alter its reluctance to effectively monitor Member State reporting in the near future.[146]

The lack of an effective enforcement and monitoring system harms the international global health governance regime as a whole. Obviously, direct non-compliance with a duty to report hinders the international community's efforts to prevent international disease spread, because without adequate knowledge of outbreaks, it is difficult for states to take appropriate defensive measures. However, just as deleterious, lack of faith in the strength and efficacy of WHO's monitoring regime causes states to adopt excessive prevention measures at the slightest hint of the risk of a global outbreak.[147] When States cannot trust that other Member States will honestly and effectively report disease outbreaks, and that WHO, as an international organization, is adequately protecting their national interests, they are more likely to adopt the maximum possible efforts to protect their own interests.[148] This not only harms related international trade and travel, but also discourages Member States from reporting outbreaks in the future for fear that any preventive measures adopted against them will outweigh the severity of the actual

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[140] *Id.* at 95.
[141] *Id.* at 69 n. 87.
[142] *Id.*
[143] *Id.* at 95.
[144] *See* FIDLER, *supra* note 6, at 98.
[145] *Id.*
[146] While proposed revisions to the IHR would strengthen the monitoring provisions of the IHR, WHO's general reluctance to enforce monitoring provisions calls into question whether these stronger measures will survive past ratification. *Id.*
[147] *Id.* at 68.
[148] *Id.*

circumstances.[149] This vicious cycle further underscores the need for a legitimate reporting regime, on which the nations of the world can effectively rely.

As a whole, international law has proved both under-qualified and under-utilized in serving the needs of effective global health governance.[150] WHO's reluctance to use international law as a means of effectively preventing the international spread of infectious disease removes a powerful weapon from the international community's arsenal. Instead of utilizing international law, WHO has generally chosen "soft measures" to achieve its objectives, issuing non-binding resolutions under Article 23 of the WHO Constitution,[151] or, as first employed during the SARS crisis, travel advisories,[152] hoping to induce Member States' compliance. Professor Fidler suggests that "sovereignty concerns of Member States force WHO to work through non-binding advice."[153] However, the consequences of a future disease outbreak are too dire to defer the world's safety in favor of short-sighted desires for near-absolute sovereignty. It is time to enhance global security by giving international law a greater and more forceful role in global health governance.

Given the current state of both WHO's mindset and the IHR, it is not possible to derive a binding duty to report SARS outbreaks, or similar emerging infectious disease outbreaks, from the IHR alone.[154] Indeed, analysis of WHO's role, and the tools that it has at its disposal, provides a bleak outlook towards the prospects of international law's role in fighting global infectious disease epidemics. As the customary international law of global health governance grows from international agreements,[155] Professor Fidler argues that the narrow scope of the IHR reflects a correspondingly narrow recognition of duties, in state practice, to report infectious diseases.[156] However, recent developments in both the body of international health law as well as state practice during the SARS crisis indicate a recognized duty to report or, at least, an appreciation of the importance of state reporting of infectious disease outbreaks, during the 2002-2003 SARS epidemic and today.

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[149] *Id.*
[150] *See* FIDLER, *supra* note 6, at 60-61.
[151] *See id.*
[152] *See Travel Advisory*, *supra* note 59.
[153] *See* FIDLER, *supra* note 6, at 69.
[154] *Id.* at 106-07.
[155] As opposed to international agreements representing a codification of preexisting customary international law, as may be the case with agreements like the Vienna Conventions on the Law of Consular and Diplomatic Relations, or the Vienna Convention on the Law of Treaties.
[156] *See* FIDLER, *supra* note 6, at 106-07.

First of all, in 1995, WHO began a process to revise and strengthen the IHR.[157] To date, the revision process has yet to bear any actual fruit,[158] but the revisions proposed by the Intergovernmental Working Group on the Revision of the International Health Regulations[159] provide insight into the current body of effective global health governance. The most significant proposed revision expands a Member State's duty to report infectious diseases from merely yellow fever, plague, and cholera to "all events potentially constituting a public health emergency of international concern within their territories . . . ."[160] Such events are defined according to a decision tree,[161] directing affected Member States to answer the following questions: (1) Is the event serious?; (2) is the event unexpected?; (3) is there a significant risk of international spread; and (4) is there a significant risk of international restriction(s) to travel and trade?[162] Member States are further guided by a series of criteria to consider in answering each of these questions. Moreover, once an affected Member State has notified WHO, the proposed revisions require the Member State to continue to make "timely, accurate, and sufficiently detailed" reports.[163] In order to safeguard Member States' interests and protect them from potentially excessive reactions by other states, the proposed revisions require WHO to delay disclosure of an affected Member State's report until the severity of the situation is verified.[164] These provisions recognize inadequacies in the scope of the current IHR reporting duties and seek to create a broader, more flexible duty to report, while protecting the legitimate local interests of affected Member States. The proposed revisions thus place responsibility where it belongs: in the first instance, on the affected Member State to fulfill its burden to report and, in the second instance, on

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[157] *Id.* at 71.

[158] *See* World Health Organization, *Revision Process of the International Health Regulations*, *at* http://www.who.int/csr/ihr/revision/en/ (last visited Apr. 9, 2006) [hereinafter *Revision Process of the IHR*]. In characteristic form, WHO has issued multiple non-binding resolutions calling for international cooperation, commitment to IHR revisions, and establishment of working groups. *See id.* However, to date, the *proposed* revisions have yet to become *actual* revisions. *See id.*

[159] This is the body designated by the World Health Assembly to spearhead the proposed revisions. *See id.*; *see also* World Health Organization, *Revision of the International Health Regulations*, *at* http://www.who.int/gb/ghs/e/index.html#IGWG1 (providing a detailed agenda of the Intergovernmental Working Group on the Revision of the International Health regulations) (last visited Apr. 9, 2006).

[160] *See IHR: Working Paper for Regional Consultations*, art. 5(1), *at* http://www.who.int/csr/resources/publications/IGWG_IHR_WP12_03-en.pdf (last visited Apr. 9, 2006) [hereinafter *IHR Provisional Draft*].

[161] *See id.* annex II.

[162] *See Revision Process of the IHR*, *supra* note 159; *see also IHR Provisional Draft*, *supra* note 160, annex II.

[163] *See IHR Provisional Draft*, *supra* note 160, at art. 5(3).

[164] *See id.* at art. 5(2).

WHO, the body that can best balance the relevant interests, and then formulate and coordinate a proper and effective response.

In addition, the proposed revisions to the IHR allow WHO to operate outside the governmental framework. The proposed revisions give WHO the authority to note and act on "reports from sources other than notifications or consultations."[165] In practice, this gives WHO the authority to act on information from entities like NGOs and whistleblowers, which can prove essential in situations like the 2002-2003 SARS epidemic, when the affected Member State's government either fails to act or frustrates efforts to disseminate information. To an extent, this is a move away from the sanctity of state sovereignty that permeates the current global health governance regime.

However, note that the proposed revisions also limit WHO's authority to unilaterally act on such reports. In response to sources other than notifications or consultations by Member States under the IHR, WHO must work with organs of the affected Member State's government to verify the reports.[166] Yet, upon WHO's request, the Member State is obligated to both verify the rumors in a timely fashion and collaborate with WHO in assessing the severity of the international implications of the outbreak.[167] Thus, the proposed revisions give WHO greater monitoring and enforcement powers. This departure from the state-centered system reflects not only the acknowledgment that Member States' governments are not always trustworthy in the field of global health governance, but also that the duty to report is so important that effective enforcement requires significant piercing of the sanctified sovereign framework. This signals a crucial shift in the international community's mindset. As the consequences of the international spread of infectious disease become more immediate and severe, states acknowledge the importance of a stronger, more invasive international legal structure to serve the world's needs.

Of course, WHO has not yet implemented the proposed revisions. As such, the above discussed principles are not yet part of the body of binding international treaty law. Nevertheless, the World Health Assembly issued a resolution in the midst of the SARS crisis which crystallized the revisions' intent by explicitly calling for all nations to implement effective systems of timely and transparent reporting.[168] Ultimately, the IHR framework demonstrates that "[i]nternational legal

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[165] *Id.* at art. 7(1).
[166] *Id.* at art. 8(1).
[167] *Id.* at arts. 8(2), 8(3).
[168] *See* WHA56.29 (May 16, 2003), *available at* http://www.who.int/gb/ebwha/pdf_files/WHA56/ea56r29.pdf; *see also* Heymann & Rodier, *supra* note 15, at 242.

rules are still needed to provide a foundation for global surveillance and to discipline States in their application of public health measures."[169] The IHR, and their proposed revisions reflect the duties and responsibilities that the global community expects from fellow states. Thus, the proposed revisions to the IHR give body to a state's otherwise vague obligations in global health governance.

