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Making International Law Matter: Promoting Universal Compliance through Effective Dispute Resolution

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Abstract

While many scholars have studied state compliance with international law, few have assessed the adequacy of existing dispute resolution processes or explored whether there are alternative mechanisms available to strengthen them. This study combines legal, political economy and public policy analysis to help fill this gap in the research literature and serve as a starting point for addressing this fundamental weakness in global legal architecture. Specifically, this paper uses the International Health Regulations as a case study to probe the strengths of existing dispute resolution processes and highlight its weaknesses. Various alternative dispute resolution options are explored to strengthen the International Health Regulations and possible improvements proposed. An innovative model of multi-tiered dispute resolution is put forward as one politically attractive option to strengthen existing and future international legal instruments. This model will be shown to meet six essential criterion, namely, a guaranteed resolution, quick process, transparent and fair, authoritative, maintains friendly relations, and realistic implementation, and perhaps most importantly, it will be shown to enhance negotiation, mediation and conciliation efforts that naturally take place in the shadows of obligatory resolution systems. Finally, political strategies for operationalizing this new model of dispute resolution will be put forward for consideration.

Introduction

In a globalized world where the actions of one state affect every other, the consequences of disagreements and non-compliance with international laws can be devastating. An unresolved dispute resulting in delayed or unilateral global action, or inaction, during a public emergency could, for example, lead to unnecessary death, environmental damage, illness, and financial collapse, in addition to the economic, psychological and social costs associated with uncertainty and fear. Disagreements over compliance with international law could affect friendly relations among states and could even lead to armed intervention if a state's security interests were perceived to be threatened (Bonventre, Hicks, and Okutani 2009; Feldbaum 2009; Peterson 2002).

For international laws to really matter, they must provide parties with confidence that their obligations will be fulfilled universally, and that if they are not, mechanisms promoting compliance are available. They must provide parties with a quick, transparent and fair way to articulate their concerns and protect their interests. An effective dispute resolution process is essential to this confidence as it provides parties a neutral forum in which to interpret legal obligations, complain of non-compliance, and resolve other disagreements as necessary. Indeed, since disputes are a normal part of law and politics, the strength of international legal and political institutions can at least be partially evaluated on the way in which disputes are managed.

Too often states are left without effective mechanisms to authoritatively interpret international laws, define their rights and obligations under them, or adjudicate allegations of transgression. States have few legal options to confront parties that may unwittingly be in violation of a certain provision or who are purposely refusing to fulfill an obligation for leverage or coercion. Political solutions to complex disputes may require too much time or may not be possible at all. There may also be times when it is desirable to shield decisions from the ordinary influence of politics, such as in technical disputes or emergencies where decisions may be better if informed primarily by scientists and research evidence (Suk 2007). Moreover, in the absence of a rational and effective dispute resolution process, disagreements can be left unresolved or managed through irrational processes such as dominance through economic strength, political clout or even the use of force (Emond 1989). These approaches to dispute resolution would clearly be disadvantageous to the world, especially resource-poor and less powerful states, and could further exacerbate or entrench conflict among nations. They could also affect important international relations and diminish the role of democratic deliberation, science and equity in favour of other interests.

While many scholars have studied commitments to and compliance with international law, few if any have assessed the adequacy of existing dispute resolution processes provided for in specific international laws or explored whether there are alternative mechanisms available to strengthen them. This study combines legal, political economy and public policy analysis to help fill this gap in the research literature and serve as a starting point for addressing this fundamental weakness in global legal architecture. The ultimate goal is to encourage more informed deliberation on possible mechanisms that can be shaped to better fit the type of conflicts that are likely to arise, achieve better resolutions, and promote universal compliance with international law more broadly.

Specifically, this paper uses the International Health Regulations as a case study to probe the strengths of existing dispute resolution processes and highlight their weaknesses. Various alternative dispute resolution options are explored to strengthen the International Health Regulations and possible improvements proposed. An innovative model of multi-tiered dispute resolution will then be put

forward as one politically attractive option to strengthen the International Health Regulations and other existing and future international legal instruments. This multi-tiered approach will be shown to meet six essential criterion – namely, a guaranteed resolution, quick process, transparent and fair, authoritative, maintains friendly relations, and realistic implementation – and perhaps most importantly, it will be shown to enhance negotiation, mediation and conciliation efforts that naturally take place in the shadows of obligatory resolution systems. Finally, strategies for operationalizing this new model of dispute resolution will be put forward for consideration.

The International Health Regulations and their Existing Dispute Resolution Processes

The recent A(H1N1) influenza pandemic highlights the central importance of international law in maintaining global health security through its establishment of a rule-based system to prevent and respond to acute health risks of international concern. The International Health Regulations, revised in 2005, obliges its 194 state signatories to maintain surveillance and response capacities and to enforce minimum requirements at points of entry. It also requires governments to report certain enumerated public health events and empowers the World Health Organization to declare emergencies and issue recommendations. Developed countries are further obligated to assist developing countries in achieving the core capacities required by this agreement (Baker and Forsyth 2007; Fidler and Gostin 2006; McDougall and Wilson 2007; World Health Organization 2006).