Indeed, state practice during the SARS epidemic generally reflects a clear international awareness that disease reporting is essential to the maintenance of effective global health governance and, arguably, a recognized duty in customary international law to report diseases like SARS. With the exception of mainland China, every SARS-afflicted nation and locality promptly reported the cases of SARS within its territory to WHO, facilitating effective containment and response.[170] Nations like Vietnam, Canada, Singapore, South Africa and India were widely lauded for their open and honest reporting of SARS cases and effective cooperation to curtail spread of the disease.[171] Whether states view reporting as an obligation constituting *opinio juris* or simply a general awareness that disease reporting is in the interests of the world community, either a moral or legal obligation to report was embraced by the international community as a whole during the SARS epidemic. This further indicates that state sovereignty concerns are no longer a valid excuse for a state's failure to report diseases which pose international threat. This constitutes recognition of an international interest in the domestic health affairs of sovereign states, at least with respect to the reporting choices that governments make in response to disease outbreaks within their national boundaries.[172]

B. The "Right to Health," the ICESCR, and General State Commitments

On a broader scale, most states, including China, have, through various international agreements, committed to protect or maintain global health standards in some form. The United Nations Charter, to which

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[169] *See* FIDLER, *supra* note 6, at 79.

[170] *See generally* World Health Organization, *Severe Acute Respiratory Syndrome (SARS): Status of the Outbreak and Lessons for the Immediate Future* (May 20, 2003), *at* http://www.who.int/csr/media/sars_wha.pdf [hereinafter *SARS: Status of the Outbreak*]; *see also Constitutional Outlines*, *supra* note 88, at 269.

[171] *See SARS: Political Pathology*, *supra* note 21, at 494; *see also SARS: Status of the Outbreak*, *supra* note 171, at 10.

[172] *Cf. SARS: Political Pathology*, *supra* note 21, at 488 (observing that SARS post-Westphalian shift acknowledges international interest in the health conditions within a sovereign state, in an effort to fight the disease at its source, also evidenced by a greater push for the human right to the "highest attainable standard of health.").

"virtually all independent states of the world" are party,[173] commits Member States to "promote . . . solutions of international . . . health, and related problems . . . ."[174] In today's legal framework, human rights law most strongly commits states to the protection of global health standards.[175] Indeed, despite the elaborate legal framework established by WHO, many public health experts prefer to utilize human rights law to protect global public health.[176]

The concept of a "right to health" predates the United Nations Charter, finding roots in the 19th century's public health movement in Europe and the United States promoting sanitary measures to curb the spread of infectious disease through international trade.[177] This movement gave body to a notion that "governments had a fundamental duty to provide for and protect the public's health . . . ."[178] More recently, bedrock agreements like the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[179] and the International Covenant on Civil and Political Rights ("ICCPR")[180] embody commitments, in some form, to the promotion and protection of public health. More focused agreements, such as the WHO Constitution, also address general commitments to the protection of public health.[181]

Article 12(2) of the ICESCR commits State parties to recognition of "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[182] State parties are further directed to take steps "necessary for . . . [t]he prevention, treatment, and control of epidemic, endemic, occupational, and other diseases . . . ."[183]

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[173] *See* THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 45 (3d ed. 2002).

[174] U.N. CHARTER art. 55(b).

[175] *See* Taylor, *supra* note 17, at 502.

[176] *See* FIDLER, *supra* note 6, at 170. Likewise, human rights enthusiasts and experts are beginning to take greater interest in the field of global health, as the link between human rights and global public health grows both tighter and stronger. *See id.*

[177] *See id.* at 180.

[178] *Id.*

[179] International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 [hereinafter ICESCR]. China signed the ICESCR on October 27, 1997 and ratified it on March 27, 2001.

[180] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 [hereinafter ICCPR]. China signed the ICCPR on October 5, 1998, but has not yet ratified it. Both because China has not yet ratified the ICCPR and also because, in the context of global health governance, the ICCPR applies mostly to discussions of a state's power to enforce quarantine and not with states' affirmative health duties, our discussion focuses on the ICESCR. Note, however, that in reference to the first sentence of Article 6 of the ICCPR ("Every human being has the inherent right to life."), "the Human Rights Committee under the ICCPR has interpreted the right to life to include not only restriction on the exercise of State power against an individual but also the State's duty to prevent and control disease epidemics." *See* FIDLER, *supra* note 6, at 194.

[181] *See Constitutional Outlines*, *supra* note 88, at 260-61.

[182] *See* ICESCR, *supra* note 179, at art. 12, para. 2.

[183] *Id.*

Needless to say, the terms and commitments are broadly worded, and effective enforcement of Article 12(2) requires, at the least, further exploration of the principles encompassed therein.[184] Moreover, the duties that the ICESCR imposes on State parties are qualified by the principle of progressive realization, embodied in Article 2 of the agreement.[185]

Unfortunately, the right to health as embodied in the ICESCR and committed to by State parties is broad and vague—perhaps too broad and vague for practical application. However, defining a "minimum content" of the right to health—in essence identifying the lowest set of standards to which a state must adhere in order to fulfill its legal obligations in global health governance—gives body to an otherwise elusive legal concept.[186] The somewhat recent convergence of international human rights law and global health law suggests that the instruments and principles constituting each discipline converge to set minimum state commitments. The minimum standards delineating a State party's obligations under the ICESCR must come from the principles drawn from the IHR. That is, the standards that support a duty to report under the IHR, their proposed revisions, and subsequent state practice can constitute the minimum standards to which states, including China, have committed themselves under the ICESCR.

In practice, some critics argue that imposing minimum core obligations may be nearly impossible due to the lack of an adequate monitoring system.[187] However, from a liability standpoint, monitoring is only relevant on an *ex ante* basis. Within the context of an *ex post facto* suit, a claimant would bear the burden of proof for exposing the defendant's failures, which would presumably lie at the heart of the claimant's suit. Thus, though it may be extremely difficult to monitor *ex ante* whether a state is fulfilling its minimum core obligations for the purposes of preventing an international outbreak from occurring in the first place, a plaintiff in an *ex post* liability suit need only prove, with the considerable benefits of hindsight, that the defendant-state failed to fulfill its minimum core obligations.

Assuming that a state's duty to report is part of the minimum core of the right to health, a state like China is sure to raise a defense based on

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[184] *See* FIDLER, *supra* note 6, at 197.

[185] *See* ICESCR, *supra* note 179, at art. 2, para. 1 ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

[186] *See* FIDLER, *supra* note 6, at 186.

[187] *See id.* at 197.

the principle of progressive realization. Within the global health context, progressive realization embodies two principles: First, that "the ability of States to fulfill their right to health differs because their economic resources differ"; and, second, that "the different levels of economic development, combined with other factors such as different climatic conditions, mean that not all countries will enjoy an equivalent standard of health."[188] This standard is based on the oft-heard proposition that it is unfair to hold developing nations to the same standards as developed nations, both because developing nations' resources are more limited and because developed nations derive disproportionate benefits from the capital expended by the developing nations.

Neither of these claims is wholly without merit in the context of a duty to report. It is feasible that a developing nation with limited resources may, because of limited infrastructure and resources, be unaware of a disease outbreak within its sovereign boundaries. Likewise, certain developing nations have climates more prone to infectious disease outbreaks, and a duty to report may affect their international trade and travel more frequently and heavily than developed nations, while the developed nations reap the many benefits of trade with the affected states on the backs of the developing nations' expenditures.

WHO's framework disposes of the latter objection in the given context. Under the IHR's proposed revisions, and based on WHO's inclination to protect individual state interests to the fullest extent, WHO both maintains confidentiality of disease reports unless the severity justifies disclosure[189] and contributes resources necessary to contain and treat the outbreak if the situation so requires.[190] Thus, through WHO's involvement, developing nations do not bear the full, or even disproportionate, cost of reporting diseases. The former objection, however, requires implementation of the proper liability construct. In determining a breach of duty, applying a gross negligence standard of care, which requires a lack of "good faith," protects governments that are unaware of disease outbreaks for lack of adequate resources.[191]

C. China's Domestic Laws

In addition, the right to health gains support from domestic laws.[192] For the present analysis, China's domestic law is most relevant.

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[188] *Id.* at 183-84.
[189] *IHR Provisional Draft*, *supra* note 160, at art. 5(2)
[190] *Id. at* art. 10.
[191] Explored more fully below.
[192] *Cf.* FIDLER, *supra* note 6, at 181.

Article 1 of China's pre-SARS Law on Infectious Disease Prevention and Control establishes laws "in order to prevent, control, and eradicate the occurrence and spread of infectious disease . . . ."[193] From the outset, the Chinese government, in its own laws, recognizes the paramount need to take necessary measures to prevent, control and, to the extent possible, eradicate the spread of infectious diseases.

China's pre-SARS measures, applicable at the time of the 2002-2003 SARS epidemic, include a domestic duty to report. Chapter Three of the Law of the People's Republic of China on Infectious Disease Prevention and Control deals with "Reporting and Publication of Epidemic Conditions."[194] Articles 21 through 23 of China's framework outline the responsibilities of various domestic actors, from individual citizens to the State Council.[195] [196] Article 21 first requires "[a]ny person who discovers infectious disease patients or suspected infectious disease patients" to report the cases to the "nearest medical wellness agency or health immunization agency."[197] It further directs relevant health personnel on the reporting procedures for various classifications of diseases, directing a general flow of upward reporting within relevant administrative agencies.[198] This article demonstrates that the Chinese government was aware that adequate information flow to the proper, competent authorities is crucial to an effective disease control regime.

Article 22 instructs "managers of all levels of government and those who are involved in medical wellness, health immunization, and management and guidance" not to "conceal, deceive, or coerce others to conceal or deceive in reporting epidemic conditions."[199] Within the context of the Chinese government's response to SARS, Article 22 is especially significant for two reasons: first, it indicates that the Chinese government was aware at the national level that a deceptive cover-up

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[193] *See* 中华人民共和国传染病防治法 [Law on Infectious Disease Prevention and Control] art. 1 (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 21, 1989, effective Sep. 1, 1989) (P.R.C.), *as translated in China's Pre-SARS Legal Framework for Disease Control*, 36 CHINESE L. & GOV. 58, 58-75 (2003) [hereinafter Law on Infectious Disease Prevention and Control]. The Standing Committee of the National People's Congress revised the law on August 28, 2004, but citations herein are to the pre-revised version of the law that was in effect at the time of the 2002-2003 SARS epidemic. For the post-SARS revisions of 2004, see 中华人民共和国传染病防治法 [Law on Infectious Disease Prevention and Control] (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 21, 1989, effective Sep. 1, 1989, as revised through August 28, 2004) (P.R.C), *available at* http://www.law-lib.com/law/law_view.asp?id=86441 (last visited Feb. 24, 2006).

[194] *See id.*

[195] *Id.*

[196] Along with the National People's Congress, the State Council is China's highest legislative body.

[197] *See* Law on Infectious Disease Prevention and Control, *supra* note 193, at art. 21.

[198] *Id.*

[199] *Id.* at art. 22.

effort was highly likely within the Chinese government framework, and, second, it shows that the Chinese government, on a domestic level, believed that transparent information flow within the government structure was the best policy of infectious disease control, prevention, and eradication.

Likewise, Article 23 orders "State Council health administrative agencies" to "promptly broadcast and publicize epidemic conditions," and allows them the option to give the same broadcasting rights to "each province, autonomous region, and direct governance municipality's health administrative agencies within their respective areas of jurisdiction."[200] Interestingly, Article 23 embodies a spirit of openness and transparency not only within the government, but with the public as well. Further, Article 23 indicates a realization that effective information flow may not necessarily rest with the organs of central government alone, but may rely on dissemination of information by and to China's localities. Taken alone, Article 23 goes even further than the IHR by mandating the State Council to publicize epidemic conditions, where, on the international plane, WHO has discretion on whether to publicize outbreak information, depending on how it reads the best interests of the global community.

As a whole, pre-SARS China seems to have had the paragon of disease reporting regimes, embracing rapid and transparent information flow both within the government and from the government to the people. The Chinese government was thus fully aware of the value of a rapid, transparent, and honest reporting requirement to the control of infectious disease, lending more body and substance to the government's duties to protect the right to health. Furthermore, it undercuts any defense China might proffer that imposition of a duty to report imposes a culturally relativistic and wholly foreign standard on China, in violation of Chinese sovereignty or cultural autonomy. Finally, it indicates a self-awareness of the importance of honesty and transparency in a disease reporting regime. Although China's pre-SARS framework limits its reporting requirements to the domestic realm, in light of the Chinese government's international obligations as a Member State of WHO and a State party to the ICESCR, the emphasis on domestic information flow in combating infectious disease outbreaks further supports China's duty to report domestic outbreaks in a good faith effort to prevent international disease spread.

Interestingly, notwithstanding the pre-SARS framework, given that China had an elaborate disease reporting and response system designed on paper, what ultimately went wrong in practice? That is, if

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[200] *Id.* at art. 23.

China's own disease control legislation mandated practice that so grossly deviated from China's actual response, what caused the disparity between theory and practice? It is in answering this question that the factual case against China is ultimately made.

D. State Responsibility and Customary International Law

Violations based on the IHR and the ICESCR are based on treaties. However, Article 38(1) of the ICJ statute also refers to the *corpus juris* of customary international law as a source of international law and, thus, international duties. One tool of customary international law, applied to enforce the rights of a harmed state against another state that has breached its international duties, is the doctrine of state responsibility, or "abuse of rights."

The "abuse of rights" doctrine is based on the principle of *sic utere tuo ut alienum non laedas*[201]—"so use your own as not to injure another's property."[202] The ICJ established this controversial doctrine[203] as a principle of customary international law in noting "every State's obligation not to allow knowingly its territory to be used contrary to the rights of other states."[204] The doctrine, however, is generally applied in the context of international environmental law, specifically with regard to interstate pollution, going back to the *Trail Smelter* arbitration.[205]

The *Trail Smelter* arbitration dealt with a cross-border pollution dispute between the United States and Canada.[206] Sulfur dioxide emissions from an ore smelter in Trail, British Columbia regularly and consistently harmed land, crops, property, and land improvements in Newport, Oregon, causing residual economic loss.[207] After repeated cycles of damage and payment by the smelter, the United States ultimately submitted a claim to the Canadian government.[208] The United States and Canadian governments signed a bilateral Convention, agreeing

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[201] *Developments in the Law - International Environmental Law*, 104 HARV. L. REV. 1492, 1496 (1991) [hereinafter *Developments in the Law*].

[202] BLACK'S LAW DICTIONARY 1690 (7th ed. 1999).

[203] *See* FIDLER, *supra* note 6, at 108.

[204] *See* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9) (determination on the merits), *quoted in* ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 182 (3d ed. 2004).

[205] Trail Smelter (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1938) (initial decision), *further proceedings*, 3 R. Int'l Arb. Awards 1938 (1941) (final decision).

[206] *See* KISS & SHELTON, *supra* note 204, at 182.

[207] *Id.* at 182-83. The United States also claimed damages for an "infringement on United States sovereignty, but the arbitral tribunal found that the Convention on which the arbitration was based did not authorize consideration of harm to United States sovereignty. *Id.* at 183 n. 3.

[208] *Id.* at 183.

to submit the matter to arbitration.[209] In the end, the arbitral tribunal awarded damages to the United States for the period covered by the Convention.[210] In dicta, the tribunal stated, "[u]nder the principles of international law . . . no state has the right to use or permit the use of its territory in such a manner as to cause [environmental] injury . . . to the territory of another or the properties of persons therein . . . ."[211] While the tribunal grounded Canada's breach of duty in "the obligations that international law places on each State,"[212] it referred to the principles in the Convention itself to give substance to these obligations.[213] Moreover, the tribunal examined relevant *domestic* law: specifically, decisions of the United States Supreme Court concerning air and water pollution, to round-out its analysis.[214]

The *Trail Smelter* arbitration established two important principles. First, from a theoretical perspective, it recognized state liability for cross-border harm, even where a party within the state, and not necessarily the state itself, committed the tortious act.[215] Thus, the state government is responsible for not taking appropriate action within its borders to prevent the occurrence of the harm.[216] Second, from a practical perspective, the Convention and tribunal focused on resolving the case at hand. The parties cooperated to face and solve the problem, rather than avoiding the problem in order to avoid dealing with difficult questions of liability and sovereignty.[217]

Of course, reconciliation of the two principles at issue—international liability and sovereignty—is rife with contradiction. On the one hand, a state owes duties to those outside of its sovereign boundaries while, on the other hand, a state is free to exercise its will freely within the confines of those same boundaries.[218] In practice, the principle requires states to exercise due diligence to prevent damages to the territory of another state.[219] Thus, the principle seeks to serve its purpose by regulating the conduct of states rather than focusing on the results of

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[209] *Id.*
[210] *Id.*
[211] *See* Trail Smelter, 3 R. Int'l Arb. Awards at 1965, *quoted in Developments in the Law*, *supra* note 201, at 1496-97.
[212] KISS & SHELTON, *supra* note 204, at 185.
[213] *See id.* at 184.
[214] *Id.*
[215] *Id.* at 185.
[216] *Id.*
[217] *Id.*
[218] *See* BUERGENTHAL & MURPHY, *supra* note 173, at 305.
[219] *See id.*

the State action or lack thereof.[220] Breach of the duty lies in the conduct, and not the harm.