Despite significant revisions in 2005, the International Health Regulations are still criticized as often as they are praised. The new regulations are said to narrowly define health security (Lancet 2007), fail to specify how national governments are actually supposed to collaborate with one another (Bhattacharya 2007), emphasize surveillance to the exclusion of other essential elements (Lancet 2004), rely upon peer pressure and public knowledge for compliance (Wise 2008) and contain no legal enforcement mechanism (Sturtevant, Anema, and Brownstein 2007). They also depend upon national governments' acquiescence to new global health responsibilities (Merianosa and Peiris 2005), provide opportunities for the politicization of epidemic responses (Suk 2007), and rely on surveillance networks in developing countries which may not be optimally functioning (Wilson, Tigerstrom, and McDougall 2008).

However, the most stinging criticism of the International Health Regulations – and the one that could exacerbate all the other criticisms – is that an effective dispute resolution mechanism is absent from its provisions. Whereas most criticisms are centred around particular issues of compliance or fears of non-compliance, this last criticism, if true, highlights the fundamental absence of any formal mechanism that can be expected to promote compliance. The centrality of dispute resolution is further underscored by the fact that most criticisms of the International Health Regulations may eventually lead to disputes between state parties which need to be resolved. The other criticisms could also mostly be mitigated if only there were reliable and effective dispute resolution mechanisms in place for when disagreements inevitably arise.

Yet dispute resolution is not entirely absent in the International Health Regulations. Governed by Article 56 of its provisions, two types of disputes are recognized with different processes for resolution. For disagreements between states, the parties "shall seek in the first instance to settle the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation." If a resolution is not attained, the parties "may agree to refer the dispute to the [World Health Organization's] Director-General, who shall make every effort to settle it." Binding arbitration is then possible if the dispute is among states that have voluntarily accepted it "as

compulsory with regard to all disputes concerning the interpretation or application of these Regulations." Disagreements between a state and the World Health Organization are referred to the World Health Assembly for resolution (World Health Organization 2006).

At first glance, the approach to dispute resolution that is outlined in the International Health Regulations seems rather progressive. It recognizes the limitations, costs and consequences of formal litigation and promotes alternative processes such as negotiation, mediation, conciliation and arbitration. Reference to the World Health Assembly, the World Health Organization's highest governing body, ensures that all state parties affected by the dispute have an important role in solving it.

However, while the parties may be legally required to *attempt* settling the dispute, there is no guarantee or requirement that they actually resolve it. Negotiation and conciliation are strictly voluntary as is mediation with the Director-General. This lack of any obligatory mechanism compelling the disputing parties to participate means that it will be power and political influence, rather than law and legal norms, that determine the resolution process and outcome. The absence of a guaranteed final settlement also unnecessarily extends uncertainty and provides little incentive for rapid resolution. While binding arbitration as outlined in the International Health Regulations would address many of these concerns, its use is possible only in disputes between members that have voluntarily accepted this additional obligation. As of now, despite heightened awareness for the central importance of the International Health Regulations as a result of SARS and the recent A(H1N1) pandemic, not a single country has done so (Gian Luca Burci, WHO's Chief Legal Officer, email communication, 23 November 2009). Finally, reference to the World Health Assembly in disputes between the World Health Organization and state parties is essentially a majority rule system that prioritizes politics and national self-interest over legal and scientific considerations. International realities and structural barriers to equal participation dictate that some states will be more influential before this governing body than others (Hoffman In preparation).

In light of this voluntariness, there are currently few incentives for states to ever resolve their disputes and no mechanism to ensure a timely settlement. Politics is allowed to reign supreme – which historically has been detrimental to progress in public health (Howard-Jones 1975; Lancet 1892; Suk 2007) – with weaker states left particularly disadvantaged and all states left vulnerable. In the realm of quickly evolving communicable diseases, the world is left vulnerable when disputes are unresolved or are addressed too slowly. Poorly monitored airports, for example, can lead to the needless spread of disease between continents, and non-compliance with reporting obligations could delay worldwide pandemic response efforts resulting in exponentially worse outcomes (World Health Organization 2007b).