To this end, some modern theorists have proposed to impose a set of procedural requirements that a state must follow in order to avoid liability for injurious actions to other states.[221] To use the *Trail Smelter* facts as an example, Canada would be procedurally duty-bound to inform the United States that it was constructing a factory in Trail, British Columbia, and that, to the extent foreseeable, sulfur dioxide emissions might harm property in Oregon. In such a regime, a violating state may be liable *before* any harm has actually occurred.[222] Such a regime has obvious advantages, in that, if it works as planned, it may prevent harm before the harm is inflicted.[223] However, from a practical perspective, it does not provide enough deference to state sovereignty. It is highly unlikely and impractical that any state would submit to a regime in which their every action or inaction may be questioned. Moreover, liability without harm is far too expensive and inefficient to serve its purposes. For instance, states may fail to report all disease outbreaks to WHO; but not all outbreaks actually result in epidemics as did SARS in 2002-2003.[224]

This is not to say that procedural requirements are not useful in determining international liability. Indeed, because a disease outbreak reduces a state's capacity to deal with the outbreak just when the state most needs its resources,[225] it is important to structure liability so that an affected state has the incentive to report the outbreak in a timely fashion, thus allowing international organizations, like WHO, and the international community as a whole, the opportunity to assist the affected state before the disease spreads internationally. Thus, breach of a procedural duty should be the key focus of an international liability construct, but actual harm should also be necessary for a claimant to have standing to bring suit.

Yet, within the global health governance context, why focus on a duty to report over other possible duties? A variety of factors favor emphasizing a duty to report. First, both evidence and analysis of the SARS epidemic indicate that open and honest reporting of disease

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[220] *See id.*

[221] *See Developments in the Law*, *supra* note 201, at 1493.

[222] *Id.*

[223] *See id.* at 1493.

[224] *See, e.g.*, Lawrence O. Gostin, *Anniversary Essay: World Health Law: Toward a New Conception of Global Health Governance for the 21st Century*, 5 YALE J. HEALTH POL'Y, L. & ETHICS 413, 416-17 (2005), citing outbreaks of cholera in Peru, plague in India, and Ebola hemorrhagic fever in Zaire. Though potentially dangerous to the international community, these instances did not see international spread.

[225] *See* Huang, *supra* note 4, at 131.

outbreaks is, if not the most effective procedural action a state can take in preventing international spread, at least a crucial catalyst in allowing another state to prevent the disease from penetrating its borders. As two of the top members of WHO's Communicable Diseases Team note, the most important lesson that the SARS epidemic has taught is "the need to report, promptly and openly, cases of any disease with the potential for international spread in a closely inter-connected and highly mobile world."[226] Indeed, medical solutions aside, the ability to effectively prevent another international epidemic rests almost entirely on effective disease surveillance and early reporting systems.[227] In addition, Doctors Heymann and Rodier note the success of timely global alerts and travel recommendations in slowing and eventually stopping the spread of SARS.[228] These devices are at best severely inhibited and at worst unfeasible without timely and accurate information. Doctors Heymann and Rodier also note the roles that a "responsible press" and "electronic communications" play in aiding the effective spread of information.[229] It is telling that, in nations like Vietnam, where the political leaders "promptly acknowledged the SARS threat at an early stage in the outbreak and sought international help," SARS was effectively contained and casualties, while tragic nonetheless, were kept to a minimum.[230] Meanwhile, in China, where the government initially adopted a deceptive approach, the SARS epidemic was much more severe.[231]

Second, imposing a duty to report is relatively cheap, effective, and noninvasive, from both a state's perspective and a global perspective, as compared to imposing a duty to improve health care systems or shut national borders when an outbreak occurs. Indeed, compliance with a duty to report in today's global society is quite cheap for the complying state. While WHO leaves much to be desired in the field of international health law, SARS proved that WHO is eminently prepared to handle the epidemiological aspects of disease control, helping to defray the costs of dealing with outbreaks once reported. Among its chief attributes, the duty to report gives WHO a chance to intervene in a timely fashion and

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[226] *See* Heymann & Rodier, *supra* note 15, at 234.
[227] *See* Breiman et al., *supra* note 22, at 62.
[228] *See* Heymann & Rodier, *supra* note 15, at 234-35 ("Second, timely global alerts can prevent imported cases from igniting big outbreaks in new areas. Third, travel recommendations, including screening measures at airports, help to contain the international spread of an emerging infection.").
[229] *Id.* at 243 ("[T]imely global alerts, especially when widely supported by a responsible press and amplified by electronic communications, worked well to raise awareness and vigilance to levels that can prevent imported cases of an emerging and transmissible infection from causing significant outbreaks.").
[230] *See* Monaghan, *supra* note 2, at 260-61; *see also* Heymann & Rodier, *supra* note 16, at 243.
[231] *See* Monaghan, *supra* note 2, at 260-61.

assist in treating a disease at its source before it has a chance to spread domestically or internationally.

Third, reporting bolsters international confidence. While a disease report might adversely affect a state's revenues from trade and tourism, SARS shows that secrecy is proportionately more damaging. Consistent, accurate, and honest reporting of disease outbreaks, coupled with the assistance of WHO and the global community in fighting those outbreaks before they become pandemics, ultimately nullifies the downsides of disease reporting. For example, if the world's companies and citizens are confident that they are getting honest information from the government of State A, then they are less likely to irrationally overreact when there is news of a disease outbreak in State A. Where outbreaks are so severe that international assistance and honest reporting do not counter the adverse effects, a balance of interests clearly indicates that affected areas should not, during the outbreak, engage in trade and tourism, for risk of further disease spread.

An imposed duty to report infectious disease outbreaks is wise. However, what role does it play in the practical application of the "abuse of rights" doctrine? As applied, state responsibility analysis is generally grounded on a violation of some legally binding international duty.[232] Notably, international tribunals faced with the question of finding a breach of state responsibility on the grounds of customary environmental law have strained to decide the cases on other grounds, most notably formally binding international obligations.[233] To that extent, an adjudicating body can look to China's commitments under Article 12(2) of the ICESCR, as given body by the WHO Constitution, the IHR, current international consciousness towards infectious disease reporting, and China's domestic laws, as discussed above. Moreover, in light of these various factors, the above noted state practice of reporting SARS, excepting China, provides strong grounds for recognizing a customary duty to report infectious diseases of international significance. Whether recognition of the duty is through convention or custom, it is inconceivable that the Chinese government's willful attempt to cover-up the SARS outbreak, despite the obvious risk to interests of other states,

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[232] *See* FIDLER, *supra* note 6, at 106-07.

[233] *See Developments in the Law, supra* note 202, at 1500-01. For example, in the *Nuclear Tests* cases (Austl. v. Fr.), 1974 I.C.J. 253, 267-72 (Judgment of Dec. 20); (N.Z. v. Fr.), 1974 I.C.J. 457, 472-78 (Judgment of Dec. 20), the ICJ decided the case based on allegedly binding statements made by the French government to refrain from further atmospheric nuclear tests. *See Developments in the Law, supra* note 201, at 1500-01. Likewise, cases of trans-boundary environmental pollution like the *Trail Smelter* arbitration, 3 R. Int'l Arb. Awards 1905, the *Lac Lanoux* case, *see* (Sp. v. Fr.), 12 R. Int'l Arb. Awards 281, 317 (1956), and the *Gut Dam* claims, *see* (Can. v. U.S.), 8 I.L.M. 114, 121 (1969), all relied, to some degree, on existing treaty obligations between the parties. *See Developments in the Law, supra* note 201, at 1500-01.

does not violate the idea that one state must not knowingly use its territory in a manner contrary to the rights of other states. Ultimately, a knowing attempt to cover up an inherently dangerous infectious disease outbreak seems exactly the type of situation that the "abuse of rights" doctrine was designed to address.

Still, because the "abuse of rights" doctrine is not frequently used in international litigation and arbitration, it lacks a degree of formal and authoritative substance.[234] Perhaps the problem lies not in a failure of the international community to develop a legal standard upon which *sic utere* is applied, but in the failure of states to actually press valid claims when the opportunity arises, for fear that any precedent will be turned back on them later.[235] Indeed, this problem pervades international health law and global health governance. As SARS and the Chinese response demonstrate, the hour is too late and the consequences of inaction too dire to allow this trend to continue.

V. BREACH & CAUSATION: THE CASE AGAINST CHINA

A. Breach: How and Why Did China Fail?

The Chayeses identify three main reasons why states violate treaties, which apply to violations of general international obligations as well. The first reason is "ambiguity or indeterminacy of treaty language," or, by extension, uncertainty as to the ultimate content of the relevant international obligations.[236] While China may argue indeterminacy of an actual duty to report in its response to SARS, the above analysis shows both that a duty to report was recognized among the global community and that China, itself, recognized such a duty on the domestic level.

The second reason is "limitations on the capacity of parties to carry out their undertakings."[237] The third reason is "the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties."[238] Both of these reasons played significant parts in China's response to the SARS crisis, starting on the domestic level but, as SARS spread internationally, resulting in China's breach of its international obligations. However, international law cannot allow either

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[234] *See Developments in the Law*, *supra* note 201, at 1501.
[235] *See* Ian Brownlie, *State Responsibility and International Environmental Law*, 44 J. INT'L AFF. 457, 463 (1991), *as cited in* FIDLER, *supra* note 6, at 254.
[236] THE NEW SOVEREIGNTY, *supra* note 9, at 10.
[237] *Id.*
[238] *Id.*

of these reasons to excuse China's failure to comply with a duty to report SARS.