These limitations of the existing dispute resolution process and their impact on the broader global health security system is perhaps best illustrated by the ongoing Indonesian virus sharing dispute. Starting in February 2007, Indonesia refused to share H5N1 virus samples despite their significance to global disease surveillance efforts. The country hoped to leverage its virus samples to obtain tangible benefits, particularly technology transfers and vaccine provisions (Enserink 2007). Supported by most developing countries, Indonesia demanded guaranteed access to future vaccines for poorer states that carry a disproportionate burden of the relevant disease and justified these demands by invoking the principles of sovereignty over biological materials, transparency of the global health system, and equity between developed and developing nations (Sedyaningsih et al. 2008). While virus sharing eventually resumed following a provisional compromise (World Health Organization 2007a), this ongoing dispute that started in January 2007 highlights the fact that ambiguity, voluntariness and political considerations

continue to challenge the regulations' dispute resolution process and real-world effectiveness. It also highlights the existing divisions among developed, developing and emerging countries which no doubt serve as a destabilizing force and a likely source for future disputes. Indeed, deliberations at subsequent World Health Organization meetings have shown that there is not even consensus among states for the conceptualization of virus sharing as a health security issue that would be covered by the International Health Regulations (Aldis 2008). This example demonstrates that the existing dispute resolution process has not been entirely successful and that strategies for strengthening it are necessary.

Alternative Dispute Resolution Processes

There is a broad range of dispute resolution mechanisms from which state parties could choose in their efforts to enhance the effectiveness of the International Health Regulations and compliance with them. Several potential options will be presented and categorized according to whether they primarily serve advisory or adjudicative functions. The potential use of the International Court of Justice will be examined separately.

Advisory Mechanisms

One of the primary goals of advisory bodies in the context of dispute resolution may be their ability to enhance or focus discussion among the conflicting parties and increase the likelihood of a negotiated settlement. Such a resolution is no doubt ideal given its potential to be quick and harmonious. One opportunity to strengthen negotiation may be to involve an independent legal expert early in the process so that he/she can provide an initial opinion on the matters in dispute and provide at least one neutral perspective on legal ambiguities. Such a mechanism could be particularly useful for situations where there is a dispute over differing interpretations of the International Health Regulations or legal issues involving the agreement's implementation. The role of neutral legal expert could possibly be served by the World Health Organization's Chief Legal Officer if the dispute is among states, or by the United Nations' Chief Legal Officer if the dispute involves the World Health Organization.

If independent negotiations fail, facilitative or evaluative mediation can be used to help the parties identify their core concerns and craft creative solutions. The use of this process is envisioned by the International Health Regulations which essentially nominates the World Health Organization's Director-General to serve as mediator in disputes among states. Mediation in this context could be strengthened by making it a compulsory activity, using professional mediators with advanced training, and/or expanding its application to include disputes between states and the World Health Organization. These changes can be made in various ways. For example, an independent group such as the new United Nations Mediation Standby Team could neutrally facilitate this process with great success given their extensive training and experience (United Nations 2008). A special dispute review board with legal and health experts could alternatively be constituted on a permanent or ad-hoc basis to provide an early evaluation of the dispute and make authoritative recommendations. Or if that is not desirable, a "mini-trial" could be conducted to further enhance these efforts given it lets high-level decision-makers make their best case in front of a panel and hear one group's take on the merits of their core arguments.

More formal political and legal mechanisms could also be incorporated as part of the dispute resolution process of the International Health Regulations. Policy commissions or special inquiry panels could be established to investigate disputes and assess proposals that could later be implemented to resolve them (e.g., European Community's Badinter Commission on the dissolution of Yugoslavia). Another common mechanism is the expert supervisory committee which continually and systematically

assesses compliance by the relevant parties and makes authoritative rulings on legal issues. This device is commonly relied upon in human rights treaties and includes various bodies such as the Committee Against Torture, Committee on the Elimination of Discrimination against Women, Committee on the Elimination of Racial Discrimination, Committee on the Rights of the Child, Committee on Economic, Social and Cultural Rights, and the Human Rights Committee overseeing the International Covenant on Civil and Political Rights. While these groups of experts mostly accept reports from countries and make recommendations, some of them can entertain complaints or "communications" from states about others (e.g., Committee against Torture and the Human Rights Committee). Their rulings are not binding but are generally viewed, like advisory opinions of the International Court of Justice, as one of the most authoritative interpretations possible about the obligations imposed by the relevant treaty (McGoldrick 1991). A similarly constituted expert committee focused on the International Health Regulations could perhaps be equally effective in advising the resolution of disputes.

Adjudicative Mechanisms

Dispute resolution processes can also involve more formalized adjudication where a specific resolution is developed or imposed by an independent body after the conflicting parties have presented their cases. The decisions of these bodies are final, except for appeals, and are meant to go well beyond just advising the parties on their respective positions or facilitating negotiation.

Adjudicative bodies in the context of the International Health Regulations could be structured in many ways. For example, the World Health Organization could create a special judicial organ that would be tasked with arbitrating disputes of all varieties and issue formal binding decisions. This approach has been adopted by other international organizations including the Benelux, Organization for Security and Cooperation in Europe, Economic Community of Western African States, Organization of Central American States and Organization of Arab Petroleum Exporting Countries.

Alternatively, the World Health Organization could form a specialized International Health Regulations Dispute Resolution Board that would concern itself exclusively with the interpretation and implementation of this legal instrument. It could be modeled off of existing administrative bodies that resolve staff complaints or that adjudicate disputes arising from treaties. For example, the International Tribunal of the Law of the Sea, created by the 1982 Law of the Sea Convention, adjudicates conflicts between states, gives advisory opinions and can order interim measures even when the main proceedings are being heard in a different forum (Klabbers 2009). Past success with such dispute resolutions boards is particularly convincing. As a requirement for World Bank-funded projects valued at over $10 million USD, they have been extensively utilized around the world (World Bank 2007). Their potential use in resolving conflicts among parties in ongoing relationships is recognized internationally (e.g., International Chamber of Commerce 2004).

The creation of ad-hoc bodies to resolve specific issues is also not without precedents. The World Health Organization has in the past empowered temporary commissioners to investigate and report on certain issues of pressing concern (e.g., WHO Commission on Macroeconomics and Health 2001; WHO Commission on Social Determinants of Health 2008) and contracting parties to the old GATT regime used to hastily convene multi-party panels to resolve conflicts when they arose (Klabbers 2009; Klabbers and Vreugdenhil 1986). The United Nations Security Council has even created temporary international criminal tribunals for Rwanda and the former Yugoslavia. Given the nexus between communicable diseases and global health security, it is not entirely inconceivable for the United Nations

Security Council to form a similar body in the context of disputes arising from the International Health Regulations.

International Court of Justice

Finally, dispute resolution under the International Health Regulations could include reference to the International Court of Justice, the judicial organ of the United Nations. In keeping with Article 36 of the court's constituting statute, states could voluntarily accept the jurisdiction of the International Court of Justice for all future disputes among themselves concerning the International Health Regulations (International Court of Justice 1945). Decisions of the court for such matters would then be final, legally binding and enforceable via reference to the United Nations Security Council.

The use of this mechanism for disputes between states and the World Health Organization is a bit more complicated. While Article 96(2) of the United Nations Charter already lets the organization "request advisory opinions of the Court on legal questions arising within the scope of their activities" (United Nations 1945), these decisions technically have no binding force and can be granted or denied at the discretion of the court (International Court of Justice 1950). Advisory opinions, however, are perhaps as authoritative a statement as is possible on international law, and can be made legally binding if parties to the International Health Regulations accept them as so for disputes that the World Health Organization refers to the court for resolution. The strategy of accepting the binding nature of advisory opinions via collateral agreements has been incorporated within many international treaties, including the General Convention on Privileges and Immunities of the United Nations (United Nations 1946). It is not inconceivable that states would accept advisory opinions related to the International Health Regulations as binding as part of a broader trade agreement.

The discretionary nature of advisory opinions issued by the court, however, is also probably not a great concern. Whereas the former Permanent Court of International Justice demonstrated hesitance to issue such non-binding opinions to settle disputes without explicit state authorization (Permanent Court of International Justice 1923), the current International Court of Justice almost always accepts them and has stated that requests for them "in principle, should not be refused" (International Court of Justice 1950). Ironically, the only request for an advisory opinion that was ever rejected by the court actually came from the World Health Organization when it asked the court to rule on the legality of nuclear weapons. The International Court of Justice refused to provide an advisory opinion on principle, explaining that "none of the functions of the World Health Organization is dependent upon the legality of the situations upon which it must act," which means it does not have the ability to request the opinion (International Court of Justice 1996). There can be no doubt that global communicable disease control is of central (if not of the most central) importance to the World Health Organization's core functions and that advisory opinions on legal concerns involving this topic would almost surely be welcomed. The only certain problem that remains is that international organizations have no standing before the International Court of Justice other than through advisory opinions (International Court of Justice 1945). This means that states have no ability to initiate proceedings against the World Health Organization even if so desired. This explains why most claims by states against international organizations have historically been resolved through arbitration or independent commissions (Arsanjani 1981).

Assessing the Alternatives

While various alternative forms of dispute resolution have been identified, they are not equally suited to the unique context of the International Health Regulations (see Table 1).

Strengths and Weaknesses of Advisory Mechanisms

Advisory mechanisms that inform negotiation or mediation efforts, for example, are best suited to empower the disputing parties to develop their own solutions. They are flexible, prioritize integrative resolutions, reflect the concerns of the disputants and encourage compliance. Advisory processes also help to preserve continuing relations which are critically important in the international sphere. These advantages, however, assume that a resolution is possible. None of the advisory mechanisms previously highlighted can compel meaningful participation, bind parties' future action, induce settlements or guarantee compliance (Kanowitz 1986). If the mediation or evaluation process is led by an internal expert or a permanent review board, the process may lack independence and due process safeguards. The use of external professional mediators or commissioners, on the other hand, may not be ideal either because they will likely lack important technical knowledge on the science of communicable disease prevention and control.