The Chinese government's failure to adequately report the SARS outbreak was not, *per se*, a lack of capacity in the sense that the government was unaware of SARS, or that they lacked the institutional resources to comply with their duty to report.[239] The Chinese government, at some level, knew of the disease in January,[240] but the Chinese government did not formally adopt a policy of open and transparent reporting until mid-April.[241] Even after the central government adopted a formal policy of openness and honesty in SARS reporting, manipulation of SARS data remained a serious problem.[242] China's failures during the SARS crisis reflect not a debilitating lack of capacity in resources, but an endemic lack of capacity in the form and structure of its political system.[243] Ultimately, China's fatal capacity weaknesses lie in the content of its laws and the nature of its bureaucracy.

First of all, although China's pre-SARS legal framework seemingly constructed an idyllic reporting system, the interplay with another body of law—China's State Secrets Law—tells a different story.[244] According to China's Implementing Regulations on the State Secrets Law, "any occurrence of infectious diseases should be classified as a state secret before they are 'announced by the Ministry of Health or organs authorized by the Ministry.'"[245] Thus, by default, infectious disease outbreaks constitute state secrets. Aside from the quirky tragedy that the initial report on SARS sat unopened because no person of sufficient security clearance was in the Guangdong Health Ministry to open it,[246] this also means that, until the Ministry of Health decides that news of a disease outbreak is ripe for reporting, any person who reports it can be prosecuted for leaking state secrets.[247] Moreover, the classified security designation meant that the Guangdong health authorities could not alert other localities within China, which ultimately increased disease spread when hospitals admitted SARS patients and exacerbated risk from

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[239] However, inadequacy of resources to effectively control and contain SARS did, of course, play a supporting role in Chinese local governments' responses to SARS, as it was easier for local governments to distort reports of SARS figures than to actually prevent disease transmission to accurately reflect the figures reported. *See* White, *supra* note 35, at 36.

[240] *See* Huang, *supra* note 4, at 120.

[241] *China Orders End to SARS Coverup*, *supra* note 7.

[242] *See* Huang, *supra* note 4, at 128.

[243] *See id.* at 117.

[244] *See id.* at 118.

[245] *Id.*

[246] *See id.* at 120.

[247] *See* Huang, *supra* note 4, at 118.

an international perspective.[248] Indeed, the top-secret classification of the SARS information prevented Hong Kong health authorities from receiving information about the outbreak, preventing them from adequately preparing for the disease.[249] Tragically, Hong Kong became one of the main hubs of international transmission.[250]

The wide scope of China's security laws, especially in conjunction with its pre-SARS legal framework, also effectively quashes the presence of domestic Chinese non-governmental organizations ("NGOs"), which, as the proposed revisions to the IHR highlight, are highly functional in the dissemination of information and the prevention of disease spread.[251] Likewise, reports indicate that common citizens were branded as "rumor spreaders" and arrested for casually relaying SARS-related information to friends and colleagues.[252] Even the post-SARS Regulations on Public Health Emergencies maintain stringent controls over the publicly circulating information.[253] Of course, the Chinese government is not liable for the failure to tolerate influential non-state actors or foster freedom of speech; but this indicates that the content of the security laws, as a whole, does not countenance extra-governmental information spread and, thus, greatly debilitates effective disease control.

Second, the structure of China's specific political system and the nature of its bureaucracy handicapped China's capacity to properly respond to and report the SARS epidemic in a prompt and transparent fashion. Professor Huang Yanzhong characterizes the Chinese government as "fragmented authoritarianism."[254] Accordingly, the Chinese political system "posits that authority below the very peak of the Chinese system is fragmented and disjointed, leading to a bogged-down policy process which is characterized by extensive bargaining."[255] The

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[248] *Id.* at 120.
[249] *Id.*
[250] *Id.*
[251] *Id.* at 129.
[252] *Id.*
[253] *Id.* at 128 ("While the newly promulgated Regulations on Public Health Emergencies stipulate that government officials make timely and truthful reports about any such emergencies, they do not enshrine the public's right to be informed in the same manner. Indeed, a recent speech by Vice Premier Wu Yi reiterated state control over the media in order to 'strictly prohibit the spread of rumors and other harmful information.'").
[254] *Id.* at 121. This is also known in Chinese as the *tiao tiao/kuai kuai* (条条/块块) system of political organization, "whereby officials are appointed by local governments but functionally responsible to their superior organization at a higher level of government." *See* Christopher A. McNally, *Baptism by Storm: The SARS Crisis' Imprint on China's New Leadership*, *in* THE NEW GLOBAL THREAT: SEVERE ACUTE RESPIRATORY SYNDROME AND ITS IMPACTS, *supra* note 35, at 74-75.
[255] *See id.* It is important to note that China's security laws, discussed above, also reflect a strong effort to keep significant decision-making powers at the highest levels, while preventing collaboration among localities. Whether the security laws are a function of China's fragmented

problems with such a system are especially acute given the central government's tight restrictions on non-official dissemination of information, a limited tolerance for official dissent,[256] and a deep-seated official and bureaucratic willingness to distort information flowing up the ranks from the lower levels of government.[257] For instance, it is likely that news of SARS as a serious risk did not reach the top leaders in Beijing until February 2003, and that provincial leaders, like Guangdong Party Secretary Zhang Dejiang, actively prevented such news from reaching the highest levels of government during the first months of the SARS outbreak.[258]

The situation in Beijing (the Chinese capitol, no less) provides a glaring example of this phenomenon. The Beijing municipal authorities were able to hide the severity of the SARS situation in Beijing from the members of the central government who, themselves, reside and meet in Beijing.[259] Deception and misreports from the Beijing municipal government handicapped the Chinese central government from appreciating the full scope of the SARS crisis and, thereby, from formulating a timely and effective response.[260] Although the highest levels of the Chinese government made dealing with SARS a priority by early April, government officials below the top leadership continued to distort SARS information out of fear that unfavorable facts would reflect upon them personally and therefore hinder their prospects for advancement.[261] Indeed, even after Hu Jintao's explicit announcement on April 17, 2003 that SARS control and prevention was a top priority, government officials continued to manipulate SARS data. According to Professor Huang, "a pattern could easily be identified in the government war against SARS in which when upper-level leaders demanded reduction of SARS cases, their orders would be reflected in statistics afterward."[262]

Likewise, focusing on public health capacities, the Ministry of Health is a relatively weak institution within the Chinese governmental

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political structure, the fragmented political structure is a function of China's security laws, or the two are not causally linked is debatable, but irrelevant to the current analysis. Ultimately, China's laws and government are as they stand and, from an international perspective, the Chinese government is responsible for its own shortcomings, notwithstanding any "chicken and egg" scenarios.

[256] *See* McNally, *supra* note 254, at 76.

[257] *See* White, *supra* note 35, at 58.

[258] *See id.* at 43.

[259] *See* Huang, *supra* note 4, at 122.

[260] *Id.* ("On April 2, Premier Wen Jiabao chaired an executive meeting of the State Council to discuss SARS prevention and control. Based on a briefing given by the Ministry of Health, the meeting declared that SARS had 'already been brought under effective control.'").

[261] *Id.*

[262] *Id.* at 128.

framework.[263] The Minister of Health is an ordinary member of the Chinese Communist Party, and not represented in the powerful Politburo.[264] Indeed, policy directives from the Ministry of Health are merely guiding or persuasive authority, but are not legally binding like directives from the National People's Congress or even provincial people's congresses.[265] Thus, execution of the Ministry of Health's policy initiatives depends on the whims of the provincial governments,[266] which are rife with distortions by local interests, as discussed above.

The coordination of such a fragmented system generally requires a strong central government that is able to "aggregate conflicting interests," [267] thereby shaping effective and practical policy implementation. Unfortunately, however, such a system often encourages subordinate government bodies to shift their "policy overload," and the accompanying responsibilities, to the higher levels of government.[268] In a situation like the 2002-2003 SARS crisis, where consequences at local levels bear high risks to the international community[269] requiring prompt information and action to prevent disease spread, this responsibility-shifting framework is both inadequate and unacceptable.

This is not to suggest, however, that the centralized authority of the Chinese government does not have its advantages. Once the central Chinese government made clear its intention to eradicate SARS, its centralized nature placed effective tools at its disposal, allowing a generally impressive response, and correspondingly impressive results.[270] In hindsight, however, the Chinese government's ultimate efficacy only underscores the tragedy of its initial response. China's post-April 17 actions show that the Chinese government did, indeed, have the practical infrastructure and authoritative capabilities to properly deal with SARS, but suffered from flaws inherent to its governmental structure, resulting in inadequate dissemination of crucial and sensitive information. Disturbingly, these institutional shortcomings have not changed since SARS. Although the power of international and domestic public opinion may mean more to the Chinese government now than before the 2002-2003 SARS epidemic, government accountability still flows to higher authorities and is subject to the same pressures that proved destructive

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[263] *Id.* at 121.
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.* at 122.
[268] *Id.*
[269] For example, a disease outbreak that starts in rural Guangdong and, through transmission, finds its way to a major international hub like Hong Kong, and then to the rest of the world clearly bears consequences far beyond Guangdong itself.
[270] *See* McNally, *supra* note 254, at 76-77.

during the SARS crisis.[271] Sovereignty dictates that only the Chinese government can deal with such weaknesses. Accordingly, this also means that the Chinese government must be held responsible for its failures.

"[T]he temporal dimension of the social, economic, and political changes contemplated by regulatory treaties"[272] also played a crucial—and more nefarious—role in China's failure to adequately report SARS. During the 2002-2003 SARS crisis, the interests of WHO and the international community ultimately came second to local pressures for economic development and maintenance of international prestige.[273] Contrary to the advice of Toronto's Commissioner of Public Safety,[274] provincial Chinese officials simply held their breath, hoping that SARS would go unnoticed or would prove unsubstantial, thus maintaining economic development and saving personal face.[275] Put simply, significant elements within the Chinese government chose, initially, to cover up the SARS crisis, sacrificing their commitment to the protection of both domestic and, more importantly, international public health as embodied by membership in WHO and the ICESCR, in favor of more immediate economic and personal interests.[276]

The interests of global health governance and international law as a whole cannot allow such a choice to stand. Under the circumstances, the Chinese government[277] made a deliberate choice to disregard its treaty commitments with knowledge of and wanton disregard for the risks inherent in that choice. While the Chinese security laws and political structure created an environment in which such a choice was countenanced, the ultimate breach of duty rests in China's deliberate failure to comply with international obligations. In legal terms, this constitutes a lack of good faith, on which China's international liability rests.

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[271] *See* Huang, *supra* note 4, at 128.

[272] THE NEW SOVEREIGNTY, *supra* note 9, at 10.

[273] *See* White, *supra* note 35, at 41.

[274] *See* SARS WAR: COMBATING THE DISEASE 65 (P.C. Leung & E.E. Oi eds., 2003), *quoted in* White, *supra* note 35, at 33 ("The name of this game is that you have to overreact.").

[275] *See* White, *supra* note 35, at 33. In fact, White reports that Chinese officials hoped that SARS would be like Ebola, killing its hosts "so quickly that, though highly infectious, [it is] less often transmitted and can be controlled with quarantines." Thus, "[m]any bureaucrats and political advisors, hoping to minimize embarrassment to themselves as well as govern well, at first thought SARS would be of this type. Some also hoped that the bug's supposed genetic instability might make it a winter season disease . . . so that the onset of the summer could aid efforts to eliminate it entirely." Their hopes, and other similarly over-optimistic predictions, "came mainly from bureaucrats, including those in health ministries, rather than from non-governmental academic epidemiologists, who stressed that little was yet known about the disease." *Id.*

[276] *See* Huang, *supra* note 4, at 130.

[277] Or, at least, actors within the Chinese government, for which the greater Chinese government must be responsible.

The Chayeses point out that, in practice, most if not all treaties allow for some level of non-compliance.[278] Generally, the level of non-compliance allowable is set at the level where the non-compliance threatens the existence of the regime.[279] At that point, the treaty regime will either bolster enforcement measures or collapse.[280] Given the practical allowance for some level of non-compliance, it is often difficult, if not impossible, for a "detached observer" to determine non-compliance in the absence of "bad faith."[281] For this reason, "bad faith" becomes a keystone concept in proof of China's failure to comply with its duty to report.

Article 26 of the Vienna Convention on the Law of Treaties commits State parties to perform their treaty obligations in good faith.[282] Moreover, according to Article 27, China's security laws and legal structure do not excuse China's failure to perform its treaty obligations in good faith.[283] Professor Robert S. Summers, canvassing relevant case laws, has conceptualized good faith in United States contract law as an "excluder."[284] That is, the very concept of good faith is actually defined by contrasting specific forms of bad faith.[285] A detailed analysis of what constitutes good faith and bad faith in international law is beyond the scope of this note. However, suffice it to say that deliberately concealing an infectious disease outbreak like SARS, which the government can reasonably assess poses an international threat, in spite of international commitments to take feasible measures, like a duty to report, to prevent trans-boundary disease spread, constitutes bad faith and therefore a lack of good faith. In the current case, whether a broader duty to report is wise or justifiable is irrelevant. If international law imposes on China a duty to

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[278] THE NEW SOVEREIGNTY, *supra* note 9, at 19-20.
[279] *Id.*
[280] *Id.*
[281] *Id.* at 13.
[282] Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 [hereinafter VCLT]. China acceded to the Convention in 1997, although it was originally signed by the government of the Republic of China in 1970, under dispute from the Soviet Union. *See* Multilateral Treaties Deposited with the Secretary General, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp#N4 (last visited Apr. 9, 2006).
[283] VCLT, *supra* note 282, at art. 27. This Article states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46." Arguably, whether China's governmental structure provides an excuse, of course, depends in part on whether one can fairly attribute the workings of the government to China's "internal laws." The question of whether political structure truly reflects domestic laws is too broad for the scope of this Note. For now, I believe it is safe to assume that a nation's political framework results from its constitution, if it exists, and other laws of the land.
[284] *See* Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 201 (1968).
[285] *Id.*

report infectious disease outbreaks of international significance, then China's attempted cover-up constitutes a violation of its good faith obligations to comply with international agreements as embodied in the Vienna Convention on the Law of Treaties. This good faith requirement gives adequate protection to state governments that attempt to live up to their obligations but fail, but it does not harbor the government that willfully violates its international commitments. In actively working to prevent adequate reporting on SARS, the Chinese government, at multiple levels, willfully violated its international commitments.

B. Causation

SARS did not begin internationally. SARS was a Chinese disease that began in China. It was a "local product, quickly globalized."[286] However, the relevant question for the current analysis is whether China's failure to report SARS in a prompt and transparent manner "caused" the global epidemic.

It is impossible to assert that if China had honestly and promptly reported the Guangdong SARS outbreak to WHO then the global outbreak would not have occurred. However, with the gift of hindsight, taking the facts as they occurred, it is clear that China's cover-up actively prevented other nations from taking adequate precautions at their borders. Ultimately, China's failure to honestly and promptly report SARS was a proximate cause of the global outbreak. Given the relative ease of SARS transmission and its relatively slow symptomatic course, it is somewhat surprising that SARS did not spread internationally earlier in the outbreak. In the end, however, it is relatively safe to assert that China's failure to comply with its duty to report figures fits comfortably into the causal chain of events that led to the 2002-2003 global SARS epidemic.

VI. HARM: THE INTERNATIONAL ECONOMIC COSTS OF SARS

It is difficult to properly calculate the full extent of the economic damage caused by the 2002-2003 SARS epidemic on a global basis. In a world as closely connected and integrated as ours, a direct cost on a particular industry in one country has residual effects across the globe.[287] Furthermore, while it may be possible to calculate direct costs to a specific monetary value, long term costs like loss of human capital,

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[286] *See* White, *supra* note 35, at 32.
[287] *See* Lee & McKibbin, *supra* note 1, at 93.

fertility decisions of households, and labor productivity may be more difficult to assess.[288] A detailed calculation of SARS's costs, broken down by affected nations, requires a study of its own. For the purposes of this analysis, however, I provide a brief overview of the factors involved.

In comparison to other global epidemics, SARS imposed relatively minor costs on the world community.[289] For the most part, SARS exacted costs through three principal mechanisms. First, fear of SARS infection in various countries led to substantial decline in consumer demand, especially in the travel and retail service industries.[290] Second, uncertainty about the disease reduced confidence in the future of affected economies.[291] Poor government response to the SARS epidemic in select nations amplified this effect.[292] Finally, SARS increased the costs of disease prevention, especially in the most affected industries like the travel and retail sales service industries.[293] In total, the cost of the 2002-2003 SARS epidemic to the world economy is suggested at approximately US$40 billion.[294]

The SARS crisis had real economic effects on both specific nations and whole regions. For instance, forecasts in July 2003 predicted that Singapore's private sector growth would halve to 1% from over 2%, and unemployment levels would rise to a record high of 5.5%.[295] Thailand's private sector growth forecasts were predicted at 4.2%, down one percentage point from the previous year, and its tourist and export industry suffered losses.[296] Canadian economic growth was expected to slow to 2.2%, representing a 1 percentage point decrease from the previous year. In May 2003, unemployment in Canada increased to 7.8% and thousands of jobs were lost in the Canadian hospitality sector.[297] As of July 8, 2003, Canada had lost airport revenues of US$950 million, with

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[288] *Id.* at 94-95.