Strengths and Weaknesses of Adjudicative Mechanisms

Adjudicative mechanisms have other strengths and weaknesses. While they may provide for final decisions that are imposed on the parties, resolutions may be sub-optimal given that they are not developed by the parties themselves and their implementation could inadvertently serve to harm friendly relations among them. The decisions of these bodies are also not necessarily legally binding depending on the status and provisions of its constituting instrument, and the disputing parties may have to rely on political processes and rhetorical persuasion to encourage compliance. Again, depending on how they are structured, adjudicative bodies may lack independence and/or technical knowledge on communicable disease control.

Strengths and Weaknesses of the International Court of Justice

Reliance on the International Court of Justice is similarly not a perfect solution. While its strength lies in its formal legal status, superior moral authority and ability to compel participation, this dispute resolution process would likely be antagonistic, polarizing, disruptive and costly (Kanowitz 1986). Decisions could take a long time to be reached and would likely involve a limited range of remedies as per the judicial model of dispute resolution; this may not be ideal for rapidly evolving pandemic situations. While technically the parties can ensure implementation of the court's decisions by reference to the United Nations Security Council, this strategy may not be possible in the real world of global politics and relations (especially if the conflict involves a permanent member of the United Nations Security Council with veto power). Indeed, the unilateral enforcement of anything in the international sphere, including binding law, is often impossible, and parties should not be under the illusion of the contrary. Compliance with adjudicative decisions, including those of the International Court of Justice, is likely to always depend on "political massaging" and national self-interest no matter the decision's legal status (Klabbers 2009).

In summary, it is self-evident that there are no perfect dispute resolution processes for all situations and scenarios; it is, however, equally clear that some mechanisms are better suited than others to the particular context of global health politics and the International Health Regulations.

Priority Criteria for Dispute Resolution under the International Health Regulations

Before proposing a particular alternative to an international law's existing dispute resolution process, it is important to consider the priority characteristics that would be essential to any system and the basic criteria against which any proposed system should be compared (see Table 2). First, any improved dispute process under the International Health Regulations should guarantee a resolution upon its conclusion. This removes much of the negative consequences of voluntariness and uncertainty and encourages resolution through more participative processes such as voluntary negotiation and mediation. Second, dispute resolution on matters of communicable disease control must not be lengthy or must at least have a fast-track rapid resolution option for urgent situations. Third, the process must be transparent and fair to ensure it has credibility and buy-in, and fourth, it must be authoritative to ensure resolutions are final and followed. Fifth, dispute resolution under the International Health Regulations should promote friendly relations among nations or at least preserve existing relationships so as not to preclude future collaboration in solving global health challenges. And sixth, the helpfulness of any proposed changes depend upon their realistic implementation. A proposal that requires revisions to the World Health Organization's constitution, for example, may not be the most practical option.

Cost-effectiveness, it should be noted, was not listed as a priority criterion given the likely willingness of states to collectively allocate financial resources towards effective dispute resolution – which in the end would amount to a negligible percent of their global budgets. The establishment of legal precedents was also not deemed to be a priority based on the potential role for the World Health Assembly, the World Health Organization's highest governing body, in issuing declarative interpretations and implementation policies on the International Health Regulations. Likewise, confidentiality is probably not especially important to states given they do not usually expect it in their international relations and because it could diminish the effectiveness of dispute resolution involving challenges that have global implications. Indeed, any proposed process should probably allow for consideration of third parties who have affected interests based on the possible transmission of diseases across borders.

Proposing a New Model for Resolving Disputes Related to the International Health Regulations

Achieving each of these criteria, however, is improbable if relying on a single dispute resolution mechanism. A multi-tiered process is likely the best route forward. Successful past use of hybrid processes show that the creativity and innovation invested in their design will often yield better results than the stringent use of single mechanisms (Brown and Marriott 1993; Emond 1989). They can also help isolate particular conflicts without disrupting broader collaborations, and can offer provisional resolutions when delayed action would otherwise lead to enormous consequences.

<u>Formal Multi-Tiered Dispute Resolution System</u>

One way to achieve the six criteria would be to adopt a mandatory multi-step dispute resolution system that starts with a process that can be applied very quickly for emergency situations but allows appeals to eventually achieve an authoritative judgment. Early mechanisms would be binding on the parties until the decisions reached are replaced by a voluntary settlement or a later-sanctioned process. Parties would be expected to implement early resolutions while waiting for the results of any appeals they may initiate. This provides for a stop-gap measure and allows the international community to move forward in the interim until the next process concludes.