[289] *Id.* at 95 ("The number of probable SARS cases is still small in comparison to other major historical epidemics. Furthermore, unlike AIDS, the duration of hospitalization of the infected patients is short, with more than 90% of the patients recovering in a relatively short period, thereby rendering the medical costs comparatively very low. The SARS-related demographic or human capital consequences are also currently estimated to be insignificant. The fatality rate of the SARS coronavirus is high, but, with current estimates indicating fewer than 800 deaths from SARS worldwide, the death toll is tiny compared with the 3 million who died of AIDS last year or at least 40 million people worldwide who died in the Spanish flue epidemic of 1918-1919. Therefore, foregone incomes associated with morbidity and mortality as a result of SARS appears to be insignificant.").

[290] *See id.* at 96.

[291] *Id.*

[292] *See* Lee & McKibbin, *supra* note 1, at 96.

[293] *Id.*

[294] *Id.* at 107.

[295] *See* Monaghan, *supra* note 2, at 253.

[296] *Id.*

[297] *Id.*

Toronto alone representing US$570 million of the loss. As a whole, Association of Southeast Asian Nations (ASEAN) countries [298] lost approximately US$25 billion to US$30 billion, resulting from severe hits to various industry sectors.[299]

Of course, the true costs of the epidemic are far greater than the sums expended on treatment of the cases involved.[300] The direct costs and effects of the SARS epidemic cut both wide and deep. Disease containment efforts forced the closure of schools, hospitals, and even some national borders.[301] A great number of people in a wide range of countries were quarantined.[302] International travel to affected areas and nations fell by 50% to 70%, while hotel occupancy fell by more than 60%. Some businesses, especially in tourism-related areas, failed, and certain large production facilities had to suspend operations when SARS cases appeared among their employee populations.[303] Moreover, the decline in China's manufacturing sector was felt in Southeast Asian countries that supplied China's raw material and energy needs.[304]

Due to the nature and effects of globalization, economic repercussions not only fell particularly hard on certain industries, but extended to more remote economic sectors and geographic locales. For instance, while SARS predictably disrupted international businesses such as airlines and tourism service related industries,[305] residual effects also reached the computer microchip industry,[306] and even cut deeply into livelihoods of local Australian fishermen.[307]

Similarly, fear of SARS played its own nefarious role in the drama, outlasting even the epidemic itself.[308] For example, "[i]ntense media attention and uncertainty" about SARS and the resulting irrational fears stemming from poor communication caused economic losses even in areas with few or no SARS cases.[309] Asian businesses in the United

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[298] Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. *Id.* at 254.
[299] *Id.*
[300] *See* Lee & McKibbin, *supra* note 1, at 96.
[301] *See* Heymann & Rodier, *supra* note 15, at 241.
[302] *Id.*
[303] *Id.*
[304] *See* Monaghan, *supra* note 2, at 267.
[305] *See id.* at 249.
[306] *Id.*
[307] *See* Keith Bradsher, *The SARS Epidemic: The Economic Impact; Economies Sickened by a Virus, and Fear*, N.Y. TIMES, Apr. 21, 2003, at A1 (recounting the plight of the Australian fishing industry, 3400 miles from China, as demand for exotic fish in Hong Kong restaurants, "by far the biggest buyers of live Australian reef fish," plummeted after Hong Kong restaurants saw incredibly steep drops in business during the SARS epidemic).
[308] *See id.*
[309] *See* Monaghan, *supra* note 2, at 249.

States suffered decreased business as people suspected that Asian people might be SARS carriers.[310] Moreover, many nations imposed travel bans on Asian tourist groups and conference participants.[311] Conversely, travel to Mongolia dropped by almost 25% through August 2003,[312] effecting travels for more than four months after the last reported case of SARS in Mongolia in 2003.[313]

The threat of a recurrence of SARS, or the international spread of a similar disease like avian flu, greatly increases the risk to the economies of both Asia and the world at large. It is especially unfortunate that the Asia-Pacific region, which appears to be today's hotbed for potential global disease outbreaks,[314] is also the most trade dependent region in the world,[315] and thus the most vulnerable to epidemic diseases transmitted through global trade routes. The opportunity to respond to the global spread of SARS in a timelier manner and under calmer circumstances would likely have reduced the human and economic costs of the epidemic.[316] Timely and effective notice would have gone a long way towards mitigating the disastrous effects of SARS on the global community, and bolsters states' ability to properly respond to impending disease threats.

VII. THE LIABILITY REGIME: WHY GO EX POST FACTO?

Creating an *ex post facto* liability regime is far from a panacea for the world's health governance problems. However, for a variety of reasons, establishing an *ex post facto* liability framework for state responsibility and treaty violations in the field of global health governance will further the greater cause towards inducing state compliance with international obligations. Moreover, the notion of

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[310] *Id.* at 50.

[311] *Id.*

[312] *See* James Brooke, *Travel Advisory: Correspondent's Report; Germs and Perhaps Golf on a Mongolian Vacation*, N.Y. TIMES, Nov. 16, 2003, Sec. 5.

[313] *See* World Health Organization, *Summary Table of Areas That Experience Local Transmission of SARS during the Outbreak Period from 1 November 2002 to 31 July 2003, at* http://www.who.int/csr/sars/areas/areas2003_11_21/en/ (last visited Apr. 9, 2006) [hereinafter *Summary Table*]. The last case of SARS in Mongolia was reported on April 19, 2003. *Id.* Further highlighting the effect that fear and confusion can have under such circumstances, a contributing factor to Mongolia's severe drop in tourism was that many people confused Mongolia, a sovereign state, with Inner Mongolia, which is part of China. *See* Brooke, *supra* note 313. The last case of SARS in Inner Mongolia was reported on May 14, 2003, nearly a month after Mongolia's last reported case. *See Summary Table, supra* note 314.

[314] *See WHO Warns of Bird Flu Pandemic*, BBC NEWS, Feb. 23, 2005, *at* http://news.bbc.co.uk/2/hi/asia-pacific/4289637.stm (last visited Nov. 17, 2005).

[315] *See* Ann Marie Kimball, et al., *Reporting, Surveillance, and Information Exchange: The SARS Imperative for Innovation*, *in* LEARNING FROM SARS, *supra* note 1, at 224.

[316] *See* White, *supra* note 35, at 38.

establishing an adjudicatory body like an International Civil Court or a claims court under the auspices of WHO, while mildly novel, is in keeping with current trends in international law.[317] Indeed, there may be a burgeoning trend towards returning to binding, judicial-type decisions in international law.[318] As the stakes of state non-compliance with international regulatory regimes increase, the world's governments and citizens alike may be less willing to rely on bilateral negotiation or ad hoc political arrangements to ensure treaty compliance.[319] Presuming that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,"[320] the world community as a whole may be less willing to tolerate deviant nations that "free ride" on a general trend of compliance by deriving regulatory benefits without paying the corresponding domestic costs.

From a policy perspective, one might ask if *ex post facto* liability in global health governance is necessary. Indeed, China has ostensibly responded well to international concern toward avian flu and its potentially catastrophic spread by vaccinating poultry within its borders[321] and confirming cases of bird to human transmission, preempting even WHO.[322] Nevertheless, while the Chinese government has acted with vigilance in some respects, there is still concern that, in certain instances, China has acted with less diligence than the global threat requires.[323] The threat of *ex post facto* liability would, among other things, serve as added incentive for a state to act in balanced accordance with global interests as a whole.

From a legal perspective, an *ex post facto* adjudicatory regime furthers the interests of effective global health governance in a variety of ways. The adjudication process serves not only to enunciate clearer rules and standards of acceptable state action within the broader principles of instruments like the WHO Constitution, the IHR, and the ICESCR, but also to publicize Member State compliance to the international community.[324]

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[317] *See, e.g.*, Judge Jon O. Newman, *Toward an International Civil War Claims Tribunal*, 12 CONN. J. INT'L L. 245, 250 (1997) (referencing the notion of establishing an international civil court).
[318] *See* THE NEW SOVEREIGNTY, *supra* note 9, at 216.
[319] *Id.*
[320] HENKIN, *supra* note 85, at 47.
[321] *See* Keith Bradsher & Elizabeth Rosenthal, *China to Vaccinate All Its Poultry, With 5.2 Billion Shots*, N.Y. TIMES, Nov. 16, 2005, at A8.
[322] *See* Keith Bradsher, *China Confirming Its First 3 Cases of Bird Flu Infecting People*, N.Y. TIMES, Nov. 17, 2005, at A8.
[323] *See* Jim Yardley, *W.H.O. Asks China to Conduct More Tests to Determine Whether Girl Died of Bird Flu*, N.Y. TIMES, Oct. 29, 2005, at A8.
[324] *See* Allyn Lesie Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J. L & MED. 301, 302-03 (1992).

First, explication of the law's requirements allows states, if they so choose, to confidently act within the boundaries of the law. Moreover, adjudication provides the opportunity for treaty interpretation or "non-amendment amendment" devices, outside of more cumbersome formal treaty amendment procedures.[325] Treaty interpretation allows states and legal regimes alike to adjust provisions according to current interests, thereby reducing incentives for non-compliance.[326]

Also, the broadcasting nature of adjudication places the threat of international condemnation into the cauldron of interests that government actors consider in making decisions. In China's response to SARS, for instance, the eventual risk of public shaming provides one more stone for officials to weigh in deciding whether to report or conceal a disease outbreak of international significance. Of course, formal condemnation will not fully deter governments' willing to take risks from violating international obligations. Some government actors will always hope that they will not get caught. However, where a government like China's can often dismiss public condemnation from certain sources as unfair and biased, it is more difficult to mark a fair, plural, and formal adjudicatory process with the same stigma.