Specifically, in the context of the International Health Regulations, it is possible to envision a three-step dispute resolution system that starts with an 1) initial legal opinion, which, if unsatisfactory to one of the parties, could be appealed to an 2) advisory body, which, if also unsatisfactory to one of the parties, could be appealed to an 3) adjudicative body for final resolution. The initial legal opinion could be given, for example, by a neutral legal expert, and the advisory body could be a permanent dispute review board. Final pleadings could then be made to an adjudicative body such as an arbitration panel which would issue a last and binding judgment. In this system, the initial legal opinion would be binding and implemented until (and unless) the dispute review board recommends a conflicting resolution. This recommendation would then be binding and implemented until (and unless) the arbitration panel issues its final decision. The three steps could involve three different dispute resolution bodies or as little as one body operating in a different capacity at each of the three stages. If just one body is preferred, an expert supervisory committee like those used in human rights treaties may be particularly effective, especially as part of a larger system where this committee continually assesses compliance, accepts reports, hears complaints, and makes rulings on legal issues. Regardless of the specific mechanism responsible for each of the three steps, a negotiated or mediated settlement among the parties that is reached prior to the final adjudicative body's ruling would replace whatever opinions or recommendations had already been issued and implemented (see Figure 1).

An initial legal opinion may be a particularly effective first step given the speed in which one could be issued (e.g., as few as 2-5 days). If provided by a neutral expert such as the Chief Legal Officer of the World Health Organization (for disputes among states) or the United Nations (for disputes involving the World Health Organization), it could carry sufficient authority commensurate with the requirement for temporary implementation. It could also serve as a valuable input to negotiation, mediation and conciliation efforts by clarifying the legal issues involved in the dispute. Similar provisional mechanisms involving other types of experts contributed successfully to the multi-tiered dispute resolution processes employed in constructing Hong Kong's International Airport and The Netherland's Maeslant Water Barrier (Bosch 2001; Lewis 2002; Sandborg 1999).

An advisory body such as a permanent dispute review board is well-suited to be the second step of this multi-tiered process given it can more extensively review any dispute's details over a few weeks and offer guidance to the parties in a form that would carry significant political weight. Again, any recommendations issued by this body would dually serve as both binding orders until overruled and as extremely valuable input to help resolve the dispute through voluntary processes.

Finally, adjudicative bodies such as a binding arbitration panel is ideally structured to offer final decisions on conflicts as the third step of the proposed dispute resolution process. An arbitration panel's work can be completed within a couple of months and would leave the disputants with an authoritative and final resolution.

Shadow Dispute Resolution System

Perhaps the most important benefit to be obtained from the introduction of this system is the "shadow system" of voluntary collaborative dispute resolution that it supports. So long as there are no mandatory steps that must be followed, the more powerful or less affected conflicting party will have little incentive to engage in more collaborative forms of dispute resolutions such as negotiation, mediation and conciliation. If such a process exists, it will be within the parties' own self-interest to actively seek out an acceptable settlement rather than leave the resolution to others who will impose one on them – possibly without even considering their priorities or interests. In the domestic context,

this need for a less advantageous process is met by the judicial system which forces disputants to participate in a thoroughly and universally unpleasant process. No such last-resort system exists under most international laws, including the International Health Regulations, to encourage disputants to pursue more collaborative ways of coming to resolution. The proposed multi-tiered model, however, fulfills the necessary requirements, requiring steps that go from the participative to authoritative thereby gradually increasing pressure among the parties to find a mutually agreeable solution. The more meaningful participation that the mandatory system is intended to elicit for voluntary mechanisms has been shown in other contexts to yield better results (Brown and Marriott 1993).

Operationalizing the Proposed Multi-Tiered Dispute Resolution System

In terms of operationalizing this proposal, the multi-tiered process and shadow system could feasibly be implemented through a declaration of the World Health Assembly concerning "Principles of Dispute Resolution" coupled with states' acceptance of compulsory arbitration outlined in Article 56 of the International Health Regulations. The principles adopted by the Assembly could outline the multi-tiered dispute resolution process and declare that states would be expected to follow it. While these principles would not technically be legally binding, they would create a political or soft law expectation to engage in the outlined process which could eventually lead to the establishment of a new customary legal norm. The final step, arbitration, would be legally binding and enforceable assuming that Article 56 of the International Health Regulations was invoked by all parties. The World Health Assembly could alternatively rely on its capacity to enact new international law to legally enshrine a new dispute resolution system (Taylor 2002; World Health Organization 1946).

Creating the institutional structures necessary to support a dispute resolution system like that proposed can similarly work within the World Health Organization's existing governance framework. The initial legal opinion could be provided by its Chief Legal Officer (or that of the United Nations), and members of the advisory body, for example, could be state representatives elected to a sub-committee of the World Health Assembly or experts specially chosen by a troika of top leaders from the World Health Organization's three governing bodies (i.e., President of the World Health Assembly, Chair of the Executive Board, and Director-General of the Secretariat). Members of the final adjudicative body could be appointed according to the relevant Permanent Court of Arbitration Optional Rules for Arbitrating Disputes as suggested in Article 56(3) of the International Health Regulations (Permanent Court of Arbitration 2009a, b; World Health Organization 2006). Many options are available to the World Health Assembly in operationalizing this proposal.