Some argue that *ex post facto* adjudication and liability are ineffective because the process takes too long to deter non-compliant parties and fails to prevent the harm in question.[327] By definition, *ex post facto* liability can only come after the initial harm has occurred. But this criticism ignores the greater deterrent interests served by *ex post facto* adjudication and liability, as discussed above. Moreover, aside from a deterrent function, *ex post facto* liability also furthers restitution for the harmed party and distributes resources from the party at fault to the party that has suffered a loss resulting from that fault. These functions serve to discourage harmed states from taking ad hoc self-help measures,[328] which may not be as effective as coordinated measures and may harm other interests, like international trade, without providing a corresponding benefit.

For any international liability regime to function, it is, of course, imperative that the parties to any particular dispute, the State parties to the regime in question, and the world-at-large concur in its legitimacy. It seems that international acceptance of an *ex post facto* adjudicative body will generally rest on three grounds.

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[325] *See* THE NEW SOVEREIGNTY, *supra* note 9, at 7.
[326] *Id.*
[327] *See Developments in the Law*, *supra* note 201, at 1511-12.
[328] *See* Heymann & Rodier, *supra* note 15, at 247.

First, is there a legitimate basis in law for the action at hand? As states are unlikely to sacrifice sovereignty interests to arbitrary and capricious judgments, they will not participate in a regime unless there are legitimate grounds for the dispute in question. Within the current context, the legal grounds for dispute were discussed above.

Second, is the adjudicative body itself within a recognized and familiar framework? States are more likely to submit to adjudicative bodies if they are familiar with such bodies in other contexts. In this regard, authoritative interpretation of treaty provisions is a common phenomenon.[329] Concededly, many adjudicative bodies in current treaty regimes do not, formally speaking, issue legally binding judgments.[330] However, in assessing the practicality of an international liability regime, the most important yardstick is whether parties subject to such judgments *treat* the decisions as binding; that is whether such tribunals, regardless of formally vested powers to bind the parties, are nevertheless treated as authoritative by the parties.[331]

Third, under what standard of review will the adjudicative body determine liability? States will look to the standard of review to protect their sovereignty interests. Conversely, when an international legal regime sets standards beyond the greater interests of its parties, states view it as little more than a "utopian vision" and are unlikely to seriously comply.[332] Further, a proper standard of review is also essential in convincing State parties that the adjudication is impartial and based on reasoned arguments.[333] While sovereignty concerns are likely to be foremost in a state's mind, states are nevertheless likely to submit to an international liability regime if they perceive it as both fair and effective in promoting regulatory compliance.[334] Of course, the challenge lies in constructing a fair and effective regime, from which member states will perceive accumulated gains to outweigh their sacrifice of sovereignty.[335] Within the field of global health governance, a gross negligence standard best serves these interests. Under a gross negligence regime, states are liable for breaches of their international obligations only where the accusing party can prove "bad faith." A "bad faith" standard is preferable from both a theoretical and practical standpoint.

In theory, a "bad faith" requirement prevents the legal regime from punishing states lacking in resources for global inequities, thus

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[329] *See* THE NEW SOVEREIGNTY, *supra* note 9, at 24.
[330] *Id.*
[331] *Id.*
[332] *See Developments in the Law*, *supra* note 201, at 1506.
[333] *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 373 (1978).
[334] *See Developments in the Law*, *supra* note 201, at 1503.
[335] *Id.* at 1504.

speaking to states' "progressive realization" concerns. For example, if China had simply lacked the resources to adequately report SARS, it would not have been subject to liability. However, the fact that China had both knowledge of the SARS outbreak and the resources to report it, but acted to deceive the international community and cover up the outbreak instead, opens it up to liability under this standard.

Practically, states are unlikely to submit to an international liability regime unless the safeguards of "bad faith" standard are central to the system.[336] Sovereignty mandates that state governments must be free to act in their interests as they see fit. However, states willingly sacrifice aspects of sovereignty when they enter international agreements, by committing to act in the greater interests of the international regime. Few states are likely to bind themselves to international principles if they may be penalized for attempting, but ultimately failing to serve those interests. History supports this, as states have not widely adhered to precedents like the *Trail Smelter* arbitration and its progeny, which generally support a standard negligence regime. In the context of a greater "right to health," if China had accurately and promptly reported SARS to WHO, yet the disease had still spread beyond its borders, China would not be liable under a "bad faith" standard. Ultimately, state governments must be free to act within their own discretion as long as their decisions reflect a good faith effort to serve their international obligations and the greater interests of the world community. This freedom allows states to manage their own affairs to the best of their abilities, while states submit themselves to a liability regime serving their own interests as well as those of the world's regulatory regimes.

Critics may argue that a negligence standard is too subjective and, thus, too difficult for fair application.[337] This is a particularly prescient concern in an international setting, as states may worry that an international body may subject them to foreign standards and values. However, subjectivity is part of any standard of review for liability other than strict liability.[338] Subjectivity exists in a domestic setting, yet domestic legal systems have not abandoned a negligence standard of review for tort liability. Moreover, in submitting to an international regulatory regime, a state must also submit to the value judgments of the world community as a whole. An adjudicatory body can look both to the

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[336] *See id.* (discussing the practical weaknesses behind both ordinary negligence and strict liability standards of review in determining liability for breaches of state responsibility).

[337] *Id.* at 1509-10.

[338] Further, while strict liability may impose liability regardless of "due care" or "good faith," in practice, many of the same issues will ultimately be pushed into the "causation" element of the liability inquiry.

specific regulatory regime in question and to the sources of international law listed in Article 38(1) of the ICJ Statute[339] for guidance in applying notions of "due care" and "good faith." Ultimately, any standard requires specific application by reasonable and impartial judges.

Of course, it is questionable whether a country like China, which traditionally places sovereignty and national autonomy at the top of its priorities,[340] will ever submit to a regime involving oversight and liability of matters it holds within Chinese national discretion. However, evidence indicates that China may not resist as vehemently as some might suggest. The eventual arc of the SARS epidemic demonstrates that, despite some tough rhetoric, the Chinese government does respond to international pressure.[341] Once it became clear that international opinion was lined up against China's cover-up, the government moved swiftly to respond to the disease.[342] Indeed, the highest levels of the Chinese government, aware of shortcomings in the system but faced with truculent domestic actors within the government, may even welcome an international liability regime as a pretext for initiating needed reforms.[343] It is in the international community's best interests to encourage China to submit to such a regime and possibly give China's leadership the political cover to institute necessary reforms, as the basic structure of China's current political system will likely foster a repeated pattern of cover-up and inaction in the face of future infectious disease outbreaks.[344]

VIII. CONCLUSION

Effective global health governance requires a multilateral effort, calling for global coordination and sacrifice in the name of a greater good.[345] An *ex post facto* liability regime both signals the urgent need for international compliance and gives added incentive to governments to make global health governance a priority. The greater body of international health law and its state of practical application and enforcement are currently in flux. However, it is in just these circumstances that the world community must come together to develop an effective regime before true crisis hits.

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[339] ICJ Statute art. 38, para. 1.

[340] *See, e.g.*, Yu Zhong, *US human rights violations rebuked*, CHINA DAILY, Mar. 4, 2005, *at* http://www.chinadaily.com.cn/english/doc/2005-03/04/content_421523.htm (mentioning, in the context of human rights violations, that the Chinese government believes "each nation should handle its own problems").

[341] *See* Huang, *supra* note 4, at 131.

[342] *SARS: Political Pathology*, *supra* note 21, at 491.

[343] *See* Huang, *supra* note 4, at 131.

[344] *Id.*

[345] *See* MacKenzie et al., *supra* note 1, at 50.

Justice Cardozo, speaking of the common law, noted that the "work of modification is gradual. It goes inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and pressure of a moving glacier."[346] Similarly, global health governance will not improve overnight, but continued efforts can yield great results. Infectious diseases like SARS are too great a threat to ignore the inherent flaws in our current system. *Ex post facto* liability is not only one method of moving the glacier along, but can also be an effective early step towards improving an international regime that bears heavy consequence to the world's citizens. China's failure to report SARS in 2002-2003, in light of a deliberate effort to deceive the international community, provides a landmark opportunity for strengthening international health norms. As the threat of pandemic grows imminent, it is time to effectively move the power of decisions with dire global effect from the shortsighted forum of sovereign interests to the hands of multilateral bodies like WHO, which are better equipped to account for the interests of the entire world. International liability helps sovereign governments prioritize such choices.

[346] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 25 (Yale Univ. Press 1973) (1921).