These proposed changes would thereby establish a new mandatory multi-tiered dispute resolution process that guarantees a resolution to disputes and encourages earlier participatory settlements through shadow system mechanisms. The fact that change is achieved through "institutional adaptation without reform" helps make this model more realistic for immediate implementation (Burci 2005), although it still requires overwhelming political will to enact the proposed principles of dispute resolution and convince every country to voluntarily accept binding arbitration.

Conclusion

Recent events have highlighted the vital importance of the International Health Regulations to global health security, yet their various weaknesses remain untouched with little debate among researchers, national decision-makers and global health leaders on how to improve them. This paper suggests that the existing system for resolving disputes is one of the greatest limitations of the

International Health Regulations and that there are practical ways in which they can be strengthened. For example, a multi-tiered process that guarantees a quick and final resolution would enhance confidence in the global communicable disease control regime, prevent inaction when there is a conflict, and diminish the role of politics in technical communicable disease control decisions. It could also help promote state parties' compliance with the treaty, an especially important issue as of 2012 when requirements for core surveillance and response capacities come into effect. Additionally, a mandatory system would provide incentives for parties to engage with more participatory mechanisms that together constitute perhaps the most productive integrated system for dispute resolution. Other global legal regimes could perhaps similarly benefit from more effective dispute resolution systems.

Change will not be easy but it is also not impossible. Better models for resolving disputes can be implemented within existing structures and without formal changes to, in the case of the International Health Regulations, the World Health Organization's constitution or any other international treaty. Politicization, non-compliance and power conflicts need not be inherent flaws of international laws such as the International Health Regulations as some have described them. Practical solutions exist and are ready for implementation.

This paper, however, also does not contain all of the solutions; rather, it aims to be a helpful starting point for more informed discussions on reforming dispute resolution in global governance in the future. In particular it aims to highlight one way of reducing the influence of politics on technical decisions such as global communicable disease control and promoting compliance with international laws such as the International Health Regulations among state parties.

There are many challenges that remain. First, there are likely to be at least several other configurations of dispute resolution systems that meet the six priority criteria and perhaps other important criteria that were not considered. Another mechanism worthy of further in-depth study, for example, is the expert supervisory committee utilized effectively by so many human rights treaties. By continually examining the system, assessing national compliance and issuing ongoing recommendations, these committees may be able to prevent disputes from arising in the first place and help resolve them quickly if and when they ever do.

Further consideration and critical examination of the proposed multi-tiered dispute resolution system is no doubt necessary across multiple issues given the many questions about it that are left unanswered. Its practicality, acceptability, and susceptibility to undue influence, for example, have yet to be tested. Its potential real-world effectiveness has also not been compared to other proposals that also aims to promote compliance, such as, in the case of the International Health Regulations, the idea for a Global Compact on Infectious Diseases (Rubin and Arroyo 2007). Finally, there are also still challenges with enforcing obligations or negotiated settlements even if they are binding with the force of international law.

In the case of the International Health Regulations, one exciting first step going forward would be to see the World Health Assembly give the World Health Organization's Secretariat a mandate to further explore this issue and assess various proposals for reform. A Committee of the World Health Assembly could then be tasked with reviewing the various proposals and recommending one for implementation. Other international organizations responsible for their own international treaties could conceivably follow similar investigative and assessment processes. Those treaties enacted without the support of a specialized international agency could be amended or supplemented following investigation by the relevant Conference of Parties or an appropriate body of the United Nations.

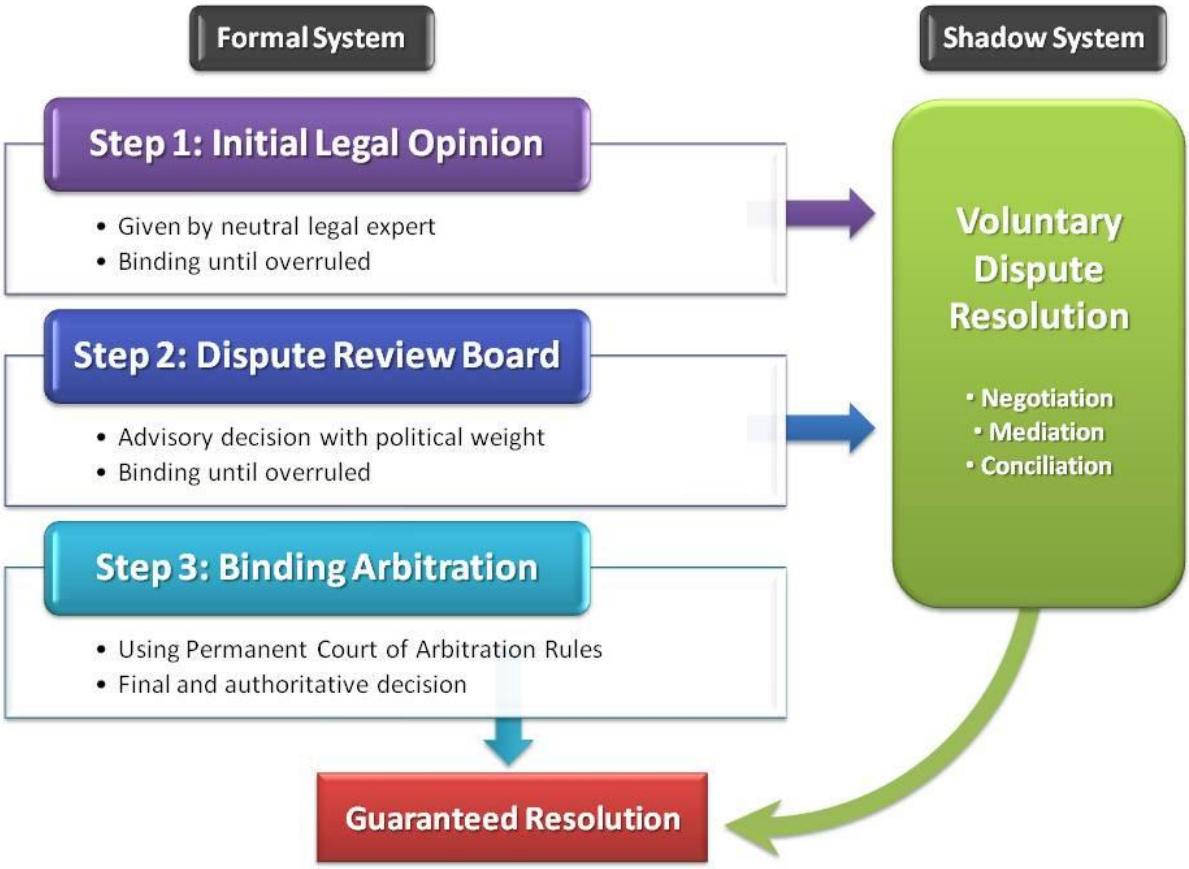
Table 1: Select Advisory and Adjudicative Dispute Resolution Processes

	Mechanisms	Strengths	Weaknesses
Advisory Bodies	1. Initial Legal Opinion 2. Mandatory Mediation 3. Dispute Review Board 4. Mini-Trial 5. Special Inquiry Panels 6. Expert Supervisory Committee	• Empower disputing parties to develop their own solutions • Prioritize integrative resolutions • Guidance from technical experts or professional facilitators • Reflect concerns of disputants • Preserve existing relationships • Encourage compliance	• Voluntary process • No guaranteed resolution • No mechanism to ensure compliance • May lack independent or due process safeguards • Professional facilitators may not have necessary technical knowledge
Adjudicative Bodies	7. Formal Judicial Organ 8. Dispute Resolution Board 9. Ad-Hoc Tribunal 10. International Court of Justice	• Provide final authoritative decisions • Guarantee resolution to dispute • Compel participation • Formal procedures • Likely to have transparent and fair process	• Can issue sub-optimal resolutions • Limited participation in developing resolution by the disputing parties • Potentially antagonistic • Can harm friendly relations • May lack necessary technical knowledge

Table 2: Priority Criteria for Dispute Resolution under the International Health Regulations

	Criterion	Significance
1.	Guaranteed resolution	• Ensures the dispute will eventually be resolved • Eliminates uncertainty and reduces fear • Encourages parties to meaningfully participate in other voluntary resolution processes such as mediation or negotiation
2.	Quick process (or fast-track option)	• Limits amount of time for inaction among parties • Prevents delay in responding to public health emergency of international concern • Considers potentially rapid evolution of pandemic situations
3.	Transparent and fair	• Enhances credibility in and legitimacy of the process • Encourages parties to meaningfully and fully participate • Promotes buy-in, trust and compliance
4.	Authoritative	• Ensures decisions are final and accepted by all parties • Encourages participation and compliance • Diminishes impact, relevance and persuasiveness of post-hoc complaints concerning legitimacy of the process
5.	Maintains friendly relations	• Ensures parties can continue working together on global communicable disease control as is necessary • Prevents the eruption of secondary, more serious conflicts in other arenas (e.g., armed intervention) • Promotes the underlying values and principles of the World Health Organization, United Nations and the entire multilateral international system
6.	Realistic implementation	• Encourage adoption of the revised dispute resolution process • Increases traction and lessens barriers for reform • Fewer roadblocks to success

Figure 1: Proposed Multi-Tiered Dispute Resolution Process for the International Health Regulations and the Shadow System it Creates



